

**AN ANALYSIS OF SOUTH AFRICA'S RIGHT
TO BOARD VESSELS WITHIN
TERRITORIAL WATERS AND
INTERNATIONAL WATERS**

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I hereby declare that I have read and understood the regulations governing the submission of MPhil Shipping Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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INTRODUCTION

Boarding, in its simplest sense, refers to the embarkation onto a ship's deck of people. A boarding can either be compliant or opposed, whereby the master and crew both acknowledge and respond to law enforcement agencies or not.¹ In peacetime, boarding allows authorized inspectors of one nation or group, to examine a ship's cargo in a search for drugs, weapons, passengers who are unrecorded on the ship's manifest, or any other type of contraband that could possibly have been carried aboard. A nation's law enforcement agencies could also board any suspicious ships that have been over fishing in such a nation's territorial waters or if the vessel is suspected of polluting.²

South Africa has a variety of rights to board vessels at sea. The legalities of a boarding in general are complex, both international and domestic law authorise South African law enforcement agencies to board vessels, with varying jurisdictions depending on where and for what reason to board. The aim of this dissertation is to give insight to the current South African law governing the country's law enforcement agencies and their right to board, inspect and seize cargo from vessels within South African waters or upon the high seas during peacetime. An analysis of these rights will be done, which will highlight legal issues relating to boarding's that have been compounded due to a number of reasons and how South Africa can draw from other countries experiences to rectify these issues.

There is no doubt that South Africa has a right to board vessels within their waters or upon the high seas for numerous reasons, but it is imperative that the applicable law enforcement authorities are aware of these rights and their limitations, in order to have the ability to perform an effective service at sea preventing any illegal activities or crimes which could have devastating consequences.

¹ J. Van der Westhuisen, *Law of Peacetime Naval Operations*, Ch 3 Protection of Persons and Property at Sea and Maritime Law Enforcement, 3-9.

² *Ibid.*

CHAPTER 1

South African Waters

The United Nations Convention on the Law of the Sea³ (UNCLOS), formally known as the Third United Nations Convention on the Law of the Sea, or UNCLOS III, was adopted in 1982.⁴ Its purpose is to establish a comprehensive set of rules governing the oceans and to replace previous UN Conventions on the Law of the Sea, one in 1958 (UNCLOS I) and another in 1960 (UNCLOS II), that were believed to be inadequate.⁵ On 16 November 1994 parliament passed the Maritime Zones Act of 1994 which came into effect a few days before the 1982 United Nations Convention on the Law of the Sea came into force. Even though South Africa had signed the Convention in December 1984, the country was not yet in a position to take a decision as to its ratification, due to the political situation prior to 1994.⁶ The South African Governments failure to ratify the Convention was not due to any lack of political will and, in fact, the Cabinet was of the view that its provisions were deemed customary law and should be reflected in legislation.⁷

On 11 November 1994⁸ the Maritime Zones Act⁹ came into effect, which increased South Africa's internal waters and continental shelf.¹⁰ It also reduced the contiguous zone, replaced the fishing zone with an EEZ, and created a new maritime cultural zone.¹¹ The field of application of South African law was extended in terms of the Act to the internal waters, the territorial sea, installations in the EEZ or on or above the continental shelf, as well as limited areas around certain installations.¹² There are four

³ United Nations Convention on the Law of the Sea (UNCLOS), New York, 1982.

⁴D. A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, August 2006.

⁵ Ibid.

⁶P. Vrancken, *Post-apartheid South Africa and the sea: First decade legislation (1994-2003)*.

⁷ Ibid.

⁸ 'South Africa enacted the Maritime Zones Act of 1994, which repealed the Territorial Waters Act of 1963, the Territorial Waters Act (Transkei) of 1978 and the Territorial Waters Act (Ciskei) of 1986. The Act came into effect on 11 November 1994 and includes 16 sections and 3 schedules, which, inter alia, give the coordinates for straight baselines (schedule 2) and the limits of the continental shelf (schedule 3). The Act also applies to the Prince Edward Islands, which are located about 700 nautical miles southeast of South Africa in the Indian Ocean.' www.unitednations.com, see South Africa Maritime Zones and Law, Prepared by the Division for Ocean Affairs and the Law of the Sea (DOALOS), Office of Legal Affairs, United Nations, New York.

⁹ Maritime Zones Act 15 of 1994.

¹⁰ Ibid, see Subsec 3,4 and 8.

¹¹ Ibid, see Subsec 5,7 and 6.

¹² Ibid, see Subsec 3(2), 4(2) and 9(1) read with sec 1(ii).

specific areas which are relevant to this paper; they are internal waters, territorial waters, contiguous zone and the high seas. Each zone has different levels of jurisdiction, which can be distinguished into three types of jurisdiction, namely, prescriptive, enforcement, and adjudicative.¹³ Prescriptive jurisdiction allows a state to mandate a ship's compliance with laws or other standards.¹⁴ Enforcement jurisdiction permits a state to prevent or punish a ship's violation of these laws or standards.¹⁵ Adjudicative jurisdiction refers to the power of a tribunal to hear a case against a vessel or person.¹⁶ 'These three types of jurisdiction do not always coincide; for example, frequently a state will have prescriptive jurisdiction but not enforcement jurisdiction. Nor do these three types of jurisdiction reflect any hierarchy; the presence of one type of jurisdiction does not imply any other type of jurisdiction, although in practice they do tend to accompany one another.'¹⁷

Internal waters

According to UNCLOS Art 8 internal waters are waters on the landward side of the baseline of the territorial sea. Within the terms of international law and the South African Maritime Zones Act of 1994, it defines and claims internal waters as, all waters landward of the baselines and all harbours. Any law in force in the Republic, including the common law will apply in the internal waters and the airspace above the internal waters. The right of innocent passage does not exist in the internal waters.¹⁸ The main legal reason for a foreign vessel to enter internal waters would be to enter a port for commercial reasons or to seek refuge if in distress. Coastal states however, have the right to close ports or refuse entry.¹⁹

¹³ D. Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, 18 E.L.Q. 719, 731 (1991).

¹⁴ T.C. Perry. Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea, *Ocean Development & International Law*, (2006) 37:1, 33 - 53. See also UNCLOS Art 207 – 212.

¹⁵ Ibid. Also see UNCLOS 213 – 222.

¹⁶ Ibid. UNCLOS does not explicitly distinguish between enforcement and adjudicative jurisdiction in the treaty text.

¹⁷ Ibid (note 14) p36.

¹⁸ Maritime Zones Act (note 9), subsec 3(3). See also arts 8(2) and 17 of UNCLOS

¹⁹ UNCLOS (note 3), see Art 25.

The right to exit from internal waters and ports in particular, are also subject to the approval of the coastal state and can be withheld.²⁰ Examples of this are where a vessel has outstanding accounts; the vessel is not compliant to local or international regulations; or whereby the vessel is unseaworthy and could cause damage to the coast or surrounding areas.

The Defence Act empowers the South African Navy to conduct criminal and civil law enforcement within the internal waters of South Africa.²¹ It sanctions a South African National Defence Force (SANDF) officer as a peace officer to exercise powers on behalf of any legislated enforcement authority within the country.²² The SA Navy, the South African Police Service (SAPS) and the statutory enforcement authority have therefore concurrent jurisdictional powers with these enforcement authorities in this zone.

Territorial Waters

In the past the breadth of the territorial sea was defined in terms of the visibility or the range of a cannon shot.²³ According to UNCLOS Art 3 it states that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with the Convention. The Convention describes in Art 5 the normal baseline for measuring the breadth of the territorial sea as the low-water line along the coast as marked on large-scale charts officially recognised by the coastal state. Art 19 of the UNCLOS Convention describes passage in such waters as innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Any activity not having a direct bearing on passage is considered prejudicial to the peace, good order or security. In accordance with the terms of international law the Maritime Zones Act defines and claims as territorial waters for South Africa in section 4 as the sea within a distance of 12 nautical miles from the baselines; any law in force in the Republic, including the common law, shall also apply in its territorial waters and the airspace

²⁰ Ibid.

²¹ Defence Act 42 of 2002, Ch 4, Sec 22 (2)(a).

²² Ibid, Sec 22 (4) (a).

²³ Department of Transport, Consolidated Maritime Issues, Document *Comido 1* (2003/4) Pretoria: Government Printer.

above its territorial waters; the right of innocent passage shall exist in the territorial waters.

South Africa has broad powers to make and enforce laws governing ships within its territorial waters. It can be said that South Africa has prescriptive, enforcement, and adjudicative jurisdiction over its territorial waters. The SANDF and in particular the SA Navy have the same jurisdictional powers as in the internal waters of the country.²⁴

Contiguous zone

The origins of the contiguous zone is probably to be found in the British 'Hovering Acts' instituted against foreign smuggling ships hovering within distances from the coast from which smuggling could take place.²⁵ 'Hovering' is a practice by which ships can remain just outside the territorial waters waiting for the opportune moment to engage in acts prohibited within the territorial waters or on land. In short, it is a buffer zone intended to help enforce the laws that apply within the territorial waters.

According to UNCLOS Art 33, coastal states are permitted to claim a zone, contiguous to its territorial sea, which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured, in which it may exercise control over infringement of its customs, fiscal, immigration or sanitary laws within its territory or territorial sea. South Africa claims a contiguous zone of 12 nautical miles in terms of section 5 of the Maritime Zones Act which states that the sea beyond the territorial waters, but within a distance of 24 nautical miles from the baselines, as the contiguous zone of the Republic of South Africa; and within the contiguous zone and the airspace above it, the Republic shall have the right to exercise all the powers which may be considered necessary to prevent contravention of any fiscal law or any customs, immigration or sanitary law and to make such contravention punishable. The Act also gave the waters within the contiguous zone the status of maritime cultural zone.²⁶ Making use of the power granted by article

²⁴ Defence Act (note 21) Ch 4 Sec 22 (2)(b).

