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Coastal State Jurisdiction over  
Foreign Flagged Vessels Suspected of  
Piracy, Human Trafficking and Oil  
Pollution Offences, and the  
Interrelationship with Flag State  
Jurisdiction: A Comparative Analysis

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# Summary

Traditionally, it has been the flag states that have had the primary possibility to take action against, and prosecute criminal offences that have taken place on a vessel outside the territory of a coastal state. Through the EEZ regime in UNCLOS, this has started to change and through various “new” types of jurisdictions used in international conventions, other states can today be granted with legal ability to deal with these criminal activities, *e.g.* through the principles of nationality.

This thesis concerns those opportunities a coastal state have to take action against three criminal offences: piracy, human trafficking and oil pollution and it is discussed whether there can be said to exist obligations in international law for a coastal state to take action against these crimes. The possible measures a state may undertake are depending on the prevailing jurisdictions in each maritime zone and the relevant exceptions to these jurisdictions.

The criminal offences chosen illustrates three types of jurisdictions; universal jurisdiction, treaty-based jurisdiction, and jurisdiction based on a special regime found in UNCLOS, which may be considered as customary international law. Through this discussion, the variety of different possibilities for the coastal state to take action is presented. For the sake of clarity and structure, the presentation of a coastal state’s possibilities and potential responsibilities is discussed primarily on a zone-by-zone basis.

In summary, the possible measures a state is allowed to take differ drastically depending on type of crime and zone. As an example, the coastal state has in its territorial sea full sovereignty for oil pollution incidents, while on the high seas it has, except the right of hot pursuit, practically no rights to act when considering the problematic use of the Intervention Convention. The situation is similar for the crime of transporting people subject to human trafficking, although the legal foundation differs. However, regarding crimes of piracy, the situation is much different due to the fact that piracy is considered as a *jus cogens* crime whose repression is granted with universal jurisdiction.

The research undertaken has not showed any signs of obligations for an unwilling coastal state to take action against any of the crimes, at least not if conventions which are ratified on a voluntary basis, are disregarded.

# Sammanfattning

Det har traditionellt sett varit primärt flaggstater som har haft skyldighet och möjlighet att väcka åtal för brott som har begåtts utanför en kuststats territorium. Detta har börjat att förändras genom introducerandet av EEZ i UNCLOS och genom ”nya” jurisdiktionsformer i olika internationella konventioner, exempelvis nationalitetsprincipeln.

Detta examensarbete kommer att behandla kuststatens möjligheter att vidta åtgärder mot tre specifika brott: kapning till sjöss, människohandel och oljeutsläpp. Det kommer även att diskuteras om det i internationell rätt finns någon skyldighet för kuststaten att vidta åtgärder mot dessa nämnda brott. Möjliga åtgärder som staten har rätt att vidta inom ramen för internationell rätt är beroende på vilken typ av jurisdiktionsformer som råder i de olika maritima zonerna och vilka undantag som kan vara aktuella i det enskilda fallet, och därför kommer kuststaternas möjligheter och potentiella skyldigheter främst presenteras zon för zon.

De valda brotten speglar tre typer av jurisdiktionsformer; universell jurisdiktion, traktatbaserad jurisdiktion, samt jurisdiktion baserad på en särskild regim i UNCLOS, som kan anses vara kodifierad sedvanerätt. De möjliga åtgärder som en kuststat har rätt att vidta har visat sig skilja sig drastiskt mellan de olika brotten samt i de olika maritima zonerna. Till exempel så har kuststaten full suveränitet i territorialhavet över oljeutsläpp, medan den på öppet hav endast har rätt till omedelbart förföljande (hot pursuit), om man bortser från den i praktiken svårtillämpade Interventionskonventionen<sup>1</sup>. Liknande resultat gäller för transport av personer utsatta för människohandel, även om den juridiska grunden är annorlunda. Dock så skiljer sig brottet kapning markant från de båda andra av den anledning att det är ett så kallat *jus cogens* brott vars förtryck är av sådan vikt att det har gett upphov till universell jurisdiktion.

Den forskning som åtagits har inte visat några tecken på skyldigheter hos ovilliga kuststater att vidta åtgärder, åtminstone inte om man bortser från konventioner, som av naturen måste ratificeras av staten på frivillig basis.

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<sup>1</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.

# Preface

This thesis is the culmination of five years of legal studies at Lund University. When I told my best friend in 2007 that I wanted to study law at university, he started to laugh and claimed that I would never make it. Maybe that is why I actually did it.

I had my eyes on the master program in maritime law already when I applied to the law program, and applying to it has been the best decision I have ever made. Even though it has been hard at times, it has been a very interesting and rewarding time here in Lund, and I must admit that this thesis has almost been fun to write (some of the time anyway).

My warmest thanks go out to everyone who has patiently listened to me bitch about this thesis since before I started writing it. You have provided me with helpful suggestions, proof reading, synonyms and coffee breaks, and I want you to know that I am truly grateful that you were there for me.

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# Abbreviations

EEZ	Exclusive Economic Zone
EU	European Union
FAO	The Food and Agriculture Organization of the United Nations
FOC	Flags of Convenience
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
HSC	High Seas Convention (Convention on the High Seas, 1958)
ICC	The International Criminal Court
ICCPR	The International Covenant on Civil and Political Rights
ICJ	The International Court of Justice
IDI	The Institut de Droit International
ILC	The International Law Commission
ILO	The International Labor Organization
IMO	The International Maritime Organization
ITF	The International Transport Workers' Federation
MARPOL	International Convention for the Prevention of Pollution from Ships as modified by the Protocol of 1978 relating thereto
OCC	United Nations Convention against Transnational Organized Crime
PCIJ	The Permanent Court of International Justice
SUA	Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UDHR	The Universal Declaration of Human Rights
UN	The United Nations
UNCLOS	United Nations Convention on the Law of the Sea

# 1. Introduction

One of the most important aspects of state sovereignty is a state's authority to rule over its domain. This right has for many years also extended to parts of the waters adjacent to the state's coastline, although the length of it has varied throughout history. Today a state's authority over the waters is mainly depending on the distance from the coastline. A state may exercise almost complete sovereignty over waters closest to the coastline, limited sovereignty for enforcement reasons for an additional part and restricted authority for economic resources and marine pollution prevention for waters stretching up to 200 nautical miles from the state's coast. It is in the coastal state's interest to be able to protect its territory, whether it is from pollution damage or armed pirates, and it is thus important for states to have jurisdiction to take action against the imminent threat before it is too late and the damage has already occurred on state territory.

One persistent problem in the maritime field is the notion of "flags of convenience", or "open registries" as they are also known, where states allow, or at least do not try hard enough to prevent sub-standard vessels from sailing the seas and do not at all times provide sufficient enforcement measures against delinquent vessels when an offence is committed against international laws and standards. Amongst these "flags of convenience" the largest registries in the world can be found. This becomes interesting when considering that flag state jurisdiction has a very high priority in international law; on the high seas it even has, as a general rule, exclusive jurisdiction over registered vessels and their crews. Since it does not seem possible to reach a solution regarding this problem in the near future, one alternative measure could be to extend other states' jurisdiction. If states other than the flag state have jurisdiction over a crime, not everything is depending on a state which may or may not be a "flag of convenience" for prosecution and further prevention of such criminal activities.

This thesis will examine whether a coastal state has the ability under international law to take action against three varieties of criminal offences in that state's maritime zones, as well as on the high seas. It will also be discussed what actions these offences include in international law and how they gain their legitimacy. For this to be feasible there is a need to discuss how the coastal state's jurisdiction in various maritime zones is compatible with the principle of flag state jurisdiction. The three offences that this thesis focuses on are piracy, transport at sea of people subject to human trafficking, and vessel-sourced oil pollution.

These crimes have been chosen due to the diversity between how they can be accessed legally in international law. Piracy is, as will be explained, of universal jurisdiction and oil pollution is covered by a specific regime in UNCLOS which deals with protection and preservation of the marine environment, while human trafficking can be seen to be connected to the well-established regime concerning slavery. Through these crimes, a broad

cover of legal regimes in various maritime zones will be illustrated and with them, a state's possibility to take action against crimes of various natures, not only these three crimes, but all crimes with a similar nature and legal structure.

In its finality, it is discussed whether it can be concluded that there might even exist, in international law, an obligation on the coastal state to take these measures against the delinquent vessel, even if the flag state does not agree, or remains silent regarding the proposed actions.

## 1.1 Method and Material

This thesis has its methodological foundation in the dogmatic discipline which implies that the research is based on a study of *de lege lata*. In this case *de lege lata* is mainly covered by international conventions although national laws will be mentioned for the enlightenment of how a legal problem is either solved or founded through the implementation of international law in a national legal system. The relevant international law is analysed with the help of legal doctrine, national law, and to some extent case law as sources of law. Chapter 3.2 concerning human trafficking<sup>2</sup> will also include a short element of discussion on *de lege ferenda* with the discussion whether a provision in UNCLOS concerning slavery can be used *mutatis mutandis* for the transport of people subject to trafficking. However, except for that passage, the discussions will primarily deal with the interpretation and study of existing international law, both through conventions and agreements as well as customary international law.

The thesis includes two comparative elements; first, for the study of how a coastal state may act depending on where the vessel can be found, the enforcement possibilities of the nominated crimes will be compared depending on the different maritime zones,. The second comparison follows from the first and involves a comparative analysis of the coastal state's jurisdiction in comparison with flag state jurisdiction in the various maritime zones, in relation to these crimes.

The foundation of this thesis lies in the provisions in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). With those provisions, which in many cases can be said to constitute customary international law, as a starting point, various other conventions are used that either provide illustrative examples or elaborate further and give details of the matter discussed. It is important that the conclusions drawn from the conventions are founded in legal doctrine, and for this reason books and articles are used. These sources also provide valuable insight and background to the topics of discussion.

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<sup>2</sup> In this thesis the terms "trafficking" and "human trafficking" are used interchangeably to mean the same thing.

The first three chapters are mainly of a descriptive nature with some analytical elements, and it is primarily chapter 5 that is of true analytical value where elements from the previous chapters are brought together.

## 1.2. Delimitation and Disposition

In international law, warships and governmental vessels enjoy almost complete immunity as a consequence of state sovereignty. The result is that there almost always exists an exception for warships and other governmental vessels in various conventions and international agreements.<sup>3</sup> UNCLOS deals with a warship's responsibilities in foreign territorial seas in articles 29-32 and these articles simply state that the governmental vessel in question needs to comply with the coastal state's rules and that the flag state carry the international responsibility for its vessels if non-compliance would result in damage to the coastal state. For other parts of the convention, governmental vessels are simply excluded although the flag state must ensure, as far as possible, compliance with the convention by these vessels.<sup>4</sup>

The thesis does not discuss the special legal regime concerning archipelagic states. These states enjoy the same rights and obligations as other states and the right of innocent passage exists in archipelagic waters as well.<sup>5</sup> The major difference is the drawing of baselines and the classification of the waters. For the sake of simplicity, these states and their maritime zones will be assimilated to states having a "normal" coastline.

All areas of subject outside the very narrow scope of this essay, *e.g.* state conduct when exercising its right of jurisdiction and its compliance with human rights, will be disregarded without any mention in the text. This does not mean that this author considers these subjects unimportant in any way, on the contrary it is a very important aspect of enforcement jurisdictions, but for a thesis this size it is unfortunately impossible to include everything of interest and importance.

As an introduction, a short exposition of different forms of jurisdictions that is of importance to later chapters is provided, and this is followed by a short introduction to the crimes on which this thesis will focus. Neither the jurisdictions nor the crimes are examined in detail, but an overview is provided so that the substance of the sequent discussion is comprehensible. Before the analysis on how a coastal state may manage these offences, a synopsis of prevailing jurisdictions in the maritime zones is presented in chapter 4. The main discussion that embodies the topic, *i.e.* what recourses a coastal state may have against a delinquent vessel in various maritime zones, is found in chapter 5 which is followed by a conclusion that summarizes the essence of this thesis.

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<sup>3</sup> See the SUA convention, article 2; and the BWM convention article 3(2)(e).

<sup>4</sup> UNCLOS article 95 and 236.

<sup>5</sup> *Ibid.*, article 52.

## 2. Introduction to jurisdictions

### 2.1 Introduction

The Oxford dictionary has defined the word “jurisdiction” as “the official power to make legal decisions and judgements”<sup>6</sup>. In national law, this refers primarily to a court’s authority to try a certain case, both concerning the parties and the subject matter. In international law, this relates to the same issues, but at a higher level; does a state have the right to legislate and/or enforce those laws and try the case in question? Is the suspected offender subject to that state’s authority?

There is a need to distinguish between legislative jurisdiction<sup>7</sup>, *i.e.* the right of states to make laws, and enforcement jurisdiction, a state’s right to enforce its laws. Legislative jurisdiction can be based either on *ratione personae*<sup>8</sup>, *ratione loci*<sup>9</sup> or *ratione material*<sup>10</sup>, while enforcement jurisdiction is primarily based on *ratione loci*, *i.e.* on geographical scope. A state cannot send agents to enforce its laws within the territory of another state without the consent of that state, while on the high seas, where no forms of territorial jurisdiction prevail, a state may exercise enforcement jurisdiction based on nationality.<sup>11</sup> This thesis is primarily dealing with maritime law, and the discussion is never whether a state can enforce its own national laws in the maritime zones of another state, but what measures of enforcement a state may take against a delinquent vessel and its crew within its own maritime zones or the high seas, where it has already exercised its legislative jurisdiction. Legislative jurisdiction will only be mentioned in circumstances where this is of importance, in all other cases the term “jurisdiction” will refer to enforcement jurisdiction.

The importance of the sequent types of jurisdiction in international law varies depending on legal traditions in different states, and even though it is the opinion of leading scholars, including dr. Luc Reydams, that only the principles of territoriality, flag state, active personality and protection are

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<sup>6</sup> Oxford Dictionary, online resource: <http://oxforddictionaries.com>.

<sup>7</sup> This is also known as prescriptive jurisdiction.

<sup>8</sup> This term is referring to different classes of people, *e.g.* those concerned by the active or passive nationality principle.

<sup>9</sup> This term refers to geographical limits. The the most illustrative example is laws applicable solely within the territory of a state. They can also be more restricted *e.g.* laws concerning environmental protection of a certain forest or fishing restrictions within the territorial sea. See the Swedish Environmental code (Miljöbalk 1998:808) chapter 4, for examples of laws concerning these distinct areas of interest.

<sup>10</sup> This term refers to types of objects, *e.g.* personal property in comparison to immovable property. See Swedish Land and Cadastral Legislation (Jordabalk 1970:994)

<sup>11</sup> Shaw, Malcolm, *International Law*. 6<sup>th</sup> ed. Cambridge University Press 2008, pp. 645-646.

uncontested<sup>12</sup>, a few more that are used or encouraged will be introduced below.

## 2.2 Territorial jurisdiction

This most basic form of jurisdiction has its foundation in the conception of a state's sovereignty over its own land. The jurisdiction arises by the sole fact that the offence took place within the territory of the state and it does not matter to which state the offender is a national or where he or she resides. This notion that the forum state should have competence for those crimes committed on its territory is uncontested and used everywhere.<sup>13</sup> However, this does not entail that no legal issues might arise from this principle. One of the most discussed issues is where the offence can be considered as having taken place. This is not always easy to conclude considering that an offence might have consequences in other places than where the offence was originally committed, and those states might want to claim jurisdiction based on the fact that the offence's consequences took place on their territory.

An illustrative example is a typical oil pollution incident. The act, either accidental or voluntary, that caused the leakage might have taken place in one jurisdiction while the actual leakage took place in a second and many others might get affected by the drifting oil. It is hard to determine exactly what should constitute the act in itself here: the damage to the vessel, the leakage of oil or the damage to the state? The doctrine of ubiquity<sup>14</sup> is used in many states to clarify this issue, and it denotes that the offence may be regarded as taking place in whole, where only part of it took place in reality. What a state require for claiming jurisdiction based on territoriality differs, some states requires that the act constituting the offence has taken place within its jurisdiction, while others find that it is essential for the creation of jurisdiction that the consequences of the act took place within its jurisdiction. This means that an act that takes place in one state but render consequences in another state can result in two states have jurisdiction based on territoriality.<sup>15</sup> The answer to the issue above concerning oil pollution is that, depending on what the state requires for jurisdiction, all states involved might claim territorial jurisdiction as long as it is criminalized in national law.

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<sup>12</sup> Reydams, Luc, *Universal jurisdiction: international and municipal legal perspectives*. Oxford University Press, 2004, p. 22.