²⁵ H. Fouché, Policing Piracy and Armed Robbery of Ships in South Africa's Territorial Waters and Contiguous Zone, Department of Safety and Security Management, Faculty of Humanities Tshwane University of Technology, July 2006.

²⁶ Maritime Zones Act (note 9) Sec 6(1).

303(2) of UNCLOS, the Act provides that South Africa has, in respect of objects of an archaeological or historical nature found in the maritime cultural zone, the same rights and powers as it has in respect of its territorial waters.²⁷

Similar to that of the internal waters and territorial waters the Defence Act empowers the SA Navy to conduct criminal and civil law enforcement within these waters of South Africa and sanctions a SANDF officer as a peace officer to exercise powers on behalf of any legislated enforcement authority within the country.²⁸ The SA Navy, the SAPS and the statutory enforcement authority have therefore concurrent jurisdictional powers with these enforcement authorities in this zone. But were the Contiguous Zone differs from the other two Zones is that the SANDF have sole jurisdiction to enforce international law in this zone.²⁹

Unlike the territorial sea, the contiguous zone does not fall under the sovereignty of the coastal state and is rather, 'a zone of the high seas.'³⁰ States can only exercise prescriptive jurisdiction with respect to defining offences, which would occur in the territorial sea or on land only, and that fall under certain categories.³¹ Likewise, states can only exercise enforcement and adjudicative jurisdiction over ships in order to prevent and punish violations that fall under these same few categories.³² The ability to interdict ships is also restricted to these limited sets of circumstances. It must be noted that there exists an apparent contradiction between UNCLOS and the Maritime Zones Act regarding jurisdiction in the Contiguous Zone. Even though customs, fiscal, immigration and sanitary South African laws are to some degree applicable in this zone, it must be kept in mind that the country has 'reduced' jurisdiction in this zone.³³

²⁷ Ibid, Sec 6(2). Those rights and powers are spelled out in the National Heritage Resources Act 25 of 1999.

²⁸ Defence Act (note 21) Ch 4 Sec 22 (4)(a).

²⁹ Ibid Sec 22 (2), (3), (4).

³⁰ UNCLOS (note 3) Art 24 (1).

³¹ T.C. Perry. Blurring the Ocean Zones (note 14) p36.

³² Ibid.

³³ Defence Act (note 21) Sec 22 (2)(b).

Exclusive Economic Zone

The concept of an exclusive economic zone was originally put forward by Kenya in 1971. The zone is a reflection of a desire by developing states to gain greater control over the economic resources off their coasts, which were being exploited by developed countries. Part V of UNCLOS permits states to establish an exclusive economic zone, not exceeding 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, in which that coastal state may exercise sovereignty over the natural resources in that exclusive economic zone. South Africa claims an exclusive economic zone of 200 nautical miles in terms of section 7 of the Maritime Zones Act, which states that the sea beyond the territorial waters but within a distance of two hundred nautical miles from the baselines, to be the exclusive economic zone of the Republic; and that subject to any other law the Republic shall have, in respect of all the natural resources in the exclusive economic zone, the same rights and powers as it has in respect of its territorial waters, which replaced the old fishing zone.

The legal nature of the EEZ has been the subject of considerable debate. One view is that it should become sovereign territory. A fear of 'creeping jurisdiction' however led to the view that this zone should retain the status of the high seas but with defined rights for coastal states. In the case of South Africa, as with other coastal states, these rights are amplified in UNCLOS Art 56 and involve the right to explore and exploit, conserve and manage natural resources, whether living such as fish and plants or nonliving such as oil, gas and diamonds. As far as policing and maintaining good order are concerned, there are no general rights but specific rights such as enforcing immigration, health, customs, certain fiscal laws and controlling installations, do exist. The Marine Living Resources Act of 1998 is the primary source of law in this zone for South Africa and is seen as comparatively 'easy' law to enforce, as any sign of fishing equipment on a vessel in the EEZ may indicate to a contravention.

The SANDF and in particular the SA Navy have the same sole jurisdictional powers as in the Contiguous Zone.³⁴ The ability to interdict and board foreign ships within the

³⁴ Ibid Sec 22 (2), (3), (4).

EEZ is restricted to the enforcement of regulations concerning the exploitation of natural resources, where as the ability to interdict and board ships on the basis of security concerns remains uncertain. Even if South Africa interdicts a ship within its EEZ, UNCLOS restricts that seizure to rather strict 'prompt release' rules.³⁵ Due to this, the EEZ represents a high-seas zone over which coastal states exercise very limited jurisdiction.

High seas

The sea beyond the EEZ is known as the high seas. The high seas represent the most uncomplicated ocean zone with respect to coastal state jurisdictions. The high seas comprise a global commons which is *terra nullius*, no man's land.³⁶ According to UNCLOS Part VII, the high seas are an area in which all states, whether coastal or land-locked, enjoy the freedom of the high seas, but are subject to the rules of the Convention and by the rules of international law. Only a handful of restrictions on this freedom of the high seas apply. Article 87(2) of UNCLOS requires states to employ 'due regard for the interests of other States in their exercise of freedom of the high seas.' Article 110 provides warships and other law enforcement vessels the 'right of visit' with respect to foreign-flagged ships that arouse reasonable suspicions that they are engaged in piracy, slave trade, or unauthorized broadcasting, or a ship without a flag, or that change flags on the high seas. 'In sum, the high seas regime is one where coastal states exert little jurisdiction and where only a handful of exceptions limit flag-state sovereignty on board vessels.'³⁷

The SANDF and in particular the SA Navy have the same sole jurisdiction to enforce international law and municipal law where applicable on the High Seas. But it is only in exceptional circumstances that municipal law will apply.

³⁵ UNCLOS (note 3) Art 292.

³⁶ H. Grotius, *The Freedom of the Seas*, reprinted in Sohn and Noyes. See also UNCLOS (note 3) Art 89.

³⁷ T.C. Perry. *Blurring the Ocean Zones* (note 14) p37.

CHAPTER 2

Law Enforcement Agencies Applicable to South African Waters

South Africa depends on the sea for 90% of its foreign trade, with nearly 1 000 000 square kilometres of territorial waters and fishing zones, and a 2 500 km maritime border,³⁸ combined with one of the busiest shipping routes in the world, passing through its territorial waters around The Cape of Good Hope, all of these factors are of national interest and can be identified with national survival.³⁹ South Africa has a duty to its citizens and international community to ensure the protection and safety of this territory, as a state of lawlessness in the county's ocean territory and an inability to ensure its integrity through law enforcement would not be in South Africa's national interest and would lead to the disruption of trade with other states and may threaten the very survival of the state.⁴⁰ It has also been said, that one of the most basic paradoxes in international relationships is the claim upon state sovereignty, supremacy, and independence in a shrinking, interdependent world.⁴¹ 'Each state declares its right to determine its own course of action regardless of the effects upon actions of other states in vital areas of mutual concern such as trade, communications, economic development and world peace.'⁴²

Law enforcement within South Africa's territorial waters and upon the high seas is a unique environment, which covers a vast area and a range of crimes. Due to this, South Africa has entrusted several government departments to work together to enforce the law within the county's offshore jurisdiction, these organisations are, the South African Police Service, the South African Navy and the Department of Environmental Affairs and Tourism.⁴³ The maritime law enforcement for South Africa contains three dimensions, namely a controlling function, enforcing function and partnership function.⁴⁴

³⁸ Vice Admiral G Syndercombe SSAS, SD, SOE, SM. Former Chief Of The South African Navy (Rtd) Published in South African Defence Review Issue No 10, 1993.

³⁹ J.E. Dougherty & R.L. Pfaltzgraff, 1981. *Contending Theories of International Relations a Comprehensive Survey*. 2nd edition. New York:Harper & Row.

⁴⁰H. Fouché, *Policing Piracy and Armed Robbery of Ships* (note 25), p 96.

⁴¹ A.L. Bennett, *International Organisations*. 2nd edition. New Jersey: Prentice-Hall, 1980.

⁴² H. Fouché, *Policing Piracy and Armed Robbery of Ships* (note 25), p 97.

⁴³ *Ibid*, see 98.

⁴⁴ *Ibid*, see 99.

South African Police Service (SAPS)

Law enforcement in South African territorial waters, has been entrusted to the South African Police Service⁴⁵ they are responsible for enforcing all the laws of South Africa, including the common law, even an area comprising more than 71 500 km² along the country's coastline. The Police Service Act 'empowers any member of the SAPS where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without a warrant to search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized.'⁴⁶ To execute this mandate the SAPS perform duties at 53 land ports of entry, 10 airports of entry, and 7 sea ports of entry.

Department of Environmental Affairs and Tourism

The Department of Environmental Affairs and Tourism is responsible for the management of South Africa's living marine resources. The Marine and Coastal Management Branch (MCM) of the Chief Directorate: Monitoring, Control and Surveillance of the Department of Environmental Affairs and Tourism is tasked with marine law enforcement in South Africa.⁴⁷ The vision of the Directorate is to achieve optimal levels of compliance by adopting the principles of deterrence and prevention.⁴⁸

The MCM are tasked with a number of duties within South African territorial waters as well as neighbouring territorial waters. Relevant to this study, the duties of the MCM include, verification and regulation of fisheries control systems in the

⁴⁵ South African Police Service Act, No 68 of 1995, sec 13 (6) of Ch 5.

⁴⁶ *Ibid.*

⁴⁷ H. Fouché, Policing Piracy and Armed Robbery of Ships (note 25), p 110.

⁴⁸ *Ibid.*

commercial, recreational and subsistence resource use; law enforcement and legal procedures with respect to recreational and fishing industry; management of 12 proclaimed fishing harbours; managing an operations centre to gather, analyse and disseminate surveillance information; operating an Inmarsat C Vessel Monitoring System (VMS) in South Africa and SADC coastal states waters; conducting near shore coastal, EEZ and high seas patrols which include boarding and inspecting procedures; and reducing illegal, unreported and unregulated fishing.⁴⁹

South African National Defence Force

In the Constitution of South Africa, it states that the primary objective of the National Defence Force is to defend and protect the Republic, its territorial integrity and its people, in accordance with the Constitution⁵⁰ and the principles of international law regulating the use of force. It further states that the Defence Force may be employed in co-operation with the Police Services, in defence of the Republic or in fulfilment of an international obligation.⁵¹ The SANDF have a number of functions and obligations, with the primary function being the defence of South Africa against external military aggression, with the other functions being secondary.⁵² The SA Navy in particular has three roles, namely the military role; the policing role; and the diplomatic role. The military role is the classic role of the defence of the country and the national maritime interests. By the nature of things it is the most demanding role, in terms of technology, quality of ships and equipment and standards of training and maintenance.⁵³ The policing role is often viewed in a very simplistic way. The functions inherent in this concept go further than what is generally viewed as policing and has been viewed by some as a constabulary role,⁵⁴ which includes countering pollution, salvage, search and rescue, fishing patrols and boarding operations. The diplomatic role refers to the unique ability of maritime forces to exert pressure, manipulate, support and project prestige, all without crossing borders, or violating

⁴⁹ Ibid.

⁵⁰ South Africa, *The Constitution of the Republic of South Africa*, Government Printers, Pretoria, 1996.

⁵¹ Ibid, p 86.

⁵² R. Simpson-Anderson, *Annual Policy Review of the South African Navy, 1996*. Published in Monograph No 9, *Diplomats and Defenders*, February 1997.

<http://www.iss.co.za/Pb/Monographs/N09/SimpsonAnderson.html>.

⁵³ V Adm G. Syndercombe (note 38).

⁵⁴ R Adm J.R. Hill, *Maritime Strategy for Medium Powers*.

airspace.⁵⁵ In light of these roles, the SA Navy's primary function is to establish a presence at sea in peacetime and a deterrent before and in case of a war and that the service does little fisheries protection, with the responsibility of fisheries protection and control falling under the mandate of the Department of Environmental Affairs and not the SA Navy.⁵⁶

The SA Navy provides surveillance and enforcement support to the relevant authorities for the protection of marine resources against illegal plundering, and of the marine environment against pollution, and maritime law enforcement with respect to piracy, drugs and weapons smuggling. Presently there are no imminent conventional threats facing South Africa, which allows the SANDF and in particular the SA Navy, to assist other departments in performing their roles. An example of this is the SA Navy's co-operation efforts with the Department of Environmental Affairs to assist with patrols as well as boardings or inspections of suspicious vessels. Marine resources are gaining importance and the marine environment is under growing pressure. The scope of the protection task has increased and the Navy is beginning to play a far more prominent role regarding this. Naval vessels conduct extensive regular patrols as part of their normal employment and the Department of Defence currently allocates 1 500 hours of sea patrols and 750 hours of air patrols to the Department of Environmental Affairs and Tourism free of charge each year.⁵⁷ Part of the SA Navy's strategy to maintain and control safe shipping for merchant vessels within territorial waters, includes a Naval Co-ordination and Guidance for Shipping Centre (NCAGS) with its headquarters at Silvermine with major South African ports split into two regions with each region being assigned three ports. Region east includes Richards Bay, Durban and East London, while region west has been allocated Port Elizabeth, Cape Town and Saldanha Bay.⁵⁸ Closer ties are being established with other SADC littoral states with the intention of setting up a local Southern African NCAGS organisation. The objective of this initiative is to protect local shipping, especially against piracy, the protection of fishing grounds and to act as an early warning system

⁵⁵ Prof. K Booth, *Navies and Foreign Policy*.

⁵⁶ H. Fouché, *Policing Piracy and Armed Robbery of Ships* (note 25), p 112.

⁵⁷ V Adm R. Simpson-Anderson (note 52).

⁵⁸ *Ibid.*

against localised threats. This function is expected to be driven by civilian and military intelligence systems.⁵⁹

CHAPTER 3

Reasons to Board Vessels and the Legal Implications

There are a number of reasons for law enforcement agencies to board vessels within South African waters as well as international waters, but before these agencies can board another vessel, certain legalities have to be met to justify the boarding operation.

Marine Living Resources

Fishing is one of the oldest uses of the ocean and has seen a dramatic shift from subsistence fishing to commercial fishing, which increased the amount of fish being caught out of the ocean from 15 million tons in 1938 to 90 million in 2002. This is a clear indication that as countries develop and their populations increase, there is a growing pressure on trying to maintain fishing stocks. Some countries have exhausted their fishing stocks and have had to resort to long distance fishing, which includes fishing within other countries waters. UNCLOS provides that a Coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.⁶⁰

In order to regulate its precious marine living resource, South Africa replaced the old Sea Fishery Act 12 of 1988 with the Marine Living Resources Act 18 of 1998. This Act is a comprehensive Act which addresses issues from the sustainable development of all marine living resources to the restructuring of the fishing industry to address historical imbalances. The relevance this Act plays in boarding operations is the

⁵⁹ G Von Zeil, Naval co-ordination and guidance for shipping (NCRGS), 2005, http://www.navy.mil.za/forecastle/:051107_NCAGS/article.html.

⁶⁰ Ibid Art 73, Enforcement of laws.

power it gives to fishing control officers to stop and search fishing vessels within South African waters as well as international waters.

Section 51 of the Marine Living Resources Act addresses the powers of a fishing control officer. It states that a fishing control officer may, without a warrant, order any foreign fishing vessel within South African waters, and any local fishing vessel in or beyond such waters to stop as well as stop fishing and take the gear of the vessel back on board.⁶¹ The officer can require the master of a vessel to facilitate the boarding of his vessel by all appropriate means, go on board the vessel and take with him or her such other persons as he or she may require for assistance in the execution of his or her powers.⁶² The officer can require the crew of a vessel to muster where necessary.⁶³ The officer may require the master to produce all official documentation regarding the vessel including all fishing documentation, in order to verify its legitimacy.⁶⁴ The officer is also authorized to make any examination or enquiries which he or she may consider necessary to ascertain whether any provision of the Act has been contravened.⁶⁵ In the incidence where an officer has reasonable grounds to believe that an offence in terms of the Act has been or is being committed, take or require the master to take the vessel to any place, port or harbour in the territory of the Republic for the purpose of carrying out any further search, examination or enquiry.⁶⁶ If the master fails or refuses to take a vessel to the designated place, port or harbour, the officer may take charge of the vessel for the purpose of taking it to the designated place, port or harbour.⁶⁷

In order to have a full understanding of Section 51 of the Marine Living Resources Act it is important to note a number of definitions and relating sections within the Act. Firstly, a fish is defined as a marine living resource of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurian or other echinoderm, reptile and marine mammal, and includes their eggs, larvae and all juvenile stages, but does not include

⁶¹ Marine Living Resources Act 18 of 1998, Sec 51 (2)(a)(b).

⁶² Ibid Sec 51 (2)(c)(d).

⁶³ Ibid Sec 51(2)(e).

⁶⁴ Ibid Sec 51 (2)(f).

⁶⁵ Ibid Sec 51 (2)(h).

⁶⁶ Ibid Sec 51 (2)(j).

⁶⁷ Ibid Sec 53 (2).

sea birds and seals.⁶⁸ Fishing is defined as searching for, catching, taking or harvesting fish or an attempt to any such activity including engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish. Placing, searching for or recovering any fish aggregating device or associated gear, including radio beacons or any operation in support or in preparation of these activities are all considered to be fishing.⁶⁹

As mentioned before, a fishing control officer may board any fishing vessel within South African waters. A fishing control officer means any person appointed as a fishing control officer⁷⁰ and when exercising his or her powers, they shall be deemed to be a peace officers as defined in section 1 of the Criminal Procedure Act 51 of 1977.⁷¹ A fishing vessel is defined as any vessel, boat, ship or other craft which is used for, equipped to be used for or of a type that is normally used for fishing or related activities, and includes all gear, equipment, stores, cargo and fuel on board the vessel.⁷² South African waters are defined as the seashore, internal waters, territorial waters, the exclusive economic zone, and in relation to the sedentary species as defined in Art 77 of UNCLOS,⁷³ the continental shelf as defined in sec 8 of the Maritime Zones Act,⁷⁴ and such waters include tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides.⁷⁵

Conservation

When a situation arises on the high seas that requires law enforcement officials to conduct a boarding operation, a fishing control officer may only board and enforce his or her powers onboard a South African registered vessel⁷⁶ and may only stop, board and search a foreign flagged fishing vessel after following hot pursuit in accordance

⁶⁸ Ibid, Sec (1) Definition of Fish.

⁶⁹ Ibid, Sec (1) Definition of Fishing.

⁷⁰ Ibid, Sec (1) Definition of Fishing Control Officer.

⁷¹ Ibid, Sec (51)(5).

⁷² Ibid, Sec (1) Definition of Fishing Vessel.

⁷³ UNCLOS (note 3) Art 77, Rights of the Coastal State over the continental shelf, "...organisms belonging to sedentary species, that is to say, organisms which, at the harvest stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

⁷⁴ Maritime Zones Act (note 9) Sec 8, also see UNCLOS Art 76.

⁷⁵ Marine Living Resources Act (note 61) Sec (1) Definition of South African Waters.

⁷⁶ Ibid Sec (51)(2)(a).

with international law as reflected in Article 111 of UNCLOS⁷⁷ and has reasonable grounds to believe the fishing vessel has been used in the commission of an offence.⁷⁸

Another important issue that is addressed in the Marine Living Resources Act is the use of photographic material as evidence. 'If a photograph is taken of any fishing or related activity and the date and time on and position from which the photograph is taken are simultaneously superimposed upon the photograph, it shall be *prima facie* evidence that the photograph was taken on the date, at the time and in the position so appearing.'⁷⁹ The reason for this being of relevance to boarding operations is that often naval vessels deploy jointly with the South African Air Force, whose aircrafts are either fitted with video recording devices⁸⁰ or have the capability to take photos from them. Submarines are also capable of taking video footage as well as photographs while submerged at periscope depth. The importance of this capability is the ability of these platforms to take the photos without prior warning, hindering the offender's ability to cover up their actions, or without the offender's knowledge, while conducting the offence. Once the footage or photo's have been taken of the applicable fishing vessel, these platforms will be able to contact or relay the information to the relevant authority in the vicinity to indicate where the vessel. The authorities are then able to use the footage as *prima facie* evidence, therefore giving them sufficient grounds to pursue the vessel and board it.