<sup>13</sup> European Committee on Crime Problems, p. 8; Shearer, I.A., *Starke's International Law*. 11th ed. Butterworths, 1994., p. 184.

<sup>14</sup> This is also known as the objective territorial principle. See Brownlie, Ian., *Principles of Public International Law*. 7th ed, Oxford University Press, 2008. p. 301.

<sup>15</sup> Extraterritorial criminal jurisdiction, European Committee on Crime Problems, Strasbourg 1990, pp. 8-9.

For a state to provide itself with jurisdiction for offences taking place in another state but that was completed or brought along severe effects in the state in question, there also exists, apart from the doctrine of ubiquity, the objective territorial principle. It merely concerns this one half of the ubiquity principle, and it was this principle that was used in the *Lotus* case<sup>16</sup> that now has reached UNCLOS<sup>17</sup>.

In the modern world of today, a lot of communication and transactions take place electronically over the internet and it is not always easy to establish where the actual crime took place. The same offence might travel through servers in various countries and have effects in many different jurisdictions and in this case the doctrine of ubiquity does not help since the core issue in that context is to determine where the offence took place, *i.e.* what jurisdictions that might be relevant as a starting point. This discussion, though being very interesting, is outside the scope of this thesis that focuses on maritime, and not cyber-space oriented questions.

The principle of territorial jurisdiction is a very fundamental principle concerning state sovereignty, but still it has proved to be not completely exclusive. As will be discussed below, there exist other principles of jurisdiction providing states, other than the forum state, with jurisdiction over offences concerning its nationals or a certain type of crime.

## 2.2.1 Flag State Jurisdiction

Ships have displayed flags and other symbols since the Vikings ruled the north and it has been a symbol of inherence, either to a port, district, tribe or state, since the middle ages. It was important already in the early days to be able to show where the vessel belonged so that it would not be considered a pirate ship or a vessel belonging to the enemy and thus free to take as prize.<sup>18</sup>

There is little debate over the legality of flag state jurisdiction, but much more about the classification of the jurisdiction. Some argue that flag state jurisdiction is based on the principle of nationality, *i.e.* that the vessel has the nationality of the flag state according to UNCLOS<sup>19</sup>, and thus is protected by that state as its national. Others argue that a vessel is a “floating island” of the state and that it should be regarded as the territory of the flag state.<sup>20</sup> This notion of the floating island regime has its foundation

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<sup>16</sup> See part 2.2.1.1.

<sup>17</sup> Article 27(1)(a) ” if the consequences of the crime extends to the coastal state”. The *Lotus* case took place in an area that at the time was considered as the high seas, but that today would be regarded as the territorial sea.

<sup>18</sup> Mansell, John N.K., *Flag State Responsibility, Historical Development and Contemporary Issues*. Springer-Verlag Berlin Heidelberg, 2009, p. 14.

<sup>19</sup> UNCLOS article 91.

<sup>20</sup> Molenaar, E.J., *Coastal State Jurisdiction over Vessel-Source Pollution*. Kluwer Law International, 1998, p. 83.

already in the writings of Jeremy Bentham<sup>21</sup>, and it is still a topic of discussion. M. Nyholm said in his dissenting opinion in *the Lotus* case that the Turkish vessel was a floating extension of Turkish territory according to international law.<sup>22</sup> This doctrine has been criticized in English law<sup>23</sup> and it has been concluded that this is solely a metaphor meaning that the flag state has jurisdiction over the vessel in the same way as it has over its territory.<sup>24</sup> The floating island doctrine is not to be taken literally with the result that it would provide a territorial sea around the vessel or similar absurd consequences.

No matter how it is characterized, the importance of the flag state jurisdiction is today greater than it has ever been. In the old days, the majority of the vessels did not travel far from land and they did not bring about very many people on board with the result that most vessels were subject to coastal state jurisdiction. If something went wrong when the vessel was far from shore, there were not many people affected by the possible lack of jurisdiction. Today, the ship business is gigantic, and the same goes for the vessels that can house close to 6000 people<sup>25</sup>. Imagine the possible legal problems if a vessel of this size would be free from jurisdiction on the high seas and possibly even worse, if it were to be faced with exclusive coastal state's jurisdiction in every state's waters that the vessel passes through. This would lead to a situation where either no laws or too many different laws and regulations would be applicable for the small community on board.

It is an obligation of each state through its national laws to regulate the requirements for how a vessel acquires this right to fly the flag of that state.<sup>26</sup> When a vessel has received the permission to carry its flag, it has acquired the nationality of that state, and is thus subject to its jurisdiction like any other national.<sup>27</sup> Unlike individuals, who can have dual citizenship, a vessel is not allowed to fly more than one flag<sup>28</sup>, if this is done, the vessel is regarded as a vessel without nationality<sup>29</sup> with the result that the vessel has no protection at all in international law.<sup>30</sup> The flag state has an obligation to "effectively exercise its jurisdiction and control in administrative, technical and social matters"<sup>31</sup> and it is stated in various

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<sup>21</sup> Coles, Richard M.F; Watt, Edward B., *Ship Registration: Law and Practice*, para. 1.22.

<sup>22</sup> *The Lotus* para. 217.

<sup>23</sup> *Chung Chi Cheung v REX*. (1938) 62 Ll.L.Rep. 151. That this is still valid is shown in *Saldanha v. Fulton Navigation Inc. (the Omega King)* [2011] 2 Lloyd's Rep. 206

<sup>24</sup> Shearer, p. 246.

<sup>25</sup> Royal Caribbean International's *Allure of the Seas* has 18 decks and can take 5400 guests, crew not included. <http://www.royalcaribbean.se/kryssningsfartyg/oasis-of-the-seas/allure-of-the-seas.htm>.

<sup>26</sup> UNCLOS article 91.

<sup>27</sup> See active personality principle below in part 2.3.

<sup>28</sup> An exception to this rule is found in UNCLOS article 93 for vessels flying the flag of the International Atomic Energy Agency, the United Nations or any of its specialized agencies.

<sup>29</sup> UNCLOS article 92(2).

<sup>30</sup> Coles and Watt, para. 1.2.

<sup>31</sup> UNCLOS article 94.

parts of UNCLOS what responsibilities the flag state has towards the international community.<sup>32</sup>

As a general rule, the flag state has exclusive jurisdiction over its vessels, but, as will be discussed in later chapters, this has been heavily restricted in international law for the benefit of *e.g.* coastal states. Not even on the high seas, which is not subject to any state sovereignty<sup>33</sup>, the flag state has complete exclusive jurisdiction. How this is restricted will be discussed in chapter 4.

### **2.2.1.1 *Lotus***

In 1926, a collision between a French and a Turkish steamer took place on the high seas which resulted in the death of eight Turkish citizens. The collision took place between five and six nautical miles off the Turkish shore, an area that today would be considered as territorial sea, but at that time in history was considered as the high seas.

When the *Lotus* arrived in Turkey, the Turkish authorities initiated investigations and proceedings against the French commander who was found guilty according to Turkish law in a Turkish court. The dispute that arose between France and Turkey was that of jurisdiction; whether Turkey acted according to international law when exercising its criminal jurisdiction.

The Permanent Court of International Justice (PCIJ), found that, unless provided for in an international agreement or by international customary law, jurisdiction is based on principles of territory and a state may not exercise its jurisdiction outside its own territory.<sup>34</sup> According to the court, a vessel is seen as a part of the flag state's territory and thus offences taking place on a vessel sailing the high seas is thus regarded as taking place in the territory of the flag state. This would lead to the conclusion that the flag state has exclusive jurisdiction on the high seas, but the court continued by stating that it also follows that if the offence has effects that stretches to the other vessel; this is seen as having effects on the territory of the other vessel's flag state which would provide the other state with concurrent jurisdiction.<sup>35</sup> In this case, the conclusion was that the flag state of the "vigilante vessel", *i.e.* France, did not have exclusive jurisdiction on the high seas and thus both France and Turkey had concurrent jurisdiction.

The court found that Turkey was not in violation of international law since it was concluded that the state had jurisdiction and that there was no international rule prohibiting its exercise of criminal jurisdiction.<sup>36</sup> Though,

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<sup>32</sup> See article 42(5), 94 and 218.

<sup>33</sup> UNCLOS article 89 and 92(1).

<sup>34</sup> *The Lotus* para. 45.

<sup>35</sup> *Ibid*, para. 65.

<sup>36</sup> *Ibid*, para. 90.

the court was far from unanimous in its decision and it was only after the President's casting vote that the judgment was settled. The judgment contains six dissenting opinions and the response to the judgment has not been very positive. Mr. Loder, a former president of PCIJ, wrote in his dissenting opinion that criminal jurisdiction of a state cannot extend to offences committed by a foreigner in foreign territory without violating the sovereignty of that state.

### 2.2.1.2 Flags of Convenience

In 2012, Panama had 3,6 million inhabitants.<sup>37</sup> The same year, as many years before, Panama had the largest registered fleet in the world. 21,39 % of the world fleet was registered in this state and 99,97% of these were owned by non-Panamanian citizens.<sup>38</sup> An old term that is still used, is the so called Flag of Convenience (FOC) registry, a term to which Panama belongs. The International Transport Workers' Federation (ITF), has defined a FOC registry as “[w]here beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered as sailing under a flag of convenience.”<sup>39</sup> In FOC registries non-nationals can register their vessels to avoid high taxes, tough labour laws concerning the crew or high, and costly safety standards higher than international minimum requirement. This is possible due to low state control and a lax attitude of the flag state concerning shipping policies. This might have the consequence that the owners of the vessels do not have to keep their vessels at the same high standard as required by national registries which in turn may result in sub-standard vessels that are a safety risk for the maritime community. There is no doubt that even national registries can have sub-standard vessels, but the likelihood that they will remain undetected and cause incidents at sea is proven bigger in the FOC registries.<sup>40</sup>

Over time, the registry system has changed. Before, there were only two types of registries, the traditional, and the FOC. Today, there are in addition hybrid systems, shipbuilding registries and bareboat charter registries. The terms FOC and “traditional” registries have as a result changed to “open” and “closed” registries referring to whether or not they allow non-nationals as owners of the vessels. However, it is not easy to label the registries when considering that some registries have the status of hybrids, *i.e.* they are open to all nationalities in comparison to the closed registries which often only accept nationals as owners of the vessel. The hybrids have instead lowered

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<sup>37</sup> Swedish encyclopedia (nationalencyklopedin). Online resource: <http://www.ne.se/lang/panama/279226>.

<sup>38</sup> Review of Maritime Transport 2012. Report by the UNCTAD secretariat, p. 44. For further information about the Panamanian registry, see Mansell, chapter 7.3.

<sup>39</sup> ITF website <http://www.itfglobal.org/flags-convenience/index.cfm>.

<sup>40</sup> Churchill, R.R; Lowe, A.V., *The Law of the Sea*. 3rd ed, Manchester University Press, 1999.pp. 258-262; Mansell, chapter 7.3.

some of the high demands that normally come with a closed registry, e.g. requirement of a crew consisting of nationals only.<sup>41</sup>

In UNCLOS a requirement of a genuine link between the vessel and the flag state can be found<sup>42</sup>, but exactly what this entails is under constant debate. The convention states that it is up to each state to decide how a vessel acquires nationality and that the only requirement in the convention is that there exists this genuine link between the state and the vessel. The convention does not mention the nationality of the owner anywhere; this is something that states themselves have included as a link between the state and the vessel. States have no right to object to another state's conditions for granting of flag<sup>43</sup>, the disapproving state might have laws contrary to its own, that might require other elements for the fulfilment of genuine link, but due to state sovereignty, the state still cannot challenge the rules unless they are contrary to international law.<sup>44</sup>

In states where the genuine link is based on the nationality of the shipowner, a way around this "problem" which has proven quite successful is the "corporate veil" which means that the true ownership of the vessel is hidden behind a more or less complicated corporate structure. Courts around the world have found themselves unwilling to lift this corporate veil for the sake of revealing who is *de facto* owning and controlling the vessel. This was the case in *Anklagemyndigheden v. Poulsen*<sup>45</sup> where the vessel *Onkel Sam* was registered in Panama and owned by a Panamanian company that in fact was completely owned by a sole Danish citizen. The result was that the genuine link could be considered satisfied when the vessel was owned by a company registered in that state, even though it only existed for the sake of fulfilling the requirement of genuine link according to the registry state's national laws.

Enforcement jurisdiction is contextually relevant to this enquiry. An FOC, or an "open" registry, which has more or less the primary purpose of earning money to the state, does not exactly exhaust itself in taking measures for the prevention and punishment of crimes committed on or by their vessels. But, as mentioned above, to exercise jurisdiction and control over master, officers and crew, is an international duty of the flag state. Also, if an offence has occurred, the flag state is required by international law to investigate and if necessary, to institute proceedings against the alleged offender.<sup>46</sup> If this is not done, it may constitute a violation of international law for which the state may be held responsible according to the doctrine of state responsibility.<sup>47</sup> But, for proceedings to be taken against

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<sup>41</sup> NIS Website: <http://www.sjofartsdir.no/en/vessels/registration-of-vessel/norwegian-international-ship-register-nis/>.

<sup>42</sup> UNCLOS article 91.

<sup>43</sup> The M/V "Saiga" (No. 2) case. (Saint Vincent and the Grenadines v. Guinea) The International Tribunal for the Law of the Sea, 1999., para. 80-86.

<sup>44</sup> Churchill and Lowe, pp. 260-262.

<sup>45</sup> C-286/90.

<sup>46</sup> UNCLOS article 94(2)(b) and 217(4).

<sup>47</sup> See Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two

the FOC/open registry that has violated international law, there needs to be a state which has the right, interest and possibility to litigate against this state. This is not something that is done easily over a day, but a complicated thing that both takes time and costs money. Some international organizations have studied this and the Food and Agriculture Organization of the United Nations (FAO) has written guidelines on how and what actions that can be taken towards a state, not necessarily a FOC state, that does not fulfil its flag state duties. These actions include trade measures against the delinquent state, diplomatic interventions as well as legal proceedings.<sup>48</sup>

The FOC has been a topic of debate for more than 60 years<sup>49</sup>, and still the international community has not been able to solve this problem satisfactorily.<sup>50</sup>

## 2.3 Nationality

In the same way that a state has jurisdiction over its territory based on the notion of state sovereignty, a state may have jurisdiction over its nationals. This is shown through two different principles, the passive and active nationality principle. The active nationality principle is sometimes referred to only as the nationality principle and it concerns the situation when a state requires jurisdiction over a crime that a national of that state is suspected of, or proven to be the offender of, even though it is committed outside the territory of that state.

This might at first sight seem as a very clear principle that does not render much discussion. However, in a world where people have dual citizenship and frequently relocate, questions may arise. One can ponder the thought of a person who is a national of state A, commits a crime in state B which is a state where this person was born and has lived in all her life but has not acquired citizenship. Does state A still have jurisdiction? Does the answer change if this person has dual citizenship in both state A and state B? Especially the issue of dual citizenship has become more frequent in many states<sup>51</sup> and for this reason many states, especially common law states, only

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States and that related to the problems arising from the Rainbow Warrior affair. See UNRIAA, vol. XX, pp. 215-284, "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation." Para 75.

<sup>48</sup> Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, 25 – 28 March 2008, Vancouver, Canada. Guidance Document May 2009, pp. 13-14.

<sup>49</sup> The ITF started its campaign against Flags of Convenience in 1948. See Mansell, chapter 7.2.

<sup>50</sup> The *Lotus*, para. 108.

<sup>51</sup> See the Swedish Nationality Act (Lag (2001:82) om svenskt medborgarskap) and the Swedish Government Webpage: <http://www.regeringen.se/sb/d/6998/a/84070>.

use this type of jurisdiction for very serious offences where the state for some reason considers it necessary to handle the prosecution itself.<sup>52</sup>

A related principle that is used even less is the passive personality principle. It concerns situations where the victim of an offence is a national of a state that wishes to exercise jurisdiction. In *the Lotus*, this principle was disregarded and the court said that this principle could only be used when it was the only basis for criminal jurisdiction.<sup>53</sup> The view has changed over time and today states are encouraged in various conventions to broaden the jurisdiction in their national laws to include the passive personality principle.<sup>54</sup>

## 2.4 Universal Jurisdiction

The principle of universal jurisdiction provides any state with jurisdiction for certain serious offences committed by non-nationals. The requirements are that the crime is considered as *delict jure gentium* and its repression is encouraged and even demanded in international law for the assurance that the crime does not go unpunished. There exists no requirement of a link between the state and the offender such as those found in the active and passive personality principle, and the jurisdiction is almost completely irrespective of where the offence took place or where the consequences occurred.