Customs

Approximately 90% of South Africa's imports and exports pass through its coastal ports.⁸¹ Due to this vast amount of goods passing through South Africa's ports the Department of Customs and Excise is not only restricted to controlling and regulating the imports and exports at its coastal ports, but also extends its jurisdiction to the territorial waters of the country. Within the Customs and Excise Act 91 of 1964, it has provisions for custom officers to board and search vessels within the country's

⁷⁷ UNCLOS (note 3) Art 111, Right of hot pursuit.

⁷⁸ Marine Living Resources Act (note 61) Sec (52)(a).

⁷⁹ Ibid Sec (75)(1).

⁸⁰ Super Lynx helicopter.

⁸¹ Wikipidia, (note 1), South African Imports and Exports.

territorial waters.⁸²

According to the Customs and Excise Act an officer may board any ship within the territorial waters or fishing zone of the Republic and may conduct a search of that ship for goods which duty has not been paid, or if he has reasonable cause to believe that there has been a contravention of any provision of the Act, and may freely remain on the ship in pursuance of his duties.⁸³ Where there are reasonable grounds to suspect that the vessel is or may be carrying goods which include those liable to forfeiture under the Act, the officer must be able to justify, on an objective test, that there is a 'reasonable suspicion' that such cargo is being carried. A suspicion is not the same as a belief; for example, it is possible to suspect something to be so without necessarily believing that it is. The officer must have a reasonable basis for his suspicion. This may be gained from first hand knowledge as well as anonymous tip-offs and intelligence, and the fact of higher authority tasking will usually be a sufficient basis for such suspicion. The officer who boards the vessel is entitled to open any containers, packages or cabins⁸⁴ and have free access to and the right to rummage every part of the ship.⁸⁵ An officer may detain any ship or goods at any place for the purpose of establishing whether that ship or goods are liable to forfeiture under the Act.⁸⁶ In the case where a ship is to be detained, the ship or goods may be detained where they were found or shall be removed to and stored at a place of security determined by the officer, at the cost, risk and expense of the owner of the vessel.⁸⁷ In reality, if a vessel were to be detained at sea, it would be ordered to and escorted to the nearest port for further proceedings and if the ship is liable to forfeiture under the Act, the Commissioner may seize that ship or goods.⁸⁸

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⁸² Customs and Excise Act 91 of 1964, Sec (9)(a).

⁸³ Ibid.

⁸⁴ Ibid, Sec (9)(b).

⁸⁵ Ibid, Sec (9)(c).

⁸⁶ Ibid, Sec (88)(1)(a).

⁸⁷ Ibid, Sec (88)(1)(b).

⁸⁸ Ibid, Sec (88)(1)(c).

Immigration

Hundreds of people from other countries around the world enter South Africa illegally for numerous reasons, either by land, air or the ocean. The smuggling and trafficking of human beings has increased throughout the world, owing to the globalization process and other factors. The problem is increased in size and seriousness by the growing involvement of organized crime groups. The smuggling of migrants by these organized crime groups disrupts established immigration policies of destination countries and often involves human rights abuses. Containers are rarely inspected on their journey, and provide easy cover for smugglers to people. The task of regulating and controlling the entering and leaving of the country falls under the Department of Home Affairs as well as the monitoring of illegal workers. Under the Department of Home Affairs the National Immigration Branch handles all immigration issues. Due to South Africa's extensive coastline being one of the entry and exit points for illegal immigrants as well as the maritime industry being a source for illegal employment of immigrants, the right to board and search vessels for this reason is of importance to conduct an effective service to the Department of Home Affairs.

The Immigration Act 13 of 2002 provides for an immigration officer or other authorised people employed by the Director-General to board any conveyance which is entering or has entered into any port of entry and for good cause prohibit or regulate disembarkation from, or the offloading of, such conveyance in order to ascertain the status or citizenship of its passengers.⁸⁹ The officer may if necessary require the vessel to anchor within the port limits to facilitate his verification of all the members immigration particulars as well as to identify any illegal workers onboard.⁹⁰

Even though the Immigration Act provides authority to board any conveyance, which is defined as any ship, boat, aircraft or vehicle, or any other means of transport, its jurisdiction is limited to a vessel entering a port, which limits the jurisdiction to the port limits and the port itself. In order to increase this jurisdiction to enforce immigration policy and board vessels past port limits, the South African Police Services Act 68 of 1995 is used. This Act provides that any member may, where it is

⁸⁹ Immigration Act 13 of 2002, Sec (35)(2)(a).

⁹⁰ Ibid, Sec (35)(2)(b).

reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without warrant search any vessel or any receptacle of whatever nature, in the territorial waters of the Republic and seize anything found in the possession of the crew or onboard the vessel or receptacle.⁹¹ This provision in the South African Police Services Act increases the jurisdiction of immigration officials or authorised persons to the limits of the territorial waters,⁹² which assists the department in performing an effective service controlling the movement of people in and out of the country as well as being able to monitor the maritime industry regarding the employment of illegal workers.

Illicit Traffic in Narcotic Drugs

Tons of illegal drugs enter in to South Africa every year, due to the physical and technical difficulties inherent in interdiction of illicit maritime trafficking, shipment by sea allows large volumes of drugs to be transported at less risk for the traffickers. Drug traffickers have long resorted to the use of private and commercial vessels and the manner in which these drugs are transported vary from containers on commercial liners to inside a vessel built and used to hide drugs.⁹³ When the drugs are transported via a commercial liner in a container, the owner, captain and crew of the vessel are generally not aware of the trafficking, but on the other hand, when drugs are hidden away or stored within a vessel, the master and crew are usually actively involved in the crime.

Measures to combat these types of trafficking differ. In the case of vessels carrying containers, most control measures can and must be taken in ports, since inspection of cargo and containers at sea is not generally feasible and can take months to search through a fully laden container vessel.⁹⁴ In the other case, where the vessels are smaller the traffickers may avoid established ports, requiring law enforcement measures to be carried out at sea, not only within a countries territorial waters, but can extend to the high seas.

⁹¹ South African Police Services Act (note 45), Sec (13)(6).

⁹² Marine Zones Act (note 9) Sec 4.

⁹³ Practical Guide for competent national authorities under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, p 3.

⁹⁴ Ibid.

Previously in international law regarding illegal drug trafficking, the lawful interdiction of drug traffickers by a State on waters beyond the territorial waters have been obliged to rely on hot pursuit⁹⁵ and general criminal law enforcement concepts such as constructive presence.⁹⁶ It was only with the adoption of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances 1988, and in particular Article 17 thereof, that real advances were made in providing guidelines for international cooperation in the interdiction of vessels trafficking outside the territorial waters of South Africa. Article 17 of the Vienna Convention⁹⁷ expands upon the obligation under UNCLOS to cooperate, through the establishment of a framework within which third party States suspecting trafficking activity may seek the authorization of the flag State to undertake interdiction efforts of its vessels located in maritime zones beyond the territorial sea.⁹⁸ The Vienna Convention allows for a Party which has reasonable grounds to suspect that a vessel flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel, which includes boarding that vessel and conducting a search and inspection of necessary documentation.⁹⁹ It is important to note that only warships or other ships clearly marked and identifiable as being on government service and authorized to that effect, may conduct a boarding and search the applicable vessel.¹⁰⁰

South Africa's Drugs and Drug Trafficking Act 140 of 1992, provides that a police official may, if he has reasonable grounds to suspect that an offence under the Act has been or is about to be committed, board and search any vessel on or in which any substance, drug or property is suspected to be found.¹⁰¹ The police official may also search any container or other thing in which any such substance, drug or property is suspected to be found onboard the vessel. In a practical scenario, whereby a police official has boarded the suspect vessel and due to the size or nature of the vessel he is

⁹⁵ UNCLOS (note 3) Art 111.

⁹⁶ Geneva Convention on the High Seas 1958, Art 23.

⁹⁷ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances 1988.

⁹⁸ UNCLOS (note 3) Art 108.

⁹⁹ Vienna Convention (note 97) Art 17 (4).

¹⁰⁰ Ibid Art 17 (10).

¹⁰¹ Drugs and Drug Trafficking Act 140 of 1992, Sec (11)(1)(a)(i).

unable to conduct a thorough search, the Act provides the necessary authority for the police official to stop the vessel, request the master to sail or cause it to be sailed to the closest harbour indicated by the official, in order to take further measures to search the vessel or for prosecution.¹⁰²

Stateless Vessel

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly and there must be a genuine link between the State and the ship.¹⁰³ A stateless vessel is a vessel which has no markings of registration or is not flying any national flag. A vessel which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.¹⁰⁴

UNCLOS provides for the right to visit¹⁰⁵ another vessel on the high seas if the ship is without nationality.¹⁰⁶ This right to visit another vessel only authorises naval vessels or clearly marked and identifiable vessels as being on government service¹⁰⁷ to board and verify that vessels documentation.

If a stateless vessel is within South African Waters, the Merchant Shipping Act 57 of 1951 provides for authorised persons to board any ship while she is within the Republic or the territorial waters of the Republic.¹⁰⁸ Once onboard the vessel, authorities are entitled to conduct a search and inspection of the vessel and its necessary documentation.¹⁰⁹

¹⁰² Ibid, Sec (11)(2)(a), (b).

¹⁰³ UNCLOS (note 3) Art 91 (1).

¹⁰⁴ Ibid Art 92 (2).

¹⁰⁵ Ibid Art 110.

¹⁰⁶ Ibid Art 110 (1)(d).

¹⁰⁷ Ibid Art 110 (5).