The traditional offences provided with universal jurisdiction are those of piracy, crimes against humanity and various war crimes, and it becomes more frequent in international agreements to provide member states with universal jurisdiction amongst themselves. An example of this is the UN Torture Convention<sup>55</sup> where each state has to provide national legislation for the criminalization of torture for crimes not only committed within state territory, but also for both the active and passive personality principle for crimes committed outside that state's territory, if this is allowed in national law<sup>56</sup>. Even though the scope of the subjects of the convention is very extensive, it is not a true universal jurisdiction that is created since states have to be party to the convention for this to be applicable. If a situation arises that does not concern any state party under the jurisdictions mentioned, the convention does not provide states with authority to act, this in comparison to true universal jurisdiction where all states always have right to take action. This type of constructive universal jurisdiction has been named "quasi-universal"<sup>57</sup> and can be summarized as an obligation to

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<sup>52</sup> Brownlie, p. 304; Shaw, pp. 661-663.

<sup>53</sup> *Lotus*, para. 60.

<sup>54</sup> Shaw, pp. 664-666; see also the SUA Convention article 6.

<sup>55</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

<sup>56</sup> The UN Torture Convention article 4-5.

<sup>57</sup> Shaw, p. 674.

provide territorial and national jurisdiction for certain specified extraterritorial offences.

The *Institut de Droit International* (IDI) writes that for a state to be able to exercise universal jurisdiction over a certain person, this person needs to be within the territory of the forum state. That state should also before initiating proceedings, ask the state in which the crime was committed, as well as the state where the suspected criminal is a national whether they are willing to exercise their jurisdiction,<sup>58</sup> in other words should the universal jurisdiction, according to the IDI, give way for states which have jurisdiction based on territory or nationality. Before the Eichmann incident<sup>59</sup>, the controversial doctrine *male captus bene detentus* was used and it was commonly regarded that if a person was abducted from one state for prosecution in another state, it was the sovereignty of the first state that was violated with the effect that only that state could complain. Even though some states, e.g. the United States, still abide by this doctrine, more courts today put emphasis on the human rights of the offender which, today, does not allow a person to be unwillingly abducted from a country. The result is that more states find themselves unwilling to try a case where the suspected offender has not come into the territory of the forum state by extradition or free will.<sup>60</sup>

The list of crimes that fall under the universal jurisdiction is very short and hard to change. But there are many crimes that even though they do not fall under universal jurisdiction are of such a nature that “normal” jurisdiction is not allowed. The importance of them getting punished is of such urgency that it is of less importance which state is the prosecuting state, i.e. the need for justice actually overrules state sovereignty. This is the basis of the maxim *Aut dedere aut judicare* that has been used since 1625 when Hugo Grotius wrote about it in his book *De iure belli ad pacis*.<sup>61</sup> The maxim means that there exists an international obligation for a state which houses a person who is suspected of having committed a serious international crime to prosecute this person, if no other states have demanded extradition. This maxim exists to make sure that certain crimes do not go unpunished, even though they do not fall under the universal jurisdiction. Even though some argue for the maxim’s status as *jus cogens* it is generally regarded as a

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<sup>58</sup> *Institut de Droit International*, Resolution from its seventeenth commission, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*. See also Shaw, pp. 672-673.

<sup>59</sup> Alfred Eichmann was, after the second world war, charged with “crimes against the Jewish people” and “crimes against humanity” in Israel, and he was hiding under a false name in Argentina. For the Israeli court to be able to try his case, he needed to physically be in Israel, and, even though it is not officially known how the transfer took place, Eichmann was moved without his or Argentina’s consent to Israel. See Baade, Hans W., “The Eichmann Trail: Some Legal Aspects”. *Duke Law Journal* 1961:400, on further information about the legality of Eichmann’s trial in Israel.

<sup>60</sup> Eichmann Supreme Court Judgment, 50 years on, its significance today. Amnesty International Publications, p. 17-19.

<sup>61</sup> Plachta, Michael, “Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches”. *Maastricht Journal of European and Comparative Law*, Vol. 6, Issue 4 (1999), pp. 331-365., p. 331.

general principle of international law and thus something states can choose to adhere to if they so wish,<sup>62</sup> and it is encompassed in various conventions, one being the SUA convention.<sup>63</sup>

## 2.5 Customary law

In article 38(1)(b) of the Statute of the International Court of Justice (ICJ) it is expressed that the court shall apply “international custom, as evidence of a general practice accepted as law”. The traditional requirements for a rule of law to be regarded as international customary law are first that there is general and consistent practice of the relevant rule by states. This does not mean that the rule has to be universally used, especially considering that some states might not have any use for such rules at all, *e.g.* landlocked states have little use for rules in maritime law concerning coastal areas. Neither does the rule have to have been consistent for a long period of time; some practice springs up quite suddenly but can none the less be considered as customary law, *e.g.* the regime of the continental shelf. But, the longer and more widespread the use of the rule of law is, the more it speaks for its status as customary law. The second requirement is the existence of *opinio juris*, the existence of an international consensus of the requirement of the rule in question, and that the opinion on the international plane thus speaks for an approval of the rule; in other words, the international community has acknowledged the rule as important as well as in line with international law.<sup>64</sup>

A professor of international law, Ian Brownlie, writes that sources giving evidence of international custom in each relevant case include: diplomatic correspondence, policy statements, press releases, legal advisor’s opinions, official manuals on legal questions, comments by governments on drafts produced by the International Law Commission, national laws, both international as well as national court decisions, recitals in treaties and other international instruments, practice of international organs and resolutions regarding legal questions from the United Nations General Assembly. Not all of these sources carry the same influence and not all of them might be needed in every given case, but the more evidence of uniform practice in these sources, the stronger is the likelihood that the practice can be considered as customary law.<sup>65</sup>

The effect of a rule being considered as customary law is that all states are bound by it, not depending on a convention or international agreement. A

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<sup>62</sup> Plachta, p 333.

<sup>63</sup> Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, see article 7 and 10.

<sup>64</sup> Brownlie pp. 7-9; and Churchill and Lowe, p.7.

<sup>65</sup> *Ibid* p. 6.

state may be exempted from this if it has objected to the rule of law even before it was considered as customary law and has stuck to its opinion.<sup>66</sup>

Even though it might sound contradictory, a convention that is said to codify customary law has member states. Those states are bound by the wording of the customary law and the rules can thus be interpreted according to the words and context of the convention. However, states that are not part of the said convention are still bound by the customary law, although not necessarily the exact wording of the codifying convention. It is much harder to interpret a rule of law that is not in writing, but the codifying convention may be used as a source of international custom as mentioned above. Theoretically, the state will not be bound by the text of the convention but the core of the customary law.

## 2.5.1 Customary Law in the Maritime Context

For more than 50 years the International Law Commission (ILC)<sup>67</sup> has worked with the codification of public international law through various draft conventions. At its first session in 1949, the commission agreed on 25 topics to study further. These included the regime of the high seas and the territorial seas. In the beginning they were regarded as two separate topics but at the eighth session in 1956 they were bundled together under the topic of “the Law of the Sea”. The United Nations General Assembly decided to convene at an international conference to examine this topic further. The conference took place in Geneva in 1958 and it was decided that the draft articles, some slightly amended, were to be embodied in four separate conventions; the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. Many of the articles found in these conventions were later the foundation, and some even copied word by word, of the correspondent articles today found in UNCLOS.<sup>68</sup>

It can be assumed that at least those articles that correspond to the ILC’s draft articles, constitute customary international law. Churchill and Lowe write in their textbook *the Law of the Sea*, that the right of intervention against threats of pollution on the high seas might be considered as customary international law, even though this was not a part of the Convention on the High Seas. The authors argue that when the British government decided to take action and bomb the *Torrey Canyon*, this can be considered the birth of that particular customary rule. That the rule was not already considered as customary law at that time, Churchill and Lowe explain by the fact that the International Maritime Organization (IMO)

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<sup>66</sup> (United Kingdom v. Norway) 1951 I.C.J. Rep. 116.

<sup>67</sup> Which has as its object the codification and development of international law, see article 1 of the Statute of the International Law Commission.

<sup>68</sup> International Law Commission’s Website: [http://untreaty.un.org/ilc/summaries/8\\_2.htm](http://untreaty.un.org/ilc/summaries/8_2.htm).

found it necessary to draft the Intervention Convention that provides states with this right of intervention.<sup>69</sup> Today, the right of states to take action on the high seas is found in article 221 UNCLOS, whose first paragraph is a paraphrasing of the Intervention convention's first article, and the second paragraph in article 221 which contains a definition of "maritime casualty", is almost identical to the corresponding article in the Intervention Convention.<sup>70</sup> This is just one example of rules in UNCLOS that, after the ILC's draft articles were completed over 50 years ago, have evolved into customary law.

The preamble of UNCLOS reads that this convention contains codification and progressive development of the law of the sea. But, this does not mean that the whole convention can be considered as customary international law. UNCLOS had as of 2013-01-23 165 member states, with Timor-Leste as the newest member from 2013-01-08.<sup>71</sup> The UN has 193 member states and the only internationally recognized independent state in the world that is not part of the UN, is the Vatican.<sup>72</sup> This means that 85% of the recognized states in the world are parties to UNCLOS. The convention was signed in 1982 and entered into force in November 1994 when the 60<sup>th</sup> instrument of ratification or accession was deposited<sup>73</sup>. This demonstrates that the convention has been recognized as international law by more than 60 states for over 18 years. This raises the question whether it can be said that the criteria of general and consistent practice and the existence of *opinion juris* have been met, with the result that it has been transformed into rules of customary law.

The UN and its agencies have a tendency to treat UNCLOS as customary law by giving it priority over other conventions even though not all parties to that other convention are parties to UNCLOS, and sometimes the conventions even refer to UNCLOS as customary law.<sup>74</sup> Resolution 40/63 the General Assembly has recognized that "all related activities within the United Nations system need to be implemented in a manner consistent with it"<sup>75</sup>, with "it" being UNCLOS. This all speaks in favour of UNCLOS constituting customary international law, but the UN Division for Ocean Affairs and the Law of the Sea writes about the universal participation of

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<sup>69</sup> Churchill and Lowe, pp.354-355.

<sup>70</sup> Article 2.1.

<sup>71</sup> United Nations Oceans and the Law of the Sea, Division for Ocean Affairs and the Law of the Sea's Webpage:

[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

<sup>72</sup> UN Swedish Educational Website: <http://www.fn.se/fn-info/om-fn/fns-medlemslander/>.

<sup>73</sup> United Nations Oceans and the Law of the Sea, Division for Ocean Affairs and the Law of the Sea's Webpage:

[http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm)

<sup>74</sup> See the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001, Article 15, "Relationship to International Law of the Sea".

Nothing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea.

<sup>75</sup> General Assembly Resolution 40/63, 1985.

UNCLOS on their webpage and there it differentiates between those provisions that are binding only for member states, and provisions of customary international law, or those becoming customary international law.<sup>76</sup> Concerning some provisions in UNCLOS, there are some deviations from the rules in state practice, which argue against customary law, and according to Churchill and Lowe, some provisions are not of “fundamentally norm-creating character”.<sup>77</sup> In the convention, a linguistic distinction can be found regarding the use of the words “States”<sup>78</sup> and “States Parties”<sup>79</sup>, but it is not clear whether any complete conclusion can be drawn through this distinction more than that the wording “States Parties” clearly speaks against that provision, at the time of its drafting, being regarded as customary law.<sup>80</sup> No similar conclusion can be made in reverse.

This discussion can continue, but in this context the conclusion that UNCLOS not only contains customary law, but also law that is only binding for member states, will have to be satisfactory. The provisions that have its origins in the Geneva conventions are more likely to be regarded as customary law, but it might not be possible to make any clear conclusions without looking into every provision in the convention in detail. For the purpose of this discussion, it is most interesting to know that some provisions might be regarded as customary law and thus binding upon all states regardless of a state is party to UNCLOS or not.

## 2.5.2 *Jus Cogens*

The ILC has defined *jus cogens* as

a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character<sup>81</sup>

A *jus cogens* crime is found at the top of the legal hierarchy triumphing over all other international norms and principles, including customary international law. Its prohibition is *obligatio erga omnes*, *i.e.* a requirement of all states irrespective of any treaty, and a change in, or removal of the norm, must be supported by *opinio juris*. A convention cannot be in conflict

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<sup>76</sup> United Nations Convention on the Law of the Sea, a historical Perspective. The UN Division for Ocean Affairs and the Law of the Sea’s webpage: [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm).

<sup>77</sup> Churchill and Lowe, p. 162.

<sup>78</sup> See article 98 which refers to “every state”. This semantically entails that it does not matter if the state is party to the convention or not.

<sup>79</sup> See article 139.

<sup>80</sup> Harrison, James., “*Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention*”. Ph.D Thesis, School of Law, University of Edinburgh, 2007 p. 64.

<sup>81</sup> Vienna Convention on the Law of Treaties, 1969, article 53.

with *jus cogens*, and would such a norm come into existence, any previous conventions in conflict with the new norm would be void.<sup>82</sup> The relationship between *jus cogens* and customary international law is debated amongst legal scholars, some of who argue that they can be considered as two sides of the same coin, while other scholars are of the opinion that there are important differences between the two.<sup>83</sup>

Some crimes are of such a nature that they have obtained this special status in international law. Bassiouni writes that “certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity”<sup>84</sup> and that if those criteria are met, there is a strong likelihood that it is a *jus cogens* crime. If only one of the criteria is met, it can still be considered as *jus cogens* but it is not a convincing argument for the status. Examples of crimes believed to be *jus cogens* are according to Bassiouni: genocide; crimes against humanity; war crimes; piracy; slavery and other similar practices; as well as torture.<sup>85</sup> The ILC have in commentaries to the draft articles on state responsibility agreed that the prohibition of slavery and slave-trade, among others, have world-wide support.<sup>86</sup> Any exhaustive list of *jus cogens* crimes have not been agreed upon by the international community as a whole<sup>87</sup> and thus has to be examined in each specific case whether the crime in question may constitute *jus cogens*.

For a crime to rise to the level of *jus cogens*, there first needs to be established an *opinio juris* of the crime as customary international law, the crime needs to be incorporated in a convention ratified by a high number of states, and the preamble and *travaux préparatoire* of such conventions must speak of the crimes in such a way that *jus cogens* can be implied. Also international tribunals’ findings in legal research and investigations when the crime’s legal status is questioned are of importance.<sup>88</sup>

## 2.6 Ships without nationality

Stateless vessels are those not registered in a flag state, or whose register is not recognized in international law. They will have the same legal status as

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<sup>82</sup> Though the likelihood that this would ever happen is not great due to the fact that conventions reflect state’s commitments and opinions, and this together with state practice are important elements for the emergence of *jus cogens*. See also the Vienna Convention on the Law of Treaties, 1969, article 53 and 64.

<sup>83</sup> Bassiouni, Cherif M., “International Crimes: Jus Cogens and Obligatio Erga Omnes”. 59 *Law and Contemporary Problems* 63-74 (Fall 1996), pp. 67-68.

<sup>84</sup> Bassiouni (1996), p. 69.

<sup>85</sup> Bassiouni (1996), p. 68.

<sup>86</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001. Yearbook of the International Law Commission, 2001, vol. II, Part Two. Commentary to article 40, p. 112.

<sup>87</sup> Kaczeroska, Alina, *Public International Law*. 4th ed. Routledge, 2010., p. 50.

<sup>88</sup> Bassiouni (1996), p. 68.

a vessel that sails with two flags or more which are both used interchangeably for convenience, as mentioned above.<sup>89</sup> The legal status, or lack of legal status of such ships without nationality, is debated. On the high seas, UNCLOS has provided all states with a right of boarding and inspecting vessels suspected of being stateless and English and American courts have concluded that these vessels do not have the protection of any state<sup>90</sup>. The basis of this conclusion is that if the rights of the vessel are violated, no state has the right to complain on behalf of that vessel. In other words, this argument is not founded on what is actually legal, but if someone can oppose its illegality. This theory, though heavily supported by scholarly legal writing<sup>91</sup>, is not the only one. Some argue that when a stateless vessel is in the maritime zones of a state, this coastal state may exercise jurisdiction based on territoriality since there is no other concurrent exclusive jurisdiction,<sup>92</sup> while others argue that some additional international jurisdictional rule giving permission for seizure and prosecution of a stateless vessel is needed for it to be considered justified. Except for the right of visit, UNCLOS does not deal with the question of jurisdiction over stateless vessels explicitly and although common law courts have decided on their approach, this matter is not completely settled.<sup>93</sup> The legal uncertainty might well be permanent considering the fact that no state can complain on the decisions of the common law courts, and no permissive rule of seizure can be found in international law and at the same time complete disregard of vessel nationality cannot be encouraged. The crew on a stateless vessel is still covered by other forms of jurisdiction *e.g.* nationality or universal jurisdiction.

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<sup>89</sup> UNCLOS article 92(2); Churchill and Lowe, pp. 213-214.

<sup>90</sup> *Naim Molvan v. Attorney General for Palestine* (Law Reports, Appeals Cases (1948)); *United States v. Marino-Garcia* 679 F.2d 1373, 1985 A.M.C. 1815; UNCLOS article 110(1)(d).

<sup>91</sup> See Shaw, p. 614; Coles and Watt, para. 1.2.

<sup>92</sup> Churchill and Lowe, p. 214.

<sup>93</sup> Churchill and Lowe, p. 214; Guilfoyle, Douglas, *Shipping Interdiction and the Law of the Sea*. Cambridge University Press, 2009., pp. 17-18.

### 3. Introductions to the crimes

It is not possible to define in detail the relevant criminal offences, mainly because they are more of a collection of crimes with a similar nature than a specific act. As an example, “piracy” includes, as will be discussed later, more or less all violent acts on the high seas against a vessel or its crew that is executed for “private ends”<sup>94</sup>. For this reason, the existing definition of piracy is extremely broad and it is not the aim of this thesis to list and discuss all different actions. The definitions of the criminal offences below is thus those available in international law and it is up to the state in question to incorporate the crimes into its own national laws, with the result of inconsistency of application among states. The legal regime for the offences in a maritime context will be thoroughly discussed in chapter 5.

#### 3.1 Piracy

Although piracy may not constitute a major problem to the majority of states in the world, and is something that people outside the field might consider as ancient, or even fictitious, piracy is still in the maritime field a highly sensitive topic that causes major problems each year. When researching the topic, it is clear that it has been thoroughly discussed in both media and legal literature for many years. The law of piracy is governed by eight articles in UNCLOS under part IX on the High Seas<sup>95</sup>. It is defined as

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>96</sup>

It is important to note that this is the definition of the international crime of piracy as codified customary international law agreed by the international community.<sup>97</sup> States may have their own definitions of crimes similar to that

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<sup>94</sup> UNCLOS article 101.

<sup>95</sup> *Ibid* Articles 100-107.

<sup>96</sup> *Ibid* article 101.

<sup>97</sup> Though, not everybody agree to this definition. See Tuerk, Helmut, “Combating Terrorism at Sea - The Suppression of Unlawful Acts against the Safety of Maritime

of piracy *jus gentium*, but that does not qualify under UNCLOS<sup>98</sup>. The national piracy crimes are thus not subject to universal jurisdiction or other provisions governing the crime in international law. To qualify as piracy, the act must according to UNCLOS's article 101(a) take place outside the jurisdiction of a state. If the act took place within the territorial waters of a state, it would not be considered as piracy *jus gentium*, but it might be regarded as piracy according to that state's national laws. That crime is then, as mentioned, not an international crime, but one which is only subject to the coastal state's national laws as well as to normal principals of jurisdiction in the territorial sea.<sup>99</sup>

The legal boundary of acts that should be able to constitute piracy is not unanimous among scholars. UNCLOS states that an action can only be piracy if the object of the action is for "private ends"<sup>100</sup>. According to Shaw, this means that the purpose of the action cannot be for a political reason while Guilfoyle writes that the words "private ends" only excludes those actions sanctioned or authorized by a state, *i.e.* political reasons would be included in the scope of piracy if it is done without state consent.<sup>101</sup> For the punishment of those acts, which in fact might be the exact same act as the one which constitutes piracy, but which does not have the object of private gain, the piracy provisions of UNCLOS cannot be used *mutatis mutandis*.<sup>102</sup> Instead, those actions, which IMO has chosen to refer to as "crimes of piracy and armed robbery against ships"<sup>103</sup>, can be regarded as acts of terrorism at sea and for these acts a whole convention is dedicated: the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). Considering the importance of prevention of terrorism at sea, these crimes, which fall outside the scope of piracy *jus gentium*, will still be included in this discussion due to their similarities with piracy.

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Navigation". *University of Miami International & Comparative Law Review*, Vol. 15, Issue 3 (Spring 2008), pp. 337-368., at p. 341.

<sup>98</sup> See Swedish Criminal Code (Brottsbalk 1962:700), chapter 13, article 5a. The requisites in the Swedish national crime of piracy, "kapning", are the unlawful use of force for the sake of intervening in the maneuvering of the vessel. Unlike the international crime of piracy, the Swedish crime "kapning" can also be directed against an aircraft, buss, lorry, and various rail vehicles.

<sup>99</sup> See part 4.1.

<sup>100</sup> Article 101(a).

<sup>101</sup> Shaw, pp. 615-617; and Guilfoyle p. 42.

<sup>102</sup> There exist other requirements as well for an action to be considered as *piracy jus gentium*, *e.g.* that the offenders need to approach from another vessel and not operating from within the vessel as passengers or crew. See the *Achille Lauro* incident in Liljedahl p. 124.

<sup>103</sup> See IMO Resolution A.922(22) where piracy is defined as "unlawful acts as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)" and, to fill the gap of those criminal activities that falls besides the scope of piracy *jus gentium*, armed robbery against ships is defined as

any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences

## 3.2 Trafficking

Human trafficking is currently a growing issue with thousands of victims in Europe alone, mainly women and children. It involves trade in human beings, forced labour, and degrading treatment, actions which all constitute grave violations of basic human rights.<sup>104</sup> The first article of the Universal Declaration of Human Rights (UDHR) reads “All human beings are born free and equal in dignity and rights”<sup>105</sup>. There is no doubt that this includes trafficking, but at the time of UDHR’s drafting, trafficking was not fully recognized and defined under international law, and thus there is no further mention of this crime in the declaration.<sup>106</sup> But, there is a statement in article 4 of the declaration that slavery in every form is prohibited.

UNCLOS does not mention trafficking but includes a prohibition on the transport of slaves on the high seas<sup>107</sup>, a provision which is based on the Geneva conventions of 1958 and that has placed responsibility on flag states to prevent and punish the use of vessels flying its flag for this purpose and a provision giving all states the “right of visit” when a warship encounters a vessel suspected of being engaged in slave trade<sup>108</sup>. It is interesting to discuss whether this can be considered as trafficking, and whether it can be included in the concept of slavery. Also the question arises whether these provisions in UNCLOS can in any case be considered to be applicable *mutatis mutandis* for transport of people subjected to trafficking.

The prohibition of slavery was one of the first human rights acknowledged under international law and is today considered as customary international law<sup>109</sup>. Even though slavery has in most states been prohibited for many decades<sup>110</sup> the International Labor Organization (ILO) estimates that a minimum of twelve million people can be considered as slaves around the

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<sup>104</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report. Warsaw, 16.V.2005, p. 27.

<sup>105</sup> The Universal Declaration of Human Rights, article 1.

<sup>106</sup> Gallagher, Anne T., *The International Law of Human Trafficking*. Cambridge University Press, 2010, pp. 12-17.

<sup>107</sup> Article 99.

<sup>108</sup> UNCLOS article 110(1)(b).

<sup>109</sup> Gallagher, pp. 178-179.

<sup>110</sup> The British Slavery Abolition Act came into force 1833 which made slavery prohibited in the entire British Empire. The last Swedish slave was released 9 October 1847 on Saint-Barthélemy, a former Swedish colony according to Motion 2012/13:K255. In the United States slavery was abolished in January 1865, although it took the state of Mississippi until February 2013 to ratify the decision properly according to the Swedish newspaper Dagens Nyheter, 2013-02-18. <http://www.dn.se/nyheter/varlden/mississippi-forbjuder-slaveri-efter-148-ar>.

world today.<sup>111</sup> A definition of slave trade can be found in the United Nations first Slavery Convention<sup>112</sup>

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.<sup>113</sup>

Trafficking has its origin in the early twentieth century and is referred at that time to forced prostitution.<sup>114</sup> The term did not have an international definition until the year 2000 when the Palermo Protocol<sup>115</sup> which supplements the United Nations Convention against Transnational Organized Crime<sup>116</sup> was signed, and which today has been adopted by 154 states<sup>117</sup>. The definition of trafficking in persons for the purpose of that protocol is

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs<sup>118</sup>

The Palermo Protocol draws clear parallels between slavery and trafficking in persons, and there are more sources that give evidence to this parallel. The explanatory report to the Anti-Trafficking Convention<sup>119</sup> refers to

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<sup>111</sup> Crane, A., "Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation". *Academy of Management Review* 2013, Vol. 38. No. 1, 49-69., p. 49.

<sup>112</sup> Convention on the Abolition of Slavery and the Slave Trade, signed at Geneva on 25 September 1926. Hereinafter known as the 1926 Slavery Convention.

<sup>113</sup> Slavery Convention, article 1.

<sup>114</sup> Gallagher, p. 13.

<sup>115</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. New York, 15 November 2000.

<sup>116</sup> The convention will hereinafter be referred to as the OCC, when the articles in the convention in itself, and not those belonging to any of its protocols, are being discussed.

<sup>117</sup> 12 February 2013, according to UN webpage [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en).

<sup>118</sup> Palermo Protocol article 3(a).

<sup>119</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report. Warsaw, 16.V.2005.

trafficking as “the modern form of the old worldwide slave trade”<sup>120</sup>. Bassiouni wrote in *A Treatise on International Criminal Law* from 1973 about the forced use of women and children for prostitution and “other immoral purposes”<sup>121</sup> as a related topic included in a discussion of slavery, and he referred to it as “white slavery”, as it was commonly known as at that time.<sup>122</sup> The ILO’s Worst Forms of Child Labour Convention<sup>123</sup>, article 3(a) defines “worst form of child labour” as “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children...”. This provides that trafficking of children would be included under the notion of slavery as a wider concept, but Gallagher, an Australian barrister and highly renowned expert in the field of human rights, writes that it might be the other way around, since trafficking according to the Palermo Protocol shall include elements where “slavery or practices similar to slavery”<sup>124</sup> is one example. This gives the impression that slavery is one entity that together with others may constitute trafficking.<sup>125</sup> Even though trafficking today has been included in the definition of enslavement in the Rome Statute of the International Criminal Court (ICC)<sup>126</sup>, Gallagher writes that the legal situation today is unclear whether trafficking can be included under slavery, but, that if the most important aspect of slavery which involves the ownership of the slave, is current in the specific situation, then trafficking might well fall under the notion of slavery. If this includes the customary law of slavery is also uncertain since the customary rule is strictly attached to the common understanding of the notion of slavery and it is not something that changes very easily. On the other hand, there is evidence of on-going changes in the customary law of slavery since the whole understanding of the provision is changing, but what those changes may result in is yet to be seen.<sup>127</sup>

No matter how it is characterized, if slavery is part of trafficking or the other way around, there is no denying that the two are closely interrelated. For the provisions in UNCLOS to be applicable *mutatis mutandis*, it might not have to be ascertained exactly how the two crimes are connected but more that they are connected in such a way for those specific provisions in UNCLOS to be applicable. It might even be that when the persons are transported over the high seas, which is the core of the UNCLOS provisions, it might not yet be fully possible to determine whether the victims on board will be subject to slavery or trafficking, or something in between. The faith of those

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<sup>120</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report. Warsaw, 16.V.2005, p. 27.

<sup>121</sup> Bassiouni, Cherif M; Nanda, Ved P, *A Treatise on International Criminal Law, Vol I, Crimes and Punishment*. Charles C Thomas Publisher, 1973, p. 518.

<sup>122</sup> Bassiouni (1973), p. 518.

<sup>123</sup> Worst Forms of Child Labour Convention, C182.

<sup>124</sup> Palermo Protocol article 3(a).

<sup>125</sup> Gallagher, p. 190.

<sup>126</sup> Article 7(2)(c), adopted 17-07-98, reads:

"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

<sup>127</sup> Gallagher, pp. 190-191.

persons is yet to be decided and the backbone of the provisions is to prohibit the transport of people subject to that kind of degrading treatment in the future.

When it comes to dealing with trafficking as connected with slavery and slave-trade for the sake of applying the 1926 and the 1956 slavery conventions *mutatis mutandis*, the situation becomes a bit more complicated. These provisions do not only deal with the transport of slaves, but with slavery in its entirety, including the criminalisation of slavery in itself, something that is not directly applicable at sea. These conventions will only be brought into the discussion concerning the transport of slaves, provisions that, in line with the discussion above, might be able to be used *mutatis mutandis* for human trafficking due to their origin in UNCLOS<sup>128</sup>. There will be no discussion on whether the rest of the slavery conventions can or should be able to be applicable for crimes of human trafficking.

In summary, the legal situation whether trafficking can be included in the notion of slavery, or the other way around, is not as clear as it might seem at first glance. Each specific situation must be examined for this purpose. Yet, there exist clear overlaps between slavery and trafficking and the legal trend is moving towards a merging of the two notions. Even though there is a lack of legal certainty in this matter, the international community should strive for legal development and attempt to fuse the notion of trafficking together with slave-trade in the context of its prohibition on the high seas. Thus, for the sake of the slavery provisions in UNCLOS<sup>129</sup>, the transport of people subject to trafficking is to be considered to be applicable *mutatis mutandis*, although, in practice, it has to be established in each specific situation if the trafficking is of such nature, especially regarding ownership of the subject, whether it can be assimilated with slavery.

### 3.2.1 Trafficking as *Jus Cogens*

Slavery and slave-trade have for a long time been considered as *jus cogens* crimes due to their *erga omnes* nature and the need for worldwide prohibition. The Nürnberg Tribunal has in its charter and judgments recognized enslavement as a crime against humanity in international law<sup>130</sup>, though, the term was never defined. In the ICC statute, enslavement can still be found as an example of crimes against humanity, and in a definition provided, the term human trafficking includes enslavement as an example of

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<sup>128</sup> UNCLOS is a much newer convention, but these provisions can be regarded as codified customary international law.

<sup>129</sup> UNCLOS article 99 and 110(1)(b).

<sup>130</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, principle VI(c). International Law Commission at its second session, 1950. See:

[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf)

trafficking.<sup>131</sup> In other sources of law including scholarly writings, there is very little evidence of trafficking being included or assimilated to slavery as *jus cogens*.<sup>132</sup>

According to Gallagher, it is not possible to rely on the connection with slavery for trafficking offences to be regarded as part of slavery's status as customary international law.<sup>133</sup> This would also exclude its status as *jus cogens* which is higher in the hierarchy and thus harder to achieve. It is only the traditional notion of slavery that can be proved of having acquired the status of *jus cogens* and this notion of the term "slavery" is so fundamental for the establishment of *jus cogens* that it does not change at the same pace as a normal international crime. There is thus reason to separate the international crime of slavery where trafficking may be included, with slavery as *jus cogens* which still only entail the traditional crime in which trafficking may not yet be included.

Bassiouni writes that the inclusion of trafficking as an example of enslavement in the ICC statute illustrates that there are situations where an act may qualify as enslavement even though no true "slave labour" has taken place and it thus works as a safe-guard to make sure that no escape for the offender exists by a simple statement that no "work" took place.<sup>134</sup> If this is the main reason for the inclusion of trafficking in the definition<sup>135</sup> it is not clear, and at this point in time it does not seem to matter. As mentioned above, there is a need for clear *opinio juris* for the establishment of a *jus cogens* norm, and this does not seem to exist in the case of human trafficking. The inclusion of trafficking as an example of enslavement in the ICC statute is a good start but it is simply not yet enough.

### 3.3 Marine pollution

The UN advisory body GESAMP<sup>136</sup> defines pollution as

the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in

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<sup>131</sup> See footnote 110.

<sup>132</sup> Compare International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 112; Oosterveld, Valerie, "Gender-based Crimes Against Humanity" in Leila Nadya Sadat (eds.), *Forging a Convention for Crimes Against Humanity*. Cambridge University Press, 2011.; Kaczorowka; Bassiouni, Cherif M, *Crimes Against Humanity, Historical Evolution and Contemporary Application*. Cambridge University Press, 2011. chapter 6; Guilfoyle, pp. 75-76 and chapter 8; and Brownlie, chapter 23.

<sup>133</sup> See footnote 127.

<sup>134</sup> Bassiouni (2011) p. 380.

<sup>135</sup> It is not apparent in the text if it is Bassiouni's opinion that this is its only function, or if he has just mentioned one illustrative consequence of the inclusion of trafficking as an example of enslavement.