¹⁰⁸ Merchant Shipping Act 57 of 1951, Ch 1 Sec 9.

¹⁰⁹ Ibid.

Unauthorised Broadcasting

Unauthorised broadcasting means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excludes the transmission of distress calls.¹¹⁰

Similar to vessels without a nationality UNCLOS provides for the right to visit¹¹¹ another vessel on the high seas if the ship is engaged in unauthorised broadcasting.¹¹² This right to visit another vessel only authorises naval vessels or clearly marked and identifiable vessels as being on government service¹¹³ to board and verify that vessels documentation regarding the broadcasts.

If a vessel is within South African waters and is broadcasting without authorisation, the Merchant Shipping Act provides for authorised persons to board any ship while she is within the Republic or the territorial waters of the Republic.¹¹⁴ Once onboard the vessel, authorities are entitled to conduct a search and inspection of the vessel and its necessary documentation.¹¹⁵ Reasonable grounds to board a vessel for this reason may be derived from a variety of sources but typically will be from information supplied by the communications centre controlled by the SANDF throughout the country. The Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002 provides grounds on what constitutes an offence within South Africa and its surrounding territory regarding broadcasting as well as what penalties result after an offence.¹¹⁶

If the person engaged in the broadcasts is found to be broadcasting without authority, that person may be prosecuted before the court of the flag State of the ship or owner

¹¹⁰ UNCLOS (note 3) Art 109.

¹¹¹ *Ibid* Art 110.

¹¹² *Ibid* Art 110 (1)(d).

¹¹³ *Ibid* Art 110 (5).

¹¹⁴ Merchant Shipping Act (note 108), Ch 1 Sec (9)(d)(i).

¹¹⁵ *Ibid*.

¹¹⁶ Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002, Ch 9 (51).

of the instillation, or by that persons home State, the person may also be prosecuted by the State where the transmission is being received.¹¹⁷

Piracy

The word pirate has been said to have derived from the Greek word 'peirates' which was the label for an adventurer who attacked a ship.¹¹⁸ Piracy at sea under international law is defined as any illegal acts of violence or detention, or any acts of depredation, committed for private ends by the crew or the passengers of a private ship and directed on the high seas against another ship or against persons or property on board that ship.¹¹⁹ It also includes ships persons or property in a place outside the jurisdiction of any State. A person is considered to be a pirate if they voluntary participate in the operation of a ship with knowledge of facts making it a pirate ship or if they intentionally facilitate and incite any acts of piracy.¹²⁰ A warship whose crew have mutinied and taken control of the ship are considered to be pirates and treated as such.¹²¹ A ship is considered to be a pirate ship if it is intended by the persons in dominant control to be used for the purpose of acts of piracy.¹²²

On the high seas, or in any other place outside the jurisdiction of any State, every state may seize a pirate ship or any ship been taken by piracy or under the control of pirates and arrest the persons onboard as well as seize the property on board.¹²³ The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ship and its property.¹²⁴

South Africa's definition of piracy, specifically the Defence Act,¹²⁵ is consistent with UNCLOS, which declares piracy a criminal act. The Defence Act similarly to UNCLOS only authorises warships or clearly marked and identifiable government

¹¹⁷ UNCLOS (note 3) Art 109 (3).

¹¹⁸ D. Johnson & E. Pladdet, 2003. An Overview of Current Concerns in Piracy Studies and New Directions for Research [paper read at the conference on People and the Sea II: Conflicts, Threats and Opportunities, August 1, Amsterdam]. Unpublished.

¹¹⁹ UNCLOS (note 3) Art 101(a), (b).

¹²⁰ Ibid Art 101 (c).

¹²¹ Ibid Art 102.

¹²² Ibid Art 103.

¹²³ Ibid Art 105.

¹²⁴ Ibid Art 105.

¹²⁵ Defence Act (note 21), Ch 4 Sec (24), (25).

vessels to conduct seizures of pirate ships.¹²⁶ The Defence Act provides that if any person who commits an act of piracy is to be guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment.¹²⁷ UNCLOS and the South African definition of piracy contains the elements that piracy must involve an illegal act of violence, detention or depredation and that piracy is committed on the high seas or in a place outside the jurisdiction of any state. 'Thus in South African law piracy can only be committed on the high seas or in a place outside the jurisdiction of any state and South Africa does not have any laws that equate acts of armed robbery against ships in South Africa's territorial waters with piracy.'¹²⁸ In support of this statement and to give more clarity on the jurisdiction outside of any state, the Instructions for Officer Commanding on the Conduct of Maritime Peace Support Operations states, 'Piracy can only be committed on or above international waters, including the High Seas, Economic Exclusion Zones and the Contiguous Zone. Similar acts committed in internal waters, territorial seas or archipelagic waters are crimes within the jurisdiction of that particular country and do not constitute piracy.'¹²⁹

Regarding the authority to conduct a boarding onto a vessel suspected of piracy or a pirate ship, the Defence Act provides for the seizure of these vessels on the high seas, which in turn gives the authority to board these vessels in order to seize them.¹³⁰ In international law, UNCLOS provides for the seizing of pirate vessels as well, which also provides authority to board the ship.¹³¹ UNCLOS also has provisions for the right to visit a vessel engaged in piracy.¹³²

¹²⁶ Ibid Sec (25)(1).

¹²⁷ Ibid Sec (24)(3).

¹²⁸ H. Fouché, Policing Piracy and Armed Robbery of Ships (note 25) p36.

¹²⁹ Instructions for Officer Commanding on the Conduct of Maritime Peace Support Operations, SADC MPSO 1A, Inter-State and Defence Committee, Para 513 (2).

¹³⁰ Defence Act (note 21) Sec (25).

¹³¹ UNCLOS (note 3) Art 105.

¹³² Ibid Art 110 (1)(a).

Passage within South African Territorial Waters Deemed not to be Innocent

Historically it has been argued that the ocean belonged to no one entity, and was consequently free to any who wished to cross it.¹³³ Nowadays, the concept of freedom of the seas and innocent passage is widely accepted as a fundamental principle of customary international law.¹³⁴ In fact, its status as customary international law was confirmed in the *Corfu Channel* case of 1949.¹³⁵ Ruling that Albania's sovereignty was not violated by the innocent passage of British warships through Albania's Corfu Channel, the International Court of Justice illustrated the global importance and acceptance of the right of innocent passage.

Every ship from all states, whether coastal or land-locked, enjoys the right of innocent passage through the territorial waters of another state.¹³⁶ Passage of a vessel is defined within the Marine Traffic Act 2 of 1981,¹³⁷ which is based on the definition of passage within UNCLOS,¹³⁸ and means the navigation through the territorial waters of a State in a continuous and expeditious manner for the purpose of traversing those waters without entering internal waters or calling at a roadstead or offshore installation outside internal waters.¹³⁹ Passage also includes proceeding to or from internal waters or a call at any such roadstead/offshore installation, and includes stopping and anchoring.¹⁴⁰ A vessel will also be considered on a passage if the stopping or anchoring is incidental to ordinary navigation or is rendered necessary by *vis major* or distress or is for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.¹⁴¹ A passage is deemed to be innocent when it is not prejudicial to the peace, good order or security of the State.¹⁴² The passage of a vessel is deemed not to be innocent if a ship which carries or has on board in the territorial waters cargo or any appliance or apparatus the use of which or persons who may

¹³³ H. Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, in *The Law of the Sea; Ocean Law and Policy* 12-18 (Thomas A. Clingan, Jr. ed., 1994).

¹³⁴ I. Brownlie, *Principles of Public International Law*, 191 (5th ed. 1998).

¹³⁵ *The Corfu Channel* (U. K. v. Alb.), 1949 I.C.J. (Apr. 9), at <http://www.icjci.org/icjwww/idecisions/isummaries/lccsummary490409.htm>.

¹³⁶ UNCLOS (note 3) Art 17.

¹³⁷ Marine Traffic Act 2 of 1981, Sec (1) Definition of 'passage'.

¹³⁸ UNCLOS (note 3) Art 18.

¹³⁹ Marine Traffic Act (note 137), Sec (1) Definition of 'passage'.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, Sec (1) Definition of 'innocent passage'.

constitute a threat against the sovereignty, territorial integrity or political independence of the State.¹⁴³

If a vessels passage within South African territorial waters is deemed not to be innocent, authorities are allowed to stop the vessel, board it and inspect the ship, its equipment and cargo.¹⁴⁴ If the vessel is within internal waters the right to innocent passage does not exist.¹⁴⁵

Slavery

Slavery is an age old trade which predominantly occurred during the nineteenth century, with Britain being one of the fore runners in attempting to suppress the trade, which consumed nearly two percent of their national income and roughly 5 000 British seamen over a period of 60 years.¹⁴⁶ Even though the slave trade in the traditional sense has been repressed, slavery and the slave trade still occur, just in other forms, varying from human trafficking across the ocean to people being made to work on vessels against their will. UNCLOS expressly prohibits the transportation of slaves and provides that every state shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that.¹⁴⁷ Both the High Seas Convention and the UNCLOS permit the boarding of a foreign vessel on the high seas if it is reasonably suspected of engaging in the slave trade, but neither treaty states the existence of any enforcement measures permitted in order to suppress the trade.¹⁴⁸ The only right that exists is for a warship to proceed to verify the nationality of the foreign ship. Only if the boarded vessel is of the same nationality as the warship may it be seized for engaging in the slave trade, and only then if such an act is prohibited by the municipal law of the flag state in question.¹⁴⁹ Other states may only report their findings to the proper authorities of the flag state.¹⁵⁰ According to international treaty law, slave trading is

¹⁴³ Ibid, Sec (8).

¹⁴⁴ Marine Traffic Act (note 137), Sec 9.

¹⁴⁵ Maritime Zones Act (note 9), SubSec 3(3). See also Arts 8(2) and 17 of UNCLOS.

¹⁴⁶ A. Shlaes, Slavery's Link to the War on Terror, Fin. Times, Nov. 3, 2003.