<sup>136</sup> Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection.

such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities.<sup>137</sup>

The MARPOL convention<sup>138</sup> recognizes that “deliberate, negligent or accidental release of oil and other harmful substances from ships constitutes a serious source of pollution”<sup>139</sup>. When discussing pollution in a wide scope, almost any type of substance can be said to have a harmful effect, especially considering the fact that even discharge of ordinary ballast water from a different region can have a harmful effect on the marine environment<sup>140</sup>. The list of substances might seem infinite, and for this reason, the discussion will only concern pollution by oil<sup>141</sup> which is one of the more distressing contributors of marine pollution. The polluting oil can enter the sea in different ways, *e.g.* from land-sources; from the air in form of acid rain; and from vessels. It is the latter form of pollution that this thesis will focus on.

The disposal of oil from vessels can be executed mainly in three different ways. Either the pollutant can enter the sea as the result of an accident (involuntary) or by operational discharge or by deliberate dumping, both of which are voluntary. The biggest contributor to this type of discharge relates to the normal operation of a vessel, *i.e.* operational discharge. This is often a necessary element for the operation of a vessel, much due to the fact that a vessel operates in the marine environment and it is thus hard to avoid any oil or oily mixtures from *e.g.* the machinery spaces, ending up there.<sup>142</sup> This does not mean that this type of discharge is permissible. It is regulated through a regime whose object is to prevent and reduce these operational discharges and it includes port reception facilities as well as regulations on technologies for reductions of polluting substances in *e.g.* tank washings.<sup>143</sup>

The MARPOL convention which was amended through the 1978 Protocol to aid the entry into force of the convention is the first instrument of its kind with the principal objective of protecting the marine environment.<sup>144</sup> The

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<sup>137</sup> GESAMP Reports and Studies No.47.

<sup>138</sup> International Convention for the Prevention of Pollution from Ships as modified by the Protocol of 1978 relating thereto.

<sup>139</sup> Preamble of MARPOL 73.

<sup>140</sup> See the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM). The convention will enter into force 12 months after ratification by 30 States, representing 35 per cent of world merchant shipping tonnage. 31 January 2013, the convention had 36 member states that together represents 29,07% of world merchant shipping tonnage.

<sup>141</sup> This is defined in MARPOL 73/78 Annex 1, regulation 1(1).

<sup>142</sup> Mukherjee, Proshanto K., “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective” in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes*. Martinus Nijhoff Publishers, 2007, pp. 463-496. At pp. 467-468.

<sup>143</sup> See IMO web page:

<http://www.imo.org/ourwork/environment/pollutionprevention/portreceptionfacilities/Pages/Default.aspx>

<sup>144</sup> Preamble of MARPOL 1973.

substantive part of the convention is regulated in its annexes, where only the first two are mandatory for all member states. Annex I deals with pollution by oil. MARPOL had in January 2013, 152 state parties which together represents 99,2% of the world tonnage.<sup>145</sup>

Regulation 15 of Annex I prohibits any discharge of oil or oily mixtures into the sea, except when certain conditions are met. Regulation 4 of the same convention states that regulation 15 is not applicable if the discharge was a consequence of a lifesaving operation or to damage to the ship or its equipment. This entails that accidental discharge is not prohibited under MARPOL provided all precautions for the prevention or minimizing of pollution damage was taken after the discovery of the discharge, and under the presumption that the discharge was not caused with intent or by reckless behaviour while knowing that pollution damage would be a probable consequence.<sup>146</sup> Noteworthy is that this is no longer the situation within the European Union (EU) after the heavily criticized Directive 2005/35/EC<sup>147</sup> which has taken the criminalization of accidental pollution a step further by making accidental discharge in the territorial sea of a European member state an offence, if it is caused by “serious negligence”.<sup>148</sup>

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<sup>145</sup> IMO status of conventions.

<sup>146</sup> MARPOL 73/78, annex I, regulation 4.2.

<sup>147</sup> Amended through Directive 2009/123/EC.

<sup>148</sup> See article 3-5 of the Directive 2005/35/EC.

## 4. Jurisdictions in the Zones

### 4.1 The Territorial sea

The territorial sea is defined in UNCLOS as the extension of a coastal state's sovereignty from its land out to the adjacent sea,<sup>149</sup> up to a maximum distance of 12 nautical miles measured from the state's baselines.<sup>150</sup> Exactly what state sovereignty entails is not mentioned in UNCLOS, but has to be understood through other bodies of international law as well as customary international law<sup>151</sup>. Instead, UNCLOS states that the sovereignty of the coastal state may be subject to exceptions in both the convention as well as in other rules of international law.<sup>152</sup>

The most extensive exemption of coastal state sovereignty in the territorial sea is the right of innocent passage for all states through the territorial sea, not depending on the flag of the vessel in passage. According to Liljedahl, the extent of coastal states' enforcement jurisdiction in relation to passage through the territorial sea is uncertain. States treat this issue in different ways and it would be far too extensive to go further into that topic.<sup>153</sup> Instead, the following discussion will concern the customary international law aspects as codified in UNCLOS.

In UNCLOS it does not matter whether the passage of a foreign flagged vessel is through the territorial sea without entering a port or internal water of the coastal state, or if the object of the passage is to enter the state's internal waters, as long as the passage can be said to be "continuous and expeditious"<sup>154</sup>, *i.e.* a vessel cannot rely on this exemption of coastal state sovereignty while it cruises around or lingers in the territorial sea. For a passage to be deemed as "innocent" it cannot be "prejudicial to the peace, good order or security of the coastal State"<sup>155</sup> and what this includes can be found in the second paragraph of article 19 in UNCLOS. The exemptions (b) "any exercise or practice with weapons of any kind"; (h) "any act of wilful and serious pollution contrary to this Convention" and; (l) any other activity not having a direct bearing on passage" are of relevance in this context. The first exemption can be relevant for the crimes of piracy and trafficking while the latter may relate to any of the discussed crimes. If the

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<sup>149</sup> UNCLOS article 2(1).

<sup>150</sup> *Ibid* article 3.

<sup>151</sup> See Brierly, J.L., *The Law of Nations, an Introduction to the International Law of Peace*. 6th ed, Edited by Sir Humphrey Waldock. Oxford University Press, 1963., pp. 7-16; Brownlie chapter 14; and The ILC Draft Declaration on Rights and Duties of States, 1949.

<sup>152</sup> UNCLOS article 2(3).

<sup>153</sup> Liljedahl, J. (2002). Transnational and international crimes: Jurisdictional issues. (P. K. Mukherjee, M. Q. Mejjia Jr., G. M. Gauci, Ed.). *Maritime Violence and other Security Issues at Sea: The Proceedings of the Symposium on Maritime Violence and other Security Issues at Sea*. Pp. 115-131., 26-30 August, Malmö: World Maritime University. At p. 120.

<sup>154</sup> UNCLOS article 18(2).

<sup>155</sup> *Ibid* article 19(1).

passage of a foreign vessel is regarded as non-innocent in accordance with article 19, the coastal state is allowed to take any necessary steps to prevent the passage through its territorial sea, *i.e.* the exemption of state sovereignty due to innocent passage is no longer applicable.

A coastal state may not hamper the innocent passage of foreign flagged vessels<sup>156</sup>, but the state is allowed to regulate the passage in respect of matters relating to a list found in article 21(1), where only (e) “the preservation of the environment of the coastal State and the preservation, reduction and control of pollution thereof”, is relevant for the discussed crimes. If the coastal state has clear grounds for suspecting that a vessel violated any of these pollution regulations in the territorial sea, the state is allowed to undertake an inspection of the vessel and take judicial proceedings against the vessel.<sup>157</sup>

As mentioned earlier, the flag state has jurisdiction over its vessels at all times, and while this vessel is within the territorial sea, the flag state and the coastal state have concurrent jurisdiction over criminal actions. For vessels passing through the territorial sea, the coastal state should refrain from exercising its jurisdiction as long as the crime cannot be said to be included in the list in article 27 of UNCLOS. These are

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

Liljedahl writes that, in practise, this mean that the coastal state will only exercise its jurisdiction in cases mentioned in (b); in cases where the offence was committed by a person who does not belong to the vessel<sup>158</sup>; if a person is wanted by the coastal state; if the master of the vessel or the flag state has requested the costal state to intervene; and in cases directly involving navigation, fishing or customs.<sup>159</sup>

If a vessel is only passing through the territorial sea of the coastal state without entering its internal waters, the coastal state is only allowed to take actions against a vessel for crimes *committed before* entering into the territorial sea, if the basis for the offence is found in Part XII of the convention, which concerns the protection of the marine environment.<sup>160</sup>

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<sup>156</sup> UNCLOS article 24(1).

<sup>157</sup> *Ibid* article 220(2).

<sup>158</sup> As neither crew nor passenger.

<sup>159</sup> Liljedahl, p. 121.

<sup>160</sup> UNCLOS article 27(4).

## 4.2 The Contiguous zone

The contiguous zone, which has a maximum breadth of 24 nautical miles measured from the baselines of the coastal state, overlaps the territorial sea and the Exclusive Economic Zone (EEZ). In this zone the coastal state may exercise control to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea<sup>161</sup>

Through this article, a coastal state has in the waters adjacent to the territorial sea, not sovereignty, but enforcement jurisdictions for the matters mentioned in (a). In the territorial sea, the state has an additional way of taking action against a delinquent foreign flagged vessel which overrides the right of innocent passage due to the fact that the coastal state has the right to exercise its authority in the contiguous zone. States which have not yet claimed an EEZ, the contiguous zone actually provides the coastal state with enforcement jurisdiction over parts of the high seas.<sup>162</sup>

## 4.3 The EEZ

The Exclusive Economic Zone, or the EEZ as it is commonly known, is a relatively new feature in the Law of the Sea. It was first introduced in connection with the preparations for what later developed into UNCLOS<sup>163</sup>. The EEZ has its roots in the ambition of coastal states to get more control over the economic resources in the waters outside their territory, mainly fish stocks, as well as the authority to prevent other states to exploit these resources.<sup>164</sup> Today, UNCLOS has established the EEZ as subject to a “specific legal regime”<sup>165</sup> found in, and governed by, the convention. In this zone, the coastal state does not have full sovereignty as in the territorial sea, but states have far more authority in comparison with the high seas. This is shown in article 58 which gives states the obligation to pay due regard to any coastal state’s rights and duties as well as be in compliance with the coastal state’s laws and regulations that are in accordance with the provisions regarding the EEZ in UNCLOS, but in return there are some rights of the high seas that still apply in the EEZ. These include free right of navigation and overflight of all foreign flagged vessels, as well as right of

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<sup>161</sup> UNCLOS article 33(1).

<sup>162</sup> See the Convention of the Territorial Sea, 1958, article 24; and Brownlie, p. 192.

<sup>163</sup> Different authors refers to this convention by different names, but this thesis uses, as earlier mentioned, the abbreviation “UNCLOS” for the 1982 convention on the Law of the Sea.

<sup>164</sup> Churchill and Lowe, pp. 160-161.

<sup>165</sup> UNCLOS article 55.

all states to lay submarine cables and pipelines, and all activities related to these freedoms that can be considered lawful in international law.<sup>166</sup> In addition to this, the provisions provided for the high seas in UNCLOS are applicable for the EEZ, as well as “other pertinent rules of international law”<sup>167</sup> as long as they are not incompatible with the rules in UNCLOS especially established for the EEZ.

The EEZ may be claimed for a maximum length of 200 nautical miles from the baselines<sup>168</sup> and the coastal state has:

jurisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment<sup>169</sup>

The distinctive feature of this zone is the coastal state’s sovereign rights to explore, exploit, conserve and manage the natural resources, both living and non-living, existing in the seabed, beneath the seabed, as well as the water superjacent to it.<sup>170</sup> In regards to these rights, the coastal state has authority to take necessary measures against a suspected delinquent vessel, *e.g.* boarding, inspection and judicial proceedings.<sup>171</sup> Coastal states may also adopt laws and regulations that give effect to international rules and standards from the “competent international organization” (the IMO) for the enforcement of laws concerning prevention, reduction and control of pollution from vessels<sup>172</sup>.

In special circumstances where the coastal state has reasons to believe, and can prove through scientific evidence, that there is an area within the EEZ which is of such delicate ecological nature that it needs special protection from marine pollution that is not sufficiently provided for in existing international regulations, the coastal state may, if the IMO agrees to this, adopt pollution preventative regulations for special areas as provided for by the IMO.<sup>173</sup>

## 4.4 The High Seas

The high seas is defined as all parts of the sea that does not constitute the EEZ, territorial sea or internal waters of a coastal state.<sup>174</sup> The high seas

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<sup>166</sup> UNCLOS article 58(1).

<sup>167</sup> *Ibid.* article 58(2).

<sup>168</sup> *Ibid.* article 57.

<sup>169</sup> *Ibid.* article 56(1)(b).

<sup>170</sup> *Ibid.* article 56(1)(a).

<sup>171</sup> *Ibid.* article 73(1).

<sup>172</sup> *Ibid.* article 211(5).

<sup>173</sup> *Ibid.* article 211(6)(a).

<sup>174</sup> Or archipelagic waters of an archipelagic state. See UNCLOS article 86.

“shall be reserved for peaceful purposes”<sup>175</sup> and cannot be subject to any state sovereignty.<sup>176</sup> It is open to all states and all states, coastal as well as land-locked<sup>177</sup> have the right to enjoy the six freedoms of the high seas which are: freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations; freedom of fishing; and freedom of scientific research.<sup>178</sup>

Since the high seas is not subject to any state sovereignty, it is neither subject of any state jurisdiction on a territorial basis. The question is on what basis jurisdiction can be exercised when a vessel is sailing the high seas. The general answer to this question of jurisdiction is today found in article 92 in UNCLOS, which states that a vessel is only allowed one flag state, and it is this state that has exclusive jurisdiction when the vessel is sailing on the high seas. For another state to be able to exercise jurisdiction with regard to an action or incident that took place on the high seas, there must be an exceptional situation for which there is provision in UNCLOS or other international treaties. This principle of flag state jurisdiction is older than the convention in which it is found today; it was an established principle already at the time of *the Lotus* case in 1926<sup>179</sup>. Regarding penal jurisdiction for the master and crew of a vessel on the high seas, there is a specific exception to the exclusive jurisdiction of the flag state in article 97 of UNCLOS which, as will be explained below, came into existence after the *Lotus* case. This article fulfils the principle of active personality jurisdiction, and it provides opportunity for the state to which the master or crew-member is a citizen to exercise penal jurisdiction. It is important to note that this does not exclude the flag state’s jurisdiction, but give both states concurrent jurisdiction in the matter.

#### 4.4.1 Exceptions to the Flag State Jurisdiction

Although the general rule in international law states that the flag state has exclusive jurisdiction on the high seas in all cases except regarding penal jurisdiction, there do exist a few other exceptions. Some crimes are of such a nature that they have acquired universal jurisdiction provided explicitly by UNCLOS, and other offences are considered of such exceptional a nature that state co-operation in the suppression of this type of action is encouraged on the high seas. These offences can be found in UNCLOS, e.g. unlawful broadcasting and prohibition of illicit traffic in narcotic drugs, or which

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<sup>175</sup> UNCLOS article 88.

<sup>176</sup> *Ibid.* article 89.

<sup>177</sup> *Ibid.* article 87 and 90.

<sup>178</sup> *Ibid.* article 87(1).

<sup>179</sup> *The Lotus*, para. 64. See chapter 2.2.1.1. See also article 6 in HSC as well as UNCLOS article 92.

have their origins in treaty law, *e.g.* terrorist acts at sea<sup>180</sup>, and they are often exercised through various conventions and regional agreements<sup>181</sup>.

As mentioned above, in UNCLOS article 92, the exclusivity of flag state jurisdiction might be avoided for cases stipulated in an international treaty. It is thus up to states to decide between themselves what wrongful acts they consider as offences of such a degree that the exclusivity of the flag state jurisdiction ought to be disregarded. These conventions do not provide all states with additional jurisdiction like UNCLOS does for piracy and hot pursuit, but they merely provide an obligation for states to among themselves criminalise the actions referred to. If this is done by states, those states' jurisdictions will stretch to vessels flying their flag and in some cases even for nationals of that state<sup>182</sup>. These conventions may even include an element where states can authorize other member states to exercise jurisdiction over that state's vessels.<sup>183</sup>

#### 4.4.1.1 Hot Pursuit

Where a violation of a state's national laws has taken place, or it is suspected that it has taken place within the internal waters, the territorial sea or the contiguous zone of that state, it is allowed to pursue the delinquent vessel and take action against it even on the high seas. The requirements are that the vessel is, at the beginning of the pursuit, still located within a zone of the coastal state, and that the pursuit is done without interruption. This provision is found in UNCLOS article 111 and allows states to prevent the possibility of getting away with an offence by escaping to the high seas. The right of hot pursuit is terminated once the vessel has entered the territorial sea of another state.

Even though this is a clear exception to flag state jurisdiction for a vessel on the high seas, it can also be seen as an extension of the territorial rights of the coastal state for crimes committed there. Without this right, it would be too easy for a delinquent vessel to escape liability for offences committed in the maritime territory of the coastal state.

The right of hot pursuit is considered to be customary law and a right the coastal state always has no matter what flag the delinquent vessel is flying.

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<sup>180</sup> See the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).

<sup>181</sup> For examples, see the Vienna Convention against illicit traffic in narcotic drugs and psychotic substances adopted in 1988, and the Council of Europe's Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

<sup>182</sup> According to the passive/active nationality principle.

<sup>183</sup> The exception in this context is the Intervention Convention which is applicable to all vessels no matter member status of the flag state. This is legitimate due to UNCLOS article 221(1) which gives states authority to protect its coastline from pollution following a maritime casualty.

Neither does it matter what offence was committed, as long as it was a law of the coastal state.

# 5. Dealing with the Crimes

It has been discussed above what jurisdictions prevail in the different maritime zones and how the crimes of piracy, trafficking and oil pollution, reflect international law. This chapter will connect the previous discussions to see out how the crimes can be dealt with in international law, *i.e.* for what situations a coastal state have jurisdiction over the matter.

## 5.1 Piracy

Piracy is one of those crimes against the international community of such a detestable nature that it has been granted universal jurisdiction. This is shown in article 105 in UNCLOS, which gives every state the right to seize a pirate ship and any other vessels under the control of pirates as well as the right to arrest the responsible individuals. Another indication of universal jurisdiction is article 110, “the right of visit”, which allows states suspecting a vessel to be engaged in piracy, to board and search the vessel. This may be done in any part of the world outside the jurisdiction of any state, and it is the seizing state that has the right to decide on penalties and further actions<sup>184</sup>. Since piracy has universal jurisdiction, the pirate itself is considered as *hostis humani generis*<sup>185</sup> against whom proceedings may be initiated in an international tribunal or by a court in any state in the world, regardless of where the offence took place or the nationality of the suspected pirates.

An issue that complicates the suppression of piracy is the fact that due to state sovereignty, a state cannot without consent pursue and arrest a suspected pirate or seize a pirate ship in another state’s territory.<sup>186</sup> This might have the result that a pirate vessel can escape liability if it successfully flees into the territorial waters of a state which chooses not to take any action against this vessel.<sup>187</sup> In Somalia where the situation concerning pirates has been extremely difficult, the United Nations Security Council adopted a Resolution in accordance with the Charter of the United Nations, chapter VII, giving states right for a period of 12 months to:

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<sup>184</sup> UNCLOS article 105.

<sup>185</sup> A term said to be first used by the Roman politician Cicero. *Pirata est hostis humani generis* which translates to “a pirate is the common enemy of humankind.” It is said to be an abbreviation of his phrase *Nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; \*\*\* hoc nec fides debet nec ius iurandum esse commune.*

Translated: “For a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought be neither mutual faith nor binding oath.” From *De Officiis*, Book III, Ch. XXIX, p. 107.

<sup>186</sup> Shaw, p. 398.

<sup>187</sup> Which *de facto* is against international law according to UNCLOS article 100, but then it is a question of whom has the right and interest to take action against the passive state.

Enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law<sup>188</sup>

This extension of hot pursuit is offensive to the sovereignty of Somalia, but is a last recourse that was found justifiable for the keeping and restoration of peace. Measures like this are only to be used in extreme situations where there exists a great threat to peace. In all other situations where there is no authority granted by the Security Council, states are dependent on the coastal state to fulfil its responsibility in international law to take action against the pirate vessel when it can be found within its territorial sea.

A states which have confined a suspected pirate but does not want to proceed with prosecution for any reason, can, after negotiation with a willing state, extradite him or her according to national laws and extradition agreements between the two states. The coastal state is for this reason not solely responsible for holding the suspected pirate responsible, but only for seizing the vessel, and taking appropriate measures until another state can, and is willing to take over.

As seen in chapter 3, the definition of piracy in UNCLOS has excluded many types of crimes that are of the same criminal nature, they might even be the exact same actions although *e.g.* not undertaken for private ends or are committed in the territorial sea of a state. These would hopefully be considered as criminal offences in domestic law, including the criminal offence of armed robbery; they can in no case be considered piracy *jus gentium*. These crimes titled “armed robbery at sea” by the IMO, cannot be considered as piracy according to UNCLOS, but the act may constitute an “unlawful act” and can thus be tackled though the SUA convention which in its original version has been adopted by 160 states. The IMO titillation is not binding international law but considered as *para-droit*, the offence must therefore exist in other documents of international law as well, *e.g.* the SUA convention.<sup>189</sup>

### 5.1.1 Suppression of Unlawful Acts

This convention first focused on what actions states are allowed to take following a terrorist action at sea, however, after 11 September 2001, it was concluded that there was a need for preventive measures relating to the use of ships in terrorist activities to be included in the convention.<sup>190</sup> This resulted in the 2005 amendments which, among other things, broaden the

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<sup>188</sup> Resolution 1846 (2008), issue 10(a).

<sup>189</sup> IMO summary of Status of Conventions, as of 2013-01-31. The 2005 version has so far only 23 member states, and the 2005 protocol only 19, but more are on the way, *e.g.* Sweden where the matter is under process, see Departementsserie 2011:43 Sveriges tillträde till överenskommelser inom FN om bekämpande av terrorism.

<sup>190</sup> Tuerk, p. 15.

scope of crimes with three additional articles regarding types of criminal activities. There is little difference between the original and the amended version in the relevant articles and for this reason only the amended version of the convention will be referred to, even though it is not yet in force.

The legal foundation of this convention is not derived directly from UNCLOS or any other source of customary law like the situation with piracy *jus gentium*. Instead, its legitimacy for acts on the high seas is found in the general rule in article 92 which has the exception of exclusive flag state jurisdiction for exceptional cases provided by an international treaty.<sup>191</sup> This is one of those treaties.

The convention requires states to criminalize the offences described in article 3; *3bis*; *3ter* and *3quater*<sup>192</sup>, for vessel's flying the state's flag, for its nationals and for crimes committed in its territory, including the territorial sea. It is also encouraged that states in its national laws provide for jurisdiction to deal with stateless persons who reside in that state, as well as for people covered by the passive personality principle. Even if a state does not have jurisdiction based on these categories, a state should take measures to establish jurisdiction over those people found within its territory in cases where the state does not extradite the criminal to those member states that have jurisdiction based on the primary categories.<sup>193</sup> When a state exercises its jurisdiction according to this convention, it has to pay due regard not to interfere with coastal state's and flag state's rights and jurisdiction according to UNCLOS.<sup>194</sup>

The geographical scope of the convention is found in article 4(1) SUA and it states that the convention applies for crimes taken place when the vessel is:

navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.<sup>195</sup>

Even if these geographical requirements above are not fulfilled, the convention still applies if the suspected criminal can be found in the territory of a state party to the convention, other than the one referred to in the quote above.<sup>196</sup>

This convention is one of those that can be considered constituting quasi-universal jurisdiction according to Shaw<sup>197</sup>. An action that in all aspects only concerns non-state parties, *e.g.* if it takes place on a vessel registered in a non-state party on the high seas, and which only affects persons of non-

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<sup>191</sup> The legal foundation for actions in the territorial sea is the state sovereignty found in article 2, the passage cannot be considered as innocent according to article 19. In the EEZ, all states enjoy the freedom of navigation for lawful purposes, something this cannot be said to constitute, see article 58(1).

<sup>192</sup> Article *3bis*, *3ter* and *3quater* are from the 2005 protocol.

<sup>193</sup> SUA article 6.

<sup>194</sup> *Ibid.* article 8*bis*(9)(c).

<sup>195</sup> *Ibid.* article 4(1).

<sup>196</sup> *Ibid.* article 4(2).

<sup>197</sup> See part 2.4, "Universal Jurisdiction".

state parties or states which have not adopted the passive personality principle, it will not fall within the scope of this convention since none of the state parties have jurisdiction over the action. If the action would be of universal jurisdictional nature, *i.e.* piracy *jus gentium*, the nationality of the victims of the action or other jurisdiction criteria mentioned above would not matter since any state would be entitled to prosecute the crime not depending on where or by whom it was committed.

The criteria concerning geography is the same in both universal jurisdiction and quasi-universal jurisdiction found in the SUA convention article 6(4), since, as mentioned above, even with universal jurisdiction the criminal needs to be within the territory of the forum state at the time of prosecution.

Since the list of crimes with universal jurisdiction is a very limited and exclusive list reserved for the worst crimes against mankind and *hostis humani generis*, this is not something states can agree upon in a treaty, but something that needs to be developed through careful consideration and *opinio juris*. And since this is bound to take time, an agreement like this convention is as close as states may get by themselves, and it is a step in the direction of providing these crimes with universal jurisdiction.<sup>198</sup>

## 5.1.2 Universal Jurisdiction in the EEZ

One requirement for piracy *jus gentium* is that the act is committed outside the jurisdiction of a state. The same wording was used in the HSC which existed before the notion of EEZ was introduced. When considering the provisions regulating the coastal state's possible jurisdictions in the EEZ, none of which concern piracy, it can be regarded that for the sake of acts of piracy, the crime is committed outside of the coastal state's normal jurisdiction.<sup>199</sup>

There are primarily two ways of regarding this complicated issue of acts of piracy in the EEZ. Either the starting point of discussion is the sovereignty of the coastal state in the EEZ, and that article 58(2), which states that articles 88 to 115 concerning the high seas are applicable to the EEZ as long as they are not incompatible with provisions in Part V of the convention<sup>200</sup>, merely provides non-coastal states with those freedoms existing on the high seas in cases where this is compatible with Part V. Or, the starting point of discussion is the freedom of the seas in the EEZ and that the coastal state only has those exclusive rights and jurisdictions as provided for in Part V of the convention.

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<sup>198</sup> Especially considering that on 31 January 2013, SUA 1988 had 160 state parties which together represent 94.63% of the world tonnage and SUA 2005 had 23 state parties representing 30.49% of the world tonnage. Source: IMO Status of Conventions, see IMO website.

<sup>199</sup> This conclusion, although not necessarily the arguments, is shared by Liljedahl p. 122.

<sup>200</sup> That deals with the specific legal regime of the exclusive economic zone.

This is an area of legal uncertainty<sup>201</sup>, and it is this author's opinion that for acts of piracy committed in the EEZ, universal jurisdiction should apply. This is not expressly stipulated in any article in UNCLOS, but when considering article 58(2), piracy cannot be said to be incompatible with any of those provisions and thus, acts of piracy should be able to be subject to the same jurisdiction in the EEZ in the same way as if the action took place on the high seas. This gives the result that the crime is granted with universal jurisdiction even in the EEZ and through this, any state may take action against both the vessel and the people on board, with observance of article 58(3).<sup>202</sup>

### 5.1.3 Flag States' Rights

States have a legal duty in international law to take any possible measures to repress acts of piracy. If a flag state gets hold of information about a suspected piracy activity concerning a vessel carrying its flag, either through own sources or from other states, the flag state has to take appropriate measures and subject the suspected pirates to legal investigations. One problem is that the pirate ship might not have a nationality, or it may be a phantom ship with fake identity<sup>203</sup> which will make the whole process of finding the responsible person, as well as finding a state with flag state jurisdiction, much more difficult.

For unlawful actions that do not fully match piracy *jus gentium*, universal jurisdiction is not applicable. The SUA convention recognizes the exclusive flag state jurisdiction over vessels, cargo and persons unless it waives its jurisdiction in favour of other states with jurisdiction according to this convention.<sup>204</sup> If a state other than the flag state suspects a vessel outside the territorial seas of any state to be involved in a criminal activity included in the convention, that state must always request authorisation from the flag state before boarding and searching the vessel<sup>205</sup>. There is no provision saying that the flag state must approve this request, on the contrary, the flag state has in this convention a right to decline authorisation for other states to

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<sup>201</sup> Noyes, John E. Introduction to the International Law of Piracy, *California Western International Law Journal*, Vol. 21, Issue 1 (1990), pp. 105-122, at p. 108.

<sup>202</sup> Many authors have avoided this discussion, but support to this conclusion can be found in Chi, Manjiao, Finding out the Achilles Heels: Piracy Suppression under International Law and Chinese Law, *Journal of East Asia and International Law*, Vol. 5, Issue 1 (2012), pp. 7-36, at p. 16 footnote 47; and Keyuan, Zou, Issues of Public International Law Relating to the Crackdown of Piracy in the South China Sea and Prospects for Regional Cooperation, *Singapore Journal of International & Comparative Law*, Vol. 3, Issue 2 (1999), pp. 524-544, at p. 530.

<sup>203</sup> See Mukherjee and Mejia, pp. 171-172.

<sup>204</sup> SUA article 6(1)(1), article 8bis(8), and article 8bis(9)(c).

<sup>205</sup> Parties to the convention can notify the Secretary-General that authorization is given if no response on a request from a state has been provided within four hours from the acknowledgement that a request to confirm nationality of a suspected person has been made.

board and search its vessels.<sup>206</sup> Boarding may only be done without the express consent from the flag state if there is imminent danger to human life and if the right to take those measures can be found in a bilateral or multilateral agreement separate from the SUA convention<sup>207</sup>.

This feature of flag state authorisation is quite distinguishable from the universal jurisdiction for crimes that can be considered as piracy. For those crimes, any state can take action not depending on what flag state that is involved or if this flag state provides consent to boarding.

## 5.1.4 Conclusion

In the territorial sea a crime cannot constitute piracy *jus gentium*, and thus the universal jurisdiction does not apply. Instead, those crimes that on the high seas would constitute piracy can in the territorial sea be tackled through the SUA convention, which requires coastal states to criminalise the stipulated actions. The result is thus that vessels, which have or are suspected of having committed acts of piracy in the territorial sea of a state party, are subject to coastal state jurisdiction. This may become very complicated if the active and maybe even the passive personality principle<sup>208</sup> are used. But, as mentioned above, the convention is not prejudiced against coastal state jurisdiction, which leaves enforcement of the crimes in the territorial seas primarily with dual concurrent jurisdiction for the flag state as well as the coastal state.

For crimes taking place in the territorial waters of a state that is not party to the SUA convention, that coastal state may still, according to its own national laws, seize and prosecute for the crime, as long as it is criminalised in national law. Other states, which have an interest in the matter, *e.g.* the flag state and states who claim jurisdiction based on active personality, still have jurisdiction over the responsible persons, but they do not have the right to seize the vessel within the territorial sea of the coastal state without express consent and thus have to ask for extradition of the suspected criminals before they can exercise their jurisdiction.

If an act similar to that of piracy is committed in the territorial sea or the contiguous zone, but not captured there, the coastal state may still seize the vessel through the provision of hot pursuit in UNCLOS<sup>209</sup> provided that all the criteria are met.

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<sup>206</sup> SUA article 8bis(5)(e)(iv).

<sup>207</sup> *Ibid.* article 8bis(7).

<sup>208</sup> If this can be applicable is up to each state to regulate in national laws. In Sweden, the passive personality principle can only be used in areas where no other state has jurisdiction, mainly the high seas. See the Swedish Criminal code (Brottsbalk 1962:700), chapter 2, article 3.5.

<sup>209</sup> UNCLOS article 111.

In comparison with actions committed in the territorial sea which grants the right of hot pursuit to the adjacent zones, no such reversed right exists for crimes committed on the high seas when the vessel escapes to the territorial sea of a third state. It is thus fully possible for a delinquent vessel to escape responsibility by fleeing into a territorial sea, where of course it is faced with that state's coastal state jurisdiction, although, for there to exist effective enforcement, it is required that the coastal state is active and that it has adopted enforcement rights to take action within its territory for a crime of piracy committed outside the territory of that state<sup>210</sup>.

The relationship between coastal states' possibility of enforcement jurisdiction and the strong right of the flag state is clearly illustrated in the SUA convention where a coastal state must ask the flag state for permission before taking action. The SUA convention deals with a situation where states have given themselves jurisdiction which normally would not exist, and it is thus especially important not to violate the sovereignty of the flag state, which may not be a party to the convention, through ignoring its jurisdiction. By "asking for permission" and always keeping the flag state informed and supplied with a veto to stop actions, other states can exercise jurisdiction where needed without violating the sovereignty of the flag state. It is to be kept in mind is that the crimes covered by the convention are the absolute most detestable forms of terrorism at sea. Through this mechanism, the problem with FOC registries (to keep the old language) is avoided by providing other states with the opportunity to take action where the flag state wishes to be passive, and thus the FOC state does not have to be in violation of international law by remaining passive while states that actually want, and are willing to work for safer seas, have the right and opportunity to take actions against delinquent vessels.