¹⁴⁷ UNCLOS (note 3) Art 99.

¹⁴⁸ Ibid Art 110 (1)(b). See also High Seas Convention, Art 13.

¹⁴⁹ Ibid Art 110 (2).

¹⁵⁰ R.R. Churchill & A.V. Lowe, The Law of the Sea 204 (3d ed. 1999) p212.

not related to the crime of piracy¹⁵¹ and does not impose a positive duty on all states to repress it. Contrary to this statement, customary international law, which is incorporated into both the High Seas Convention and UNCLOS, instead may permit the seizure on the high seas of foreign vessels engaging in the slave trade.

A leading case regarding the principle of universality of jurisdiction over slave trading vessels is United States vs The La Jeune Eugenie.¹⁵² Following a denunciation of slavery and the slave trade, Justice Story addressed the first question at issue in the case which was whether the law of nations prohibited it.¹⁵³ In construing the law of nations on the issue, Justice Story looked to 'general principles of right and justice,'¹⁵⁴ 'customary observances and recognitions of civilized nations,'¹⁵⁵ and to the 'conventional or positive law that regulates the intercourse between states.'¹⁵⁶ In examining the practice of states relating to the slave trade, Justice Story concludes that 'there is scarcely a single maritime nation of Europe, that has not . . . pledged itself to promote its abolition.'¹⁵⁷ While concluding that customary international law forbade the traffic in slaves, Justice Story rested his opinion that any state may rightfully seize a slave trading vessel by stating 'that any trade contrary to the general law of nations . . . may subject the vessel employed in that trade to confiscation.'¹⁵⁸

Justice

Besides the international law and international customary law, South Africa has a provision within the Defense Act, which provides the authority for any warship to board a vessel suspected of being engaged in the slave trade and if their suspicion is proved to be well-founded, the ship may be seized and any person who is reasonably suspected of having committed the offence, may be arrested and tried within South Africa.¹⁵⁹

¹⁵¹ *Ibid.*

¹⁵² 26 F. Cas. 832 (C.C.D. Mass. 1822). The case involved an action against a French vessel that was seized off the coast of Africa for being involved in the slave trade there.

¹⁵³ *Ibid.* at 845.

¹⁵⁴ *Ibid.* at 846.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* at 847. The case Justice Story was referring to is *The Amedie*. See *The Amedie*, 12 Eng. Rep. 92 (1810).

¹⁵⁹ Defence Act (note 21) Sec 26 (1), (2).

Duty to Render Assistance

Accidents and mishap at sea are a common occurrence. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition. UNCLOS provides that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or passengers to render assistance to any person or vessel in distress or in danger at sea.¹⁶⁰ Based on this provision by UNCLOS, the Defence Act provides for the same obligation upon its warships while at sea.¹⁶¹

In committing to this obligation and giving the SANDF exclusive jurisdiction, naval vessels are authorised to board vessels when in distress and/or in danger to help prevent loss of life or damage to the vessel which could in turn cause further damage to the environment. South Africa also has the National Sea Rescue Institute (NSRI) who is an organisation which responds to all distress calls along the country's coastline. The NSRI are a volunteer based organisation who provides a very effective service, with limited resources, to marines at sea. The NSRI are authorised to board vessels in need of assistance and have an effective range from the coastline to render assistance of 50 nautical miles. The request to launch an NSRI craft usually originates from the local harbour master, port authority or the SAPS. They will normally have received the original Mayday or emergency phone call. If a rescue involves organisations other than the NSRI, such as the South African Air Force, the Navy, commercial vessels or helicopters the rescue will be coordinated by the South African Search and Rescue Organisation (SASAR) from their Maritime Rescue Co-ordination Centre (MRCC). Smaller operations are co-ordinated by the local National Ports Authority Office.

Terrorism

'Asymmetric threat and terror have been around for virtually as long as mankind has, although not necessarily conceptualised as such. To the extent that the Cold War of the 20th century spawned new military thinking and a new vocabulary, its demise

¹⁶⁰ Ibid, Art 98 (1).

¹⁶¹ Ibid, Sec (28)(1), (2).

seems to have done so to an even greater extent. Today we face asymmetric threat, terror, suicide bombers and improvised incendiary devices. Common everyday technological tools such as light aircraft, helicopters, jumbo jets, high speed ski-boats or luxury passenger liners can suddenly turn into instruments of terror or leverage for high economic or political stakes.¹⁶²

After the 9/11 attack on the USA, America and the rest of the world realised the need to increase security against such threats, which could come in any form and at any time. According to the African Security Review the threat of global terrorism in Southern Africa is a matter of concern because of connections between the region and terrorist activity in Africa and beyond.¹⁶³

Provision has been made in South African law in the Protection of Constitutional Democracy against Terrorist and Related Activities Act to give effect to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). This Act provides that any person who intentionally-

- Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
- Performs any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
- Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
- Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
- Injures or kills a person, in connection with the commission of any of the acts set forth in the above paragraphs;

¹⁶² P.F. Hugo, *Asymmetrical War and Terror at Sea: 2010 Scenarios*. The Institute for Maritime Technology, Simon's Town, 23 July 2008.

¹⁶³ E. Rosand and J. Ipe, *Enhancing Counterterrorism Cooperation in Southern Africa*, African Security Review, Vol. 17 No. 2, June 2008.

is guilty of an offence relating to hijacking a ship or endangering the safety of maritime navigation.¹⁶⁴

The wording of this section in the Act is clearly directed at the traditional ‘hijacking’ situation, but the wording and intention of the relevant Convention is clearly to also address acts, which pose a danger to maritime safety. The Act provides that a court of the Republic has jurisdiction in respect of a specified offence if the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship registered or required to be registered in the Republic. Even though this Act does not specifically authorise law enforcement agencies to board vessels suspected for any of the mentioned offences, law enforcement agencies will *ipso facto* be authorised to board a suspected vessel within the country’s territorial waters¹⁶⁵ and prosecute the vessel for any offences within the Act.

Pollution

Pollution from ships and other maritime instillation is a concern which countries all around the world have realised could have devastating effects on the environment and have huge monetary implications to resolve the effects of the pollution, not only on the environment, but also the economy of that country.

Perhaps the most potent provision in favour of a coastal states authority to board a vessel suspected of violating the pollution regulations of the coastal state is Article 220 (3)–(6) of UNCLOS. This provision authorizes coastal states to obtain the identification of the vessel, board, and conduct a search of vessels in its EEZ, which is suspected of violating the pollution regulations of the coastal state. If there are clear grounds¹⁶⁶ for believing that a vessel is violating international pollution standards, a coastal state may, demand information, physically inspect the vessel if a substantial discharge¹⁶⁷ from it causes or threatens significant pollution of the marine

¹⁶⁴ Protection of Constitutional Democracy against Terrorist and Related Activities Act, No 33 of 2004. Sec (10).

¹⁶⁵ Merchant Shipping Act (note 108), Ch 1 Sec (9)(d)(i).

¹⁶⁶ UNCLOS (note 3) Art 220 (5).

¹⁶⁷ Ibid.

territorial waters and the exclusive economic zone and, in relation to an offshore installation, includes the sea within the limits of the continental shelf.¹⁷¹

CHAPTER 4

Analysis of South Africa's Right to Board Vessels

With reference to the previous section in this paper, there are a number of provisions which provide law enforcement agencies to board vessels within South African waters as well as on the high seas. Even with the provisions of various domestic laws and international conventions, law enforcement agencies are still limited in their authority to board vessels, in some incidents, for good reason, and others times it prevents these agencies from providing an effective service to the country.

South Africa's economic situation does not allow its maritime law enforcement agencies to have access to all the resources necessary to patrol and enforce the necessary law within its entire waters and on the high seas. South Africa is said to have more urgent issues to address, such as housing and education for its citizens as well as crime within the country, which is understandable to a certain degree. Due to this, the country's maritime law enforcement agencies have to use what ever resources they have to their full potential and work together in creating a more effective service. In order to achieve this goal of more effective maritime law enforcement by interdepartmental cooperation and cooperation between other organisations, the current legislation has to support this ideal. Another issue to take cognisance of when having joint operations or cooperation between other organisations is that one organisation must not attempt to take over another organisations role; this would lead to unfriendly relations between the organisations, including legal implications. When conducting these joint operations, the organisations involved must be aware that they are in support of each other and the lead organisation for what ever situation arises when exercising law enforcement, must know what legal rights they have to exercise as well as the support organisations must be aware of what rights they have in that specific operation.

¹⁷¹ Ibid, Sec (1) See definition of 'prohibited area'

environment, and detain the vessel if the discharge causes or threatens damage to the coastline or resources.¹⁶⁸

This right of visit, inspection, and detention gives the coastal state a right to take action in some circumstances, but state practice appears to have expanded this right dramatically after the disastrous break-up of the oil tanker *Prestige* off the coast of Spain in November 2002.

South Africa has a similar provision to the international law of UNCLOS in its Marine Pollution (Control and Civil Liability) Act 6 of 1981, which states ‘Any person authorized thereto by the Authority and any member of the South African Police Service or of the South African National Defence Force may go on board any ship or tanker in any part of the prohibited area to ascertain whether any document required by the Marine Pollution Acts to be carried on board such ship or tanker is so carried on board or, if he has reasonable grounds for believing that any provision of those Acts has been or is being contravened in connection with such ship or tanker, may so go on board and inspect such ship or tanker or any part or cargo thereof, inspect and make copies of any documents or records kept in respect of such ship or tanker or in respect of its cargo or the harmful substances on board thereof, take samples of any harmful substance on board such ship or tanker, take soundings of tanks, spaces and bilges and test any equipment on board such ship or tanker which is intended for use in preventing a discharge of harmful substances from such ship or tanker.’¹⁶⁹

The Marine Pollution Act differs slightly to UNCLOS’s Art 220, where by it specifies which government agencies have authority to enforce the provision; it also does not limit the provision to commercial cargo vessel only, but extends it to all ships including tankers. UNCLOS Article 220 only gives jurisdiction within a States EEZ, where as the Marine Pollution Act gives authority to board, search and inspect a vessel within any part of the prohibited area,¹⁷⁰ which includes the internal waters, the

¹⁶⁸ Ibid Art 220 (6).

¹⁶⁹ Marine Pollution (Control and Civil Liability) Act 6 of 1981, Sec (7).

¹⁷⁰ Ibid.

Marine Living Resources - The Department of Environmental Affairs and Tourism are responsible for monitoring and controlling the marine living resources of the country, with the lead organisation to enforce the law being the Marine and Coastal Management Branch (MCM). In the Marine and Living Resources Act, it stipulates that only a fishing control officer has the authority to board and conduct the necessary law enforcement onboard any suspicious fishing vessel.¹⁷² Within Section 9 (1) of this Act it states, 'The Minister may, subject to the laws governing the public service, designate posts or ranks in any organ of state of which the incumbents shall be fishery control officers'. This provision in the Act allows for SAPS and SANDF members to be granted the authority to be a fishing control officer. This provision does not authorise any naval vessel or SAPS member to board and arrest any fishing vessel they deem suspicious, MCM are still the lead agency regarding law enforcement of marine living resources. What the Act does provide in Section 9 (1) is that MCM officials or fishing control officers cannot be everywhere all the time, therefore MCM may call upon one or more of these organisations to assist them in their law enforcement. When a member from another organisation is given the authority of a fishing control officer, they may board and search fishing vessels as defined in the Act¹⁷³ and are to ensure there is reasonable suspicion to justify the boarding, either from their own intelligence or if instructed by a higher authority such as MCM. Once onboard the fishing vessel and conducting what ever task is required by MCM, the designated official may search and/or verify necessary documentation on that vessel, if a discrepancy is found, this discrepancy is to be forwarded onto MCM, who will have the necessary information and authority to verify the vessels legitimacy. If a discrepancy is found and confirmed by MCM, only then should the designated fishing control officer take the necessary action to bring the vessel into a harbour, whereby MCM officials will be able to take the case over and proceed with the necessary legalities, such as detaining or arresting the vessel. Even tough in theory, a designated fishing control officer from another organisation not falling under MCM, is authorised to board, search and arrest a fishing vessel if necessary, the practical implications of knowing exactly what constitutes an offence under the Act and what actions to take, is and should be left to MCM officials who have all the necessary resources and legal knowledge to prosecute offenders. Designated fishing control officers understandably

¹⁷² Marine Living Resources Act (note 61) Sec (51).

¹⁷³ Ibid, Sec (1) Definition of 'Fishing Vessel'.

cannot be expected to know exactly where and what to look for, let alone justify an arrest of a vessel on the limited knowledge they have regarding the South African legalities of marine living resources both within the country's waters and on the high seas.

Therefore any designated fishing control officer that is used to assist MCM from another organisation should have a basic knowledge of what to expect and what to look for once they have boarded the vessel. If a discrepancy is found, the official is to relay the information to MCM officials ashore, who in the quickest possible time, can give verification of the information and if there is a reasonable suspicion or a confirmed offence by that vessel, the fishing control officer can instruct or take measures to, get the vessel to the nearest harbour, where the officer can hand the vessel over to MCM officials, who will be able to take matters further. This approach of assistance to another organisation avoids the other organisation getting too involved with procedures and legalities which could cause conflict of interests and confusion of mandates.

Customs – The Department of Customs and Excise is responsible for the law enforcement regarding any imports or exports within South Africa and its surrounding territory. Due to a vast majority of the country's imports and exports passing through its coastal ports, most of the law enforcement regarding regulations and monitoring, can be exercised within the port limits while vessels are alongside busy with their loading or discharging of cargo. This approach toward law enforcement for customs and excise is deemed to be fairly effective, due to customs officials not having to hinder the normal operation of a vessel when alongside while ensuring a valuable service of regulation and monitoring goods entering and leaving the country, another advantage of this approach is that there is no confusion regarding jurisdiction or the right to board a vessel, it all falls under South African law. Unfortunately this approach of regulation within port limits is only effective in an ideal world where vessels are honest in providing all documentation when requested and being open in relaying what and how much cargo they are transporting.

Due to this dilemma of vessels not always being honest in what they are transporting, sometimes to the master and crew's knowledge, other times not, customs officials

have to rely on intelligence from different sources, they also have to rely on other organisations resources to help enforce custom regulations beyond port limits.

Common reasons for custom officials to board vessels beyond port limits are typically when vessels purchase goods duty free, then sail out of the harbour, where another vessel might be waiting to uplift the goods and upon receiving the goods, return ashore, whereby they sell the goods without paying the necessary duties on those goods. Other instances range from unofficial and fake bills of lading or inventories to illegal trading of goods at sea. All these instances require custom officials to either apprehend the offenders at sea while conducting the act or by boarding the necessary vessel to conduct searches or inspection of documentation for the cargo.

It is not feasible for the Department of Customs and Excise to patrol the country's territorial waters in search of custom offenders or even transfer a customs official from the port limits to a suspected vessel at sea within the territorial waters. Due to this constraint the department has to rely on other organisations resources, such as the SAPS as well as the SANDF. In relying on these organisations, the Department of Customs and Excise have two choices, either they arrange with the other organisation to accommodate one of their officials onboard their vessels to take them to sea and board the suspected vessel, or they can appoint a qualified member onboard that organisations vessel as a customs official, that member can then board the suspected vessel and conduct the necessary procedures required by the Department. According to the Customs and Excise Act¹⁷⁴ the Commissioner is allowed to grant the authority of a customs official to any person he deems capable. When another organisations member is given the authority of a customs official, similar to that of a designated fishing control officer, the members organisation is acting in assistance to the Department of Customs and Excise, therefore the Department is the lead agency and only if there is reasonable suspicion of an offence or directed by the Department, must the designated member use the authority bestowed upon him or her to board the applicable vessel. Cognisance must be taken that unlike the Marine and Living Resources Act¹⁷⁵ which jurisdiction extends to the EEZ the Customs and Excise

¹⁷⁴ Customs and Excise Act (note 82) Sec (3).

¹⁷⁵ Marine Living Resources Act (note 61).

Act's¹⁷⁶ jurisdiction is restricted to the Territorial Waters of South Africa and before any action is taken to board another vessel under the authority of the Customs Act, its position in relation to which zone the suspected vessel is in must be made clear.

Once authority is given to board the suspected vessel, the designated customs official is to act in accordance to Customs and Excise protocol and conduct the necessary verification of details or searches onboard. If something is found that may constitute an offence, the member is to relay this information to the necessary authorities in the Department of Customs and Excise, who will then in the quickest time possible, make a decision on further proceedings. If the vessel has reasonable grounds of suspicion of an offence and the Department authorises the vessel to be detained, the designated customs official is to request the vessel or take necessary action to make it return to port¹⁷⁷ where professional custom officials will be able to take matters over and take any further action if required.

Immigration – The Department of Home Affairs have a number of responsibilities which are bestowed upon them, and in order to manage all these responsibilities, different branches within the Department are given authority to manage these responsibilities. The National Immigration Branch handles all immigration issues, from illegal citizens to illegal workers within the country and its surrounding territories.

The Immigration Act¹⁷⁸ only provides authority to board another vessel for the purpose of verifying crew lists or for suspected illegal trafficking of people, when a vessel is either entering or leaving a port or if its alongside.¹⁷⁹ This provision does not necessarily imply that immigration officials have to wait until a vessel is alongside, for them to board it and conduct the necessary law enforcement, if a vessel is entering or leaving a port, it is deemed to be within port limits. Port limits vary from port to port, but usually constitute a range from 2 nautical miles to 5 nautical miles from the harbour entrance. The jurisdiction of the Act is not very effective for vessels at sea, due to any vessel knowing this limit of jurisdiction, it can 'hover' just off the port

¹⁷⁶ Customs and Excise Act (note 82) Sec (9)(a).

¹⁷⁷ Ibid, Sec (88)(1)(a).

¹⁷⁸ Immigration Act (note 89).

¹⁷⁹ Ibid, Sec (35)(2)(a).

limits, and due to port limits not being to extensive, small crafts can easily reach the vessel from the shore to uplift or transfer illegal immigrants. Another issue relating to the Acts jurisdiction is that a vessel can stop off anywhere along the coastline, outside port limits, and will not be liable for any immigration offence.

To prevent vessels from escaping prosecution regarding immigration offences under the Immigration Act, the South African Police Services Act¹⁸⁰ provides that members may board, search and inspect vessels within the territorial waters of South Africa, without a warrant, for the purposes of control over the illegal movement of people or goods across the borders of the Republic. The Police Services Act therefore increases the jurisdiction on immigration offences, what the act also provides for is that a SAPS official is given the authority to prosecute immigration offenders, which assists immigration officials in regulating any immigration offences. Therefore the Immigration Branch and the SAPS assist each other in protecting the country from immigration offences. The SAPS who have the resources and authority to board and inspect vessels within the territorial waters are often left to the law enforcement of immigration offences in that area. The SANDF can also assist in law enforcement of immigration offences, by either accommodating a SAPS or immigration official onboard one of their vessels, or by having one of its members being given the authority of a customs official by the Director-General¹⁸¹ who can then act in accordance with both the Immigration Act or Police Services Act. The SANDF can only provide assistance regarding immigration offences, which means if a vessel is suspected of an immigration offence within the territorial waters of the country, the delegated immigration official has the authority to board that vessel, either on the grounds of reasonable suspicion or directed by one of the lead agencies, either SAPS or the Immigration Branch. Once onboard the delegated member may search and inspect the vessel for any immigration offences, if an offence is suspected or confirmed it is to be relayed to one of the lead agencies, and similar to the procedure of a delegated fishing control officer or delegated customs official, the lead agency is to decide on further action, if necessary, taking the vessel to the nearest port, to be handed over to the appropriate authorities for any further actions.

¹⁸⁰South African Police Services Act (note 45) Sec (13)(6).