## 5.2 Human Trafficking

It was concluded in chapter 3 that it is not, yet, the case that trafficking can be regarded as a *jus cogens* crime. If the situation was different, which it might very well be in the future, this criminal activity might be able to be accessed through universal jurisdiction with the result that the discussion concerning enforcement will be the same as regarding piracy. Until then, the provisions in UNCLOS regarding prohibition of transport of slaves on the high seas can, or at least should be able to be used *mutatis mutandis* for transport of people subject to human trafficking. This has the consequence that according to international law, flag states have the responsibility to take effective measures against vessels flying its flag while engaged in this activity.<sup>211</sup> No further mentioning of this, or any mentioning of trafficking can be found in UNCLOS, and thus, the detailed provisions on how this

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<sup>210</sup> Sweden has criminalized such actions in the Criminal code (Brottsbalk 1962:700). Chapter 2, article 3.6. It should be read together with chapter 13, article 5a.

<sup>211</sup> See UNCLOS article 99.

prohibition is to be carried out in practice is left to be decided by other instruments of international law.

Slavery is primarily dealt with in international law through the 1926 Slavery Convention which is amended through the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery from 1956<sup>212</sup>. The latter includes a requirement to criminalise the transport of slaves not depending on means of transport in national law, and to make sure that vessels flying the state's flag, as well as making sure that ports and coasts are not used for this purpose.<sup>213</sup>

## 5.2.1 Palermo Protocol

The primary legal framework for trafficking is the Palermo Protocol which belongs to quite a new convention<sup>214</sup> that, even though it has only been in force for 10 years<sup>215</sup>, has received a lot of attention and has already acquired 154 parties<sup>216</sup>. A big part of the convention is about state parties providing and offering each other assistance in the aftermath of any of the applicable crimes, *e.g.* investigation and prosecution.<sup>217</sup> This is a very interesting and extensive regime that unfortunately is outside the scope of this thesis.

The Palermo Protocol<sup>218</sup> states in its first article that “it shall be interpreted together with the Convention”<sup>219</sup> and that the offences established in the Palermo Protocol shall be considered as offenses established within the convention. This has the important result that provisions of the convention are applicable for crimes with origin in the Protocol as well.<sup>220</sup>

The Palermo Protocol places responsibility on states to take all necessary measures to criminalise all aspects of human trafficking<sup>221</sup> and through the

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<sup>212</sup> Hereinafter known as the 1956 Slavery Convention.

<sup>213</sup> 1956 Slavery Convention article 3.

<sup>214</sup> The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000.

<sup>215</sup> The Protocol entered into force 25-12-00.

<sup>216</sup> UN treaty webpage:

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en)

<sup>217</sup> See articles 16-21.

<sup>218</sup> There are actually two other protocols supplementing the convention: the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. But, these are not important in this thesis and therefore, “the Protocol” will only refer to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>219</sup> The Palermo Protocol article 1(1).

<sup>220</sup> *Ibid.* article 1(3).

<sup>221</sup> *Ibid.* article 5.

convention's provision regarding jurisdiction<sup>222</sup>, states are required to establish jurisdiction over the crimes in their territorial sea and over vessels flying its flag.<sup>223</sup> States are also encouraged to provide jurisdiction over people covered by the active and passive nationality principle as well as over responsible people that can be found in the territory of the state even though the crimes might have been committed outside of the territory of that state.<sup>224</sup>

## 5.2.2 The Territorial Sea

In the territorial sea, all states have the right to pass “innocently” without the passage being hampered by the coastal state. There are certain conditions for when a coastal state may regulate the innocent passage, and it does not seem, when reading article 21, that human trafficking can be included in any of those categories. The result is that as long as the vessel never enters the internal waters of the coastal state where it is no longer subject to the innocent passage regime, the coastal state is not allowed to hamper the vessels passage. However, the key issue for accessing the crime of human trafficking is whether the passage of a vessel engaged in human trafficking can be considered as innocent. When reading article 19 and scholarly writings<sup>225</sup>, the impression rendered is that it cannot be considered as innocent and the vessel is thus subject to coastal states' sovereignty.

Whether the coastal state has right to exercise its criminal jurisdiction over the vessel is based on UNCLOS' article 27. Trafficking could be regarded as a crime that disturbs peace and “good order” of the territorial sea<sup>226</sup>, depending on how this activity is performed, *e.g.* the use of weapons on board, for those crimes that the coastal state might have the right to exercise jurisdiction over the vessel. Paragraph 4 of the same article, which deals with criminal jurisdiction for crimes committed before entering into the territorial sea, is not applicable in this case due to the fact that the crime in focus is the transport of people subject to trafficking, and the transport in itself is an on-going crime that is being undertaken while the vessel is passing through the territorial sea, the crime can thus not be considered as committed before entering into the territorial sea.

A fundamental rule of the territorial sea regime is the extension of the coastal state's sovereignty. In the 1926 Slavery Convention, there is an explicit requirement that the states criminalise transport of slaves in the territorial sea<sup>227</sup>. The 1956 Slavery Convention has not adopted the same

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<sup>222</sup> OCC article 15.

<sup>223</sup> *Ibid.* article 15(1).

<sup>224</sup> *Ibid.* article 15(2)(a-b) and article 15(4).

<sup>225</sup> Churchill and Lowe, pp.85-86.

<sup>226</sup> UNCLOS article 27(1)(b).

<sup>227</sup> 1926 Slavery Convention article 3(1).

language, but demands that states make transport of slaves<sup>228</sup> between countries a criminal offence in national law.<sup>229</sup> It can be understood that one form of transport between countries is by sea, and for this regulation to be functional, this will have to include a prohibition of transport of slaves in the territorial sea. As mentioned above concerning the close relationship between transport of slaves and transport of people subject to trafficking, it can be argued that these conventions establishing a requirement for state parties to criminalise transport of slaves in the territorial sea, today includes criminalisation of transport of people subject to human trafficking.<sup>230</sup> For states parties to the Palermo Protocol, the situation is less complicated and simply contains a provision stating a requirement to criminalise trafficking in the territorial sea, as well as on vessels flying its flag, as mentioned above.

### 5.2.3 The EEZ and the High Seas

In both the EEZ and on the high seas, the rule concerning freedom of navigation is undeniable.<sup>231</sup> There are no provisions in UNCLOS establishing sovereignty for coastal states over these zones, or providing coastal states with jurisdiction to legislate or take action against vessels suspected of human trafficking or similar activities. The conclusion must thus be that the legal situation concerning the EEZ can be assimilated to that of the high seas in this context, and the flag state thus has exclusive jurisdiction over its vessels, unless otherwise stipulated by international law.<sup>232</sup>

Through the OCC and its supplementing Palermo Protocol, state parties have, or at least should have, established jurisdiction over vessels flying their flag and hopefully over people subject to the passive and active nationality principle as well, though this is not mandatory. This means that even in other parts of international law, it is, on the high seas and in the EEZ, primarily, the flag state which has jurisdiction over a vessel used for

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<sup>228</sup> There also exist requirements in article 6 to criminalize the act of enslaving people, but that is outside the scope and interest of this essay.

<sup>229</sup> 1956 Slavery Convention article 3(1).

<sup>230</sup> The basis for this conclusion is that the crime of human trafficking can be considered to be connected with the slavery crime. The general rule of interpretation (article 31.1) in the Vienna Convention on the Law of Treatise, 1969, state that:

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.

It is submitted that the “ordinary meaning” of slavery should include, in line with the discussion in part 3.2, human trafficking, and since the crime of transport of people subject to these crimes are so closely related that it is in line with the “object and purpose” of the slavery conventions to include human trafficking.

<sup>231</sup> See UNCLOS article 58 and 87(1)(a).

<sup>232</sup> As stated in UNCLOS article 92(1).

human trafficking, and the only way for other states to acquire jurisdiction is through the active and passive personality principle.

Customary international law has one important resort for non-flag states that wish to get involved, and that is through “the right of visit”<sup>233</sup>. This provision allows warships that encounter a vessel suspected of engaging in slave trade or, through the discussion in part 3.2, engaged in human trafficking, to board and conduct investigations on board the vessel with “all possible consideration”<sup>234</sup>. But, unfortunately this does not provide the visiting state with jurisdiction over the crime. The findings of a state that exercises its right of visit according to article 110 can only be reported to the flag state<sup>235</sup>, which in its turn has the responsibility to punish the responsible persons under article 99.

## 5.2.4 Conclusion

As addressed above, flag states are required to regulate and take action against its vessels engaged in this activity and cannot be in compliance with international law while remaining passive. This is further emphasized by the conventions in which all of them include provisions regarding states to criminalise this unlawful act on their vessels.<sup>236</sup> The result is that in the territorial sea, there exist concurrent jurisdictions between coastal states which are parties to either the slavery conventions or the Palermo Protocol, and the flag state. The concurrency is extended if states have adopted the passive and active nationality principle according to the OCC.<sup>237</sup>

In the EEZ and on the high seas, a coastal state has limited legal opportunities for taking action against a delinquent vessel. Only if states have established jurisdiction based on the passive and active nationality principle in line with the Protocol, a non-flag state can take legal action against a delinquent vessel.

## 5.3 Marine Pollution

The protection of the marine environment is of such importance that its governing regime is placed in a part of its own in UNCLOS; part XII. Its first article houses the general obligation of states: “to protect and preserve

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<sup>233</sup> UNCLOS article 110(1)(b).

<sup>234</sup> *Ibid.* article 110(2).

<sup>235</sup> Guilfoyle, p 76.

<sup>236</sup> 1926 Slavery Convention article 3; 1956 Slavery Convention article 3(2); and the OCC article 15(1)(b).

<sup>237</sup> For a discussion on concurrent jurisdiction, see part 5.4 below.

the marine environment”<sup>238</sup>. Vessel-sourced pollution is dealt with in article 221 and it places obligations on states acting through an international organization or general diplomatic conference, to establish international regulations for the prevention and control of marine pollution.<sup>239</sup> Flag states are also required to adopt laws and regulations having, as a minimum, the same effect as those international regulations for vessels flying its flag<sup>240</sup>, and to make sure that there exist effective enforcement mechanisms for the performance of the international regulations. Examples of these measures are the prevention of sailing for sub-standard vessels, that the vessels are inspected on a regular basis and that each vessel carries certificates to prove its regulation compliance. Penalties of adequate severity should be provided for any violation to discourage further delinquent behaviour.<sup>241</sup>

### 5.3.1 The Territorial Sea

In the territorial sea, coastal states are allowed to, as a consequence of its sovereignty, adopt national laws and regulations concerning protection of the environment, without this being considered as hampering the innocent passage regime.<sup>242</sup> In addition, a passage is no longer innocent in cases of “wilful and serious pollution”<sup>243</sup>, which excludes accidental and negligently caused discharges as well as those discharges that do not have a major impact on the environment.<sup>244</sup> But since a coastal state is allowed to regulate these matters, the issue of innocent passage is of less importance, the vessel has a duty to obey the coastal state’s regulations.

If a suspected delinquent vessel has by free will entered into a port or off-shore terminal of the coastal state, a port state regime is applicable. In short, whenever a vessel can be found within this area, the coastal (or port) state may initiate investigations and proceedings against this vessel even if the violation of international rules took place in the territorial waters or the EEZ. If the discharge took place in another state’s waters, the port state may only take initiate investigations and proceedings if this is requested by that state, the flag state or any other state whose environment is threatened by the discharge.<sup>245</sup> Although the port state regime is very interesting, this is something outside the narrow scope of the thesis and will not be further discussed.

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<sup>238</sup> UNCLOS article 192.

<sup>239</sup> *Ibid.* article 211(1).

<sup>240</sup> *Ibid.* article 211(2).

<sup>241</sup> *Ibid.* article 217.

<sup>242</sup> *Ibid.* article 21(1)(f); and UNCLOS article 211(4).

<sup>243</sup> *Ibid.* article 19(2)(h).

<sup>244</sup> Peters, Mary S; Kumar, Manu.,” Analysis of Innocent Passage in the Territorial Sea under The Law of the Sea Regime 1982”. *European Energy and Environmental Law Review*, December 2012, p. 308.

<sup>245</sup> UNCLOS article 218(1-2).

The enforcement mechanism for pollution laws differs depending on where the discharge took place, where the vessel is found, and how serious the discharge is. If a vessel has violated pollution laws in the territorial sea, the coastal state may take measures against the vessel according to its own national law, as provided for in Part II of UNCLOS.<sup>246</sup> For vessels suspected of violating pollution regulations through moderate discharges within the EEZ of the coastal state, and the vessel can be found in either the territorial sea or the EEZ, the coastal state only has the right to require the vessel to give information about its identity and of its last and next port of call so that the coastal state may be able to establish if the vessel has violated any pollution regulations.<sup>247</sup> It is only if the vessel is suspected of a violation that resulted in “substantial discharge causing or threatening significant pollution of the marine environment” that the coastal state is allowed to physically inspect the vessel to find evidence about the pollution incident, and this only if the vessel has refused to provide the information mentioned or it can be suspected when considering the factual situation that the information provided about the incident is not the complete truth.<sup>248</sup> If “clear objective elements” indicate that the vessel is responsible for “major damage or threat of major damage”<sup>249</sup> to the coastal state’s interests, the state is allowed to initiate proceedings against the vessels in the manner provided for in national laws irrespective of any provided information about next port of call etc.

It is thus clear that the coastal state has jurisdiction over vessel-sourced pollution, and according to article 27<sup>250</sup>, the coastal state is also entitled to exercise its criminal jurisdiction over the vessel since consequences of marine pollution might affect the coastal state. This may also be done even if the violation took place before the vessel entered into the territorial sea when provided in Part XII<sup>251</sup> of the convention.<sup>252</sup>

### 5.3.2 The EEZ

The coastal state’s right to adopt laws for prevention and control of marine pollution in the territorial sea, is applicable even for the EEZ, but only for enforcement purposes established in UNCLOS.<sup>253</sup> These include the right of the coastal state to take actions against a pollution violation in the EEZ, depending on the severity of the discharge and the threat of damage.<sup>254</sup> The right of enforcement measures for these violations in the EEZ is the same as

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<sup>246</sup> UNCLOS article 220(2).

<sup>247</sup> *Ibid.* article 220(3).

<sup>248</sup> *Ibid.* article 220(5).

<sup>249</sup> *Ibid.* article 220(6).

<sup>250</sup> *Ibid.* article 27(1)(b) to be exact.

<sup>251</sup> Concerning protection and preservation of the marine environment.

<sup>252</sup> UNCLOS article 27(5).

<sup>253</sup> *Ibid.* article 211(5).

<sup>254</sup> See UNCLOS article 220, discussed in 5.3.1.

for vessels found in the territorial sea which has already been discussed above.<sup>255</sup> But, for pollution violations in the EEZ, where the vessel cannot be found in the territorial sea or the EEZ, *i.e.* it has successfully escaped to the high seas; the coastal state may not take action unless the criteria for hot pursuit are fulfilled. If the vessel instead has escaped to another state's territorial sea or EEZ, the right of hot pursuit does not exist and there must thus be an agreement between the two coastal states for the first state to be able to pursue the delinquent vessel. As mentioned before, the flag state always has jurisdiction over its vessels and this state can always hold the delinquent vessel responsible for a marine pollution violation, as long as this particular situation that has occurred is criminalised in the flag state's national law. Whenever the coastal state has taken action against a foreign flagged vessel, the flag state should be notified, this includes a submission of all official reports concerning the violation.<sup>256</sup>

### 5.3.3 The High Seas

There are unfortunately not many special provisions regarding pollution incidents on the high seas. To solve the jurisdictional matters, there is thus a need to resort to the general provisions which involve the freedoms of the high seas as well as the right of hot pursuit. If a vessel has violated pollution regulations of the coastal state, that state may pursue the vessel from waters within the contiguous zone, and eventually take action against the vessel even on the high seas, if this is in accordance with the hot pursuit provision in UNCLOS.

The only relevant article in UNCLOS relating to marine pollution on the high seas is article 221 which allows states to take measures to protect its interests<sup>257</sup> from pollution damage, if the pollution can reasonably be expected to bring "major harmful consequences"<sup>258</sup>, and the pollution in itself is a consequence of a maritime casualty<sup>259</sup>. The requirement in UNCLOS is that the measures taken are proportionate to the damage, or threat of damage, from the pollution accident. From this article, the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*<sup>260</sup> derives its legality. This convention was hastily drafted after a major oil spill on the high seas, off the English

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<sup>255</sup> See 5.3.1; the Swedish supreme court decision NJA 2004:255 regarding marine pollution penalty for confirmed pollution in the EEZ of Sweden.