¹⁸¹Immigration Act (note 89) Sec (35)(2)(a).

Illicit Traffic in Narcotic Drugs – The SAPS are responsible for law enforcement regarding illicit traffic in narcotic drugs. Due to the drug trade being an international problem, the SAPS have to rely on both domestic and international law to authorise their law enforcement. Domestically, South Africa applies the Drugs and Drug Trafficking Act,¹⁸² while internationally on the high seas they apply either UNCLOS¹⁸³ or the Vienna Convention.¹⁸⁴

South Africa's Drugs and Drug Trafficking Act is a comprehensive Act, which authorises police officers to board and inspect any vessels that is reasonably suspected of an offence in the Act and detain them if need be.¹⁸⁵ What the Act does not clearly state is the jurisdictional limit it has, therefore it is considered to be domestic law and only applicable up to the limit of the territorial waters of South Africa. Beyond the territorial waters of the country, government agencies rely on the provisions within the international Conventions to authorise boarding vessels suspected of drug trafficking.

Art 17 of the Vienna Convention is accepted as being innovative and complex which covers a broad range of incidents that might occur during law enforcement of drug trafficking and the authority law enforcement agencies have to board, search and/or seize vessels suspected of drug trafficking. When enforcing domestic or international law at sea, often law enforcement agencies have to rely on provisions from other Acts or Conventions to authorise boarding a suspicious vessel that might be transporting drugs. The reason for this is that it is often hard to prove a vessel is transporting drugs without actually boarding the vessel and conducting a search on it, there is also the problem of reliable intelligence which might not be enough to justify an authorised boarding on the suspicious vessel.

Vessels that are used for drug trafficking are more often than not, not registered or fly a flag of nationality that they are not registered with. Law enforcement agencies have the right to visit these vessels to verify its nationality.¹⁸⁶ According to Art 17¹⁸⁷ before

¹⁸²Drugs and Drug Trafficking Act (note 101).

¹⁸³ UNCLOS (note 3).

¹⁸⁴Vienna Convention (note 97).

¹⁸⁵Drugs and Drug Trafficking Act (note 101) Sec (11)(1)(a)(i).

¹⁸⁶ UNCLOS (note 3) Art 110 (1)(d).

the vessel can be boarded, the law enforcement agencies have to contact the flag state of the vessel, if they are displaying any flag. Once verification is done and the vessel is registered with that state, law enforcement authorities have to request permission from the flag state before boarding the vessel, explaining why they want to board and possibly detain one of their flagged vessels. If permission is granted from the flag state, the law enforcement agency may then board the vessel and conduct the necessary search and inspection of documentation onboard the suspect vessel. If the flag state reports that the suspect vessel is not on their register or if the vessel is not displaying any flag, or even displaying contradicting flags, the vessel will be deemed to be stateless.¹⁸⁸ The law enforcement agency will then be authorised to board the vessel to verify its nationality¹⁸⁹ as well as conduct a search to verify the suspicion of illegal drug trafficking.

An example of a case that used the authority of a right to visit, to verify its nationality, onboard a suspected vessel transporting drugs, was in the case United States vs. Juda¹⁹⁰. The Juda case involved the seizure of a stateless vessel on the high seas for alleged trafficking in illegal drugs. Although the court recognizes that, under U.S. domestic law, there is no breach of international law if there is 'no state under whose flag the vessel sails,'¹⁹¹ there is still required a Constitutionally based nexus between the stateless vessel and the U.S.¹⁹² In this case, the required nexus was found in that five of the six persons arrested on the vessel were American citizens. Due to the illegal drugs found on board were heading for Canada, and that there was no evidence that the drugs would, even ultimately, be destined for the U.S., that nexus alone was lacking.¹⁹³ The expression in Juda that a nexus must exist between the stateless vessel and the state asserting jurisdiction over it has become the accepted view in international law.¹⁹⁴ From this, countries have had to rely heavily on intelligence to justify the boarding of a stateless vessel for alleged trafficking of illegal drugs. Before boarding the suspect vessel, authorities should know in which country the drugs were

Statistics

¹⁸⁷ Vienna Convention (note 101) Art 17 (3).

¹⁸⁸ UNCLOS (note 3) Art 91 (1).

¹⁸⁹ Ibid, Art 91 (2).

¹⁹⁰ 797 F. Supp. 774 (N.D. Cal. 1992).

¹⁹¹ Ibid, quoting U.S. v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979).

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ R.R. Churchill & A.V. Lowe, The Law of the Sea (note 150) p214.

loaded, what the nationality the crew are and where the drugs are bound for. The reason for this, is that if the law enforcement agency who are in a position to intercept and board the suspect vessel have no nexus with that vessel, the law enforcement agency will either have to wait until they are accompanied by officials who have a nexus with that vessel before boarding, or the agency can request to act on behalf of the country who has a nexus with the suspect vessel. When a law enforcement agency acts on behalf or with another country that has a nexus with the suspect vessel, the agencies have to cover all insignia representing their country and display insignia of the nexus country.

Another issue that arises, specifically relating to law enforcement of illegal drug trafficking, is the issue of time delays and the element of surprise. In order to conduct a successful authorized law enforcement boarding operation against illegal drug trafficking, all legalities have to be met before and during the operation as well as effective tactics have to be conducted. These two key formalities have to work hand in hand for any drug law enforcement operation to be successful, an agency cannot have all their legalities in place but their element of surprise has been lost or they took too long to get authority to board and by that time the suspect vessel has already discharged its cargo of drugs. In order to rectify the issue of delays caused by flag states taking time to verify suspect vessels on their register or to grant authority for other law enforcement agencies to board their vessels, Article 17 of the Vienna Convention has made a provision which requires all parties to 'respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3.'¹⁹⁵

Even though the provision in Article 17 is made to increase the efficiency of boarding operations, in reality, not all States can meet this requirement due to various reasons. If this is the case and law enforcement agencies have reliable intelligence on a vessel suspected of drug trafficking and cannot wait for verification on the validity of the vessels registration or authority to board the vessel, the agencies may board in accordance with UNCLOS Art 110 to verify the vessels nationality,¹⁹⁶ without any

¹⁹⁵ Vienna Convention (note 101) Art 17 (7).

¹⁹⁶ UNCLOS (note 3) Art 110 (1)(d).

authorisation from the flag state. This is only done in extreme circumstances and should not be common practice by other States. Once law enforcement officials are onboard the suspect vessel, they may inspect the vessels registration documentation if suspicion remains after the documents have been checked, they may proceed to a further examination on board the ship, which must be carried out with all possible consideration, they are also authorised to conduct a watertight integrity search of the vessel to ensure the vessel is a safe environment for its officials onboard.¹⁹⁷

Coinciding with the watertight integrity search, officials can search for any suspicious cargo or ship design irregularities which can help to verify their suspicion of the vessel being involved in drug trafficking. If illegal drugs are found in this search or they have reasonable suspicion that the drugs are concealed deep within the vessel and there is a need for the vessel to be alongside in order to find and extract the drugs, the law enforcement officials may remain onboard until the applicable flag state has replied regarding the verification of the suspicious vessels registration. If the vessel is deemed to be stateless, it will be treated as such and put under the authority of the State which has a nexus with it, either for the cargo it is carrying or the crew onboard; that State will then take the necessary steps to prosecute the vessel for any offences. If the vessels registration is legitimate, the flag state is to be informed of the situation of boarding before flag state authorisation. In most instances when this occurs, the flag states are understanding and are supportive toward the boarding operation. If in the unlikely even the flag state objects to the law enforcement agency being onboard their vessel prior to their authorisation, the officials onboard the vessel are do disembark and return to their vessel. In the instance where drugs were found or there was reasonable suspicion that drugs were concealed further in the vessel and law enforcement officials were instructed to disembark the vessel by the flag state, the only measure the law enforcement agency can take to prevent that vessel from distributing the drugs is to shadow the vessel to wherever it destination is and then inform the relevant authorities of the suspect vessel entering their waters.

In the extreme circumstances where law enforcement agencies have to board a suspect vessel without flag state authority, it is imperative that the agencies have full support from their State and other States who are involved in the law enforcement of drug

¹⁹⁷ UNCLOS (note 3) Art 110 (2)

authorisation from the flag state. This is only done in extreme circumstances and should not be common practice by other States. Once law enforcement officials are onboard the suspect vessel, they may inspect the vessels registration documentation if suspicion remains after the documents have been checked, they may proceed to a further examination on board the ship, which must be carried out with all possible consideration, they are also authorised to conduct a watertight integrity search of the vessel to ensure the vessel is a safe environment for its officials onboard.¹⁹⁷

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trafficking and help to defend the ends of justice against drug dealing and trafficking on the high seas and within their territorial waters. Law enforcement agencies often need to react to different situations at sea with little time to receive authority to justify their actions, this is why flag states need to be prepared for these situations by having the necessary resources to be able to give authority or verification without delay, it also includes the law enforcement agencies States, who after receiving information from their authorities dealing with the situation; they are able to make decisions without delay and allow their law enforcement authorities to conduct an efficient service.

Stateless Vessel – All vessels over a certain tonnage at sea have to be registered under the nationality of a State. The South African Maritime Safety Authority (SAMSA) is the lead law enforcement agency that deals with stateless vessels within the country's territorial waters. The Merchant Shipping Act¹⁹⁸ does not specify the right for SAMSA to board a stateless vessel, it instead gives broad authority for them to board vessels within the territorial water for a number of reasons and the right to board and verify a vessels nationality falls under this broad authority. Beyond the country's territorial waters, law enforcement agencies rely on UNCLOS Art 110's¹⁹⁹ provision of a right to visit a stateless vessel, to authorize boarding the vessel to verify its nationality.

The Merchant Shipping Act²⁰⁰ and the SAMSA Act²⁰¹ both provide authority for other law enforcement agencies to assist SAMSA in boarding and inspecting vessels, by either being appointed by SAMSA to do so or working in cooperation with SAMSA. When acting under SAMSA