<sup>256</sup> UNCLOS article 231. Though, for discharges in the territorial sea, this is only a requirement for measures taken in proceedings.

<sup>257</sup> Including fishing, see UNCLOS article 221(1).

<sup>258</sup> UNCLOS article 221(1).

<sup>259</sup> UNCLOS article 221(2) defines maritime casualty for the purpose of this article as

A collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

<sup>260</sup> Hereinafter referred to as the Intervention Convention.

coast.<sup>261</sup> As mentioned previously, the flag state is always responsible for its vessels and, on the high seas, the flag state has exclusive jurisdiction unless otherwise stipulated in UNCLOS, *e.g.* article 221, or in an international convention.

### 5.3.3.1 The Intervention Convention

This convention was adopted at a Brussels' Convention in 1969 when the need for available legal measures against foreign flagged vessels causing serious pollution on the high seas that threatens the coastal state, was acknowledged after the *Torrey Canyon* disaster in 1967, where a Liberian-flagged tanker hit a reef and leaked an estimated 60 000 tons of oil which caused serious pollution on the British and French coastline.<sup>262</sup> The British government decided to bomb the vessel to set the remaining cargo oil on fire for the prevention of further pollution damage. This was done even though the vessel was in an area that at that time was considered the high seas and was thus only subject to the flag state jurisdiction, *i.e.* Liberia.<sup>263</sup> The applicable convention at the time was the HSC which merely stipulates that the flag state has exclusive jurisdiction on the high seas, except when an international treaty or articles in the high seas convention provide otherwise. The available exceptions in this convention concerned primarily piracy and hot pursuit, nothing that would be applicable in the case of the *Torrey Canyon* disaster. The realization of the absence of an international convention approving such measures as those taken and discussed in the *Torrey Canyon*-situation was the starting point of the Intervention Convention.

This convention is one exception to the exclusive jurisdiction of the flag state for ships sailing the high seas. When certain conditions are met, a coastal state has jurisdiction, following a maritime casualty, to take appropriate measures for prevention and elimination of oil pollution that threaten the state's coastline or similar area of interest. The requirement is that the threat of pollution is expected to bring "major harmful consequences" to the coastal state.<sup>264</sup>

The convention contains a list of provisions that a state needs to obey *e.g.* that the state shall consult other affected states, there among the flag state, and that any subject that has an interest that might be affected by the proposed measures shall be informed and their opinions shall be heard before any measures is taken. It is only if the situation is of such emergency that it does not allow for these provisions to be followed, that a state is allowed to take those measures deemed necessary at the time without consulting and informing the flag state, other interested parties and various

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<sup>261</sup> The *Torrey Canyon* disaster, discussed in part 5.3.3.1.

<sup>262</sup> Brownlie p. 240.

<sup>263</sup> Churchill and Lowe, p. 354.

<sup>264</sup> Intervention convention article I.1.

experts.<sup>265</sup> The proposed measures are subject to proportionality of the pollution threat; they should not last longer than required by the situation, and the state must make sure not to violate other states' rights and interests more than what is absolutely necessary.<sup>266</sup> If the requirements set up by the convention are not met, the state is obliged to compensate any such damage caused by the taken measures.<sup>267</sup>

In a conference in London in 1973, a protocol<sup>268</sup> to the convention which in original only concerns pollution by oil, was adopted providing an extension of the convention making it applicable not only to oil, but to all harmful substances mentioned in a list provided by the IMO.

A problem with this convention today is the requirement of imminent danger to the coastal state's interest. After the prolongation of the territorial sea and the establishment of the EEZ in UNCLOS, the outer limit of the high seas was moved from 3 nautical miles to up to 200 nautical miles from the state's baselines. At the time of the *Torrey Canyon* disaster, an oil pollution incident that took place on the high seas could well be considered as bringing imminent threat of serious consequences for the coastal state, but it can be discussed whether the same conclusion would be drawn for an oil discharge 200 nautical miles off the coast. This does not entail that a discharge on the high seas today cannot cause serious consequences on a coastal state, but rather that this particular convention does not support the measures that need to be taken in such event.

### 5.3.4 Conclusion

Protection of the marine environment from pollution is something that is very important to the international community and this is clearly illustrated in UNCLOS through the detailed regime concerning states' rights and obligations. A vessel which is in violation of pollution regulations while in passage through a territorial sea loses its status as "innocent" and is subject to the coastal state's full sovereignty. The same is applicable for a delinquent vessel which is by free will within the coastal state's internal waters, even though the violation might have occurred in the EEZ.

For vessels which are navigating in the territorial sea or the EEZ and are suspected of having violated pollution regulations, the coastal state has varying means to hold the delinquent vessels responsible and the means depend on the severity of the discharge and threat of damage. For severe discharges the coastal state has very extensive rights, in comparison with

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<sup>265</sup> Intervention convention article III.

<sup>266</sup> *Ibid.* article V.

<sup>267</sup> *Ibid.* article VI.

<sup>268</sup> Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil (London, 2 November 1973).

minor discharges, where the coastal state may only require information from the vessel.

On the high seas, a coastal state has very few opportunities to take action against a delinquent oil polluting vessel. The flag state has exclusive jurisdiction over the vessel, unless the pollution was a result of a navigational incident to which the state where the suspect is a national also may exercise penal jurisdiction. If the discharge threatens to damage coastal interests of the coastal state, then that state may take measures to protect itself from damage, if support for these measures can be found in customary international law, or in an international convention, *e.g.* the Intervention Convention, but even in this convention, the coastal state has to consult with the flag state and other interested parties before any measures can be taken. The criminal jurisdiction over the polluting incident in itself lies only with the flag state.

## 5.4 Consequences of Concurrent Jurisdictions

When more than one state have jurisdiction over a crime, there are no clear rules on who has priority over the others. But, states which have jurisdiction based on a form of jurisdiction with “lower status”, *e.g.* principles of nationality in comparison to the flag state, will normally, unless the crime and its punishment is of special interest to the state, waive its jurisdiction on behalf of the other state, on the basis of comity.<sup>269</sup>

When disregarding comity between states, concurrent jurisdiction means, in theory, that all states with jurisdiction have equal right. This version of double jeopardy is not a violation of international law as it is in many national laws<sup>270</sup>, and it entails that all states may punish the crime in question according to its own national laws. Through agreements and conventions, states can amongst themselves agree to recognize each other’s judgements and apply the principle of *ne bis in idem*<sup>271</sup>. In Europe, before the EU, the Convention between the Member States of the European Communities on Double Jeopardy was drafted and signed by 11 states, but is today only in force in 5 states<sup>272</sup>. One reason for the very low interest in

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<sup>269</sup> See part 2.3.

<sup>270</sup> In England this was established in *Connelly v DPP* 1964 AC 1254 HL and in Swedish law it can be found in the code of procedure (*Rättegångsbalken* 1942:740), chapter 30 article 9. See Morosin, Michele N., “Double Jeopardy and International Law: Obstacles to Formulating a General Principle”. *Nordic Journal of International Law* 64: 261-274, 1995., p. 262.

<sup>271</sup> As an example, see The International Covenant on Civil and Political Rights, article 14(7).

<sup>272</sup> Denmark, France, Italy, the Kingdom of the Netherlands and the United Kingdom. Source: The Netherlands Ministry of Foreign Affairs: <http://www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/1987/5/001096.html?printpart=parties>.

such a convention is that the principle of mutual recognition of foreign judgements has within the EU been an important issue for the community since 1998 and is today considered of fundamental value<sup>273</sup>. The principle of *ne bis in idem* can be found in article 54 of the Convention Implementing the Schengen Agreement in the EU<sup>274</sup> as well as article 50 of the Charter of Fundamental Rights of the European Union<sup>275</sup>.

For agreements like this to function properly, it is important that the states trust each other's legal systems in regard of *e.g.* proportionality and human rights. If states do not trust each other to render a fair trial and judgement, a state might be tempted to ignore the agreement for the sake of punishing the criminal. In the EU, the community has placed high demands on the legal systems through the Lisbon treaty as well as various Framework Decisions, and this is supervised by the different organs within the EU.

Another example of an agreement regulating double jeopardy is the International Covenant on Civil and Political Rights (ICCPR) in which *ne bis in idem* is found in article 14(7).

The essence of this short discussion is that in general international law where special agreements and conventions can be disregarded, there are no explicit rules of priority in a situation where one or more state have jurisdiction based on international law. Double jeopardy is thus no problem, and it might even be necessary to ascertain that serious criminals do not get punished too mildly<sup>276</sup>, but it should be kept in mind that for state parties to the ICCPR it is against human rights to exercise double jeopardy.

## 5.5 Obligation to take action

An interesting issue relating to enforcement jurisdiction is whether a coastal state can be obliged to take action against a delinquent vessel. For trafficking violations in customary international law this question would have to be answered in the negative, considering that the provisions in

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<sup>273</sup> See Program of measures to implement the principle of mutual recognition of decisions in criminal matters, (2001/C 12/02).

<sup>274</sup> Its full name is: Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders of 19 June 1990.

<sup>275</sup> The status of this charter is defined in the Treaty on European Union article 6. The EU has taken this matter a step further by Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. It establishes rules for when another state other than the forum state is able to enforce the sentence in that state for the sake of social rehabilitation. See article 3.

<sup>276</sup> The idea is that if a serious crime gets a very mild punishment, other states might choose to exercise its jurisdiction as a second state to make sure that the crime gets a "decent" punishment.

UNCLOS have only placed responsibility on the flag state for the prevention and punishment of transport of slaves. The same goes for marine pollution where, even though all states are obliged to protect the marine environment, there is only a requirement on flag states to ensure that their vessels complies with international as well as national laws and regulations, while coastal states are merely provided with encouragement and possibilities to take action against polluting vessels.

Regarding piracy, the situation at first seems different. The provisions in UNCLOS starts with the statement that all states should cooperate to repress acts of piracy.<sup>277</sup> However, when reading the provision where acts of piracy are granted universal jurisdiction<sup>278</sup>, the convention has not placed any requirements on states, but merely provided jurisdiction for actions that states 'may' take for the suppression of this crime.<sup>279</sup> Not even regarding right of visit can any requirements to take action be found, only possibilities if the state would feel like it.

The reason for this lack of obligations on states to take actions against serious crimes is the state sovereignty. The very essence of sovereignty is that there is no one at a higher hierarchical level that can order a state to do something against the state's policies. One place within international law where obligations on states can be found is in conventions.<sup>280</sup> Although, in comparison with customary international law, the term obligation is misleading considering that conventions are ratified by states by their free will, and the commitment within are thus agreed upon voluntarily. This does not make any obligations less of a requirement, but states who wish, as a general policy, to remain passive in these aspects, can simply abstain from ratifying the convention in question or, if allowed, place a reservation on the provision regarding the issue at hand.

In most conventions, there are no express requirements on states to actually take actions against delinquent vessels, but merely a requirement to make certain acts criminal offences in national law. It can thus be argued whether an obligation to take action can be regarded as included within the scope of the convention. The OCC, as an example, has as one object the criminalisation of different acts, *e.g.* trafficking. The convention requires states to provide itself with jurisdiction over vessels flying its flag and encourages states to adopt the passive and active nationality principle. The question is thus, if it can be considered as against the core of the convention to only criminalise, but not actually act to suppress these crimes. If it can be regarded that to take action against delinquent vessels is included in the object of the convention, this would lead to the result that a state which has implemented the conventions and taken the necessary measures to fulfil the requirements of criminalisation, but later chooses not to follow its own national law, is in violation of the convention as a whole. This in turn, is a

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<sup>277</sup> UNCLOS article 100.

<sup>278</sup> *Ibid.* article 105.

<sup>279</sup> Guilfoyle shares this conclusion, see p. 30.

<sup>280</sup> See SUA article 5 "Each State Party shall make the offences set forth in article 3 punishable..."

violation of international law, and as a result other states can hold the passive state responsible<sup>281</sup>. If this is not the case, the result would be that a state which chooses not to follow its own implementation of the convention would not be in violation of the convention, simply in violation of its own national law, something that other states cannot do anything about.

In conclusion, it can be summarized that flag states can in theory be required to take action against its delinquent vessels, but coastal states do not have the obligation, but merely possibilities, to take action.

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<sup>281</sup> Provided that there exist a competent forum that both states have agreed upon, *e.g.* the ICJ.

## 6. Conclusion

The discussions in the chapters above have illustrated when a coastal state may act if faced with one of these criminal activities. The crimes were chosen to reflect three serious crimes which pose a frequent threat to safe seas around the world. In international law, these activities are with in the three different ways, and those three together clearly illustrate how a coastal state may use international law to prevent and punish such criminality.

First, the crime with the most extensive form of jurisdiction is piracy. This crime is at the top of the hierarchy of all serious international crimes, and one of very few criminal activities whose repression has been granted universal jurisdiction. Though the list of activities falling within the scope of piracy is very restrictive, the international community has tried to redeem this by drafting and ratifying the SUA convention, which does not constitute universal jurisdiction, but as close as can be agreed upon by states themselves. For criminal activities within the SUA convention to be regarded as part of piracy *jus gentium*, the whole understanding of piracy needs to change or develop, and for this, there must be evidence of *opinio juris* in this matter.

Through these regimes of universal jurisdiction and the comprehensive SUA convention, states have quite extensive opportunities to deal with acts of piracy, if they choose to do so. Even though UNCLOS has placed responsibility on all states to cooperate in the repression of piracy, there exists no requirement in customary international law for unwilling states to take action against acts of piracy.

The second crime and jurisdiction issue concerns transport of people subject to human trafficking. This crime cannot be found in customary international law, but transport of people subject to slavery can, and it is this author's opinion that these two, in this context, overlaps in such a way as to make an inclusion of human trafficking to customary international law possible. This brings the result that all flag states are responsible, although not obliged, to take action against this type of criminal activity on the high seas, as well as in their territory. For coastal states of which customary international law have not posed a requirement to prevent this activity<sup>282</sup>, it will be up to each state to decide whether they want to criminalize this action in national law, and thus be able to take measures against delinquent vessels within their jurisdiction. States parties to the Palermo Protocol are required to criminalize these acts, but since this protocol as well as its convention is voluntary and does not constitute international customary law, it cannot be said to be a requirement in international law to criminalise the acts of human trafficking.

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<sup>282</sup> The slavery provision in UNCLOS, which codifies customary international law, has only placed a requirement on the flag state to prevent and punish the use of its flag for this purpose. There is no mentioning of coastal, or other states' duties in this regard.

The last criminal activity is that of non-accidental oil pollution. This legal regime is neither of universal nature like piracy, nor based on conventions with a possible foundation in customary international law like trafficking, but has quite a comprehensive basis regarding jurisdictions in UNCLOS itself. Within the EEZ and the territorial sea, the coastal state has actually quite extensive jurisdiction to take action against oil polluters, although this regime primarily concerns major pollution incidents, and notably, it is the many minor discharges that are of greatest threat to the environment, especially considering that the large spills are often caused by an accident, something that most often cannot be considered a criminal activity. For minor discharges, there are limited opportunities for the coastal state which mean that this is left to the responsibility of the flag state.

On the high seas, a coastal state has very limited opportunities to take action against a delinquent vessel, especially when taking into account the fact that the Intervention Convention has become quite hard to use after the EEZ-regime, and considering that it mainly involves the right to take preventive/damage control measures and does not concern the aftermath issues *e.g.* prosecution of the offender.

Another way to regard the issue of jurisdiction is considering what states are allowed to do in each maritime zone. In the territorial sea, the coastal state has practically unlimited sovereignty with the sole exception of innocent passage which cannot be claimed by the offender when a crime has been committed. The next zone, the EEZ, is more complicated and it is important to examine the nature of the crime to see whether the coastal state may take action. In many cases, *e.g.* non-minor oil pollution and serious criminal activities, the coastal state has quite extensive opportunities to exercise jurisdiction, although not as extensive as in the territorial sea.

It is in international law primarily the flag state that has jurisdiction when a vessel is outside the territory of a coastal state, but when certain conditions are met, *e.g.* universal jurisdiction or nationality principle, the range of states with possible jurisdiction can be expanded to ensure that it is not possible to escape punishment for serious criminality in international areas.

Through the discussed crimes, this thesis has illustrated on what legal grounds a coastal state may base its jurisdiction for a wide range of criminal activities and it has been concluded that there cannot be said to exist obligations for a state in international law to take action, merely opportunities for those states which are willing to work for safe seas.

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<sup>283</sup> Translation made by the author, note that this is not an official translation.

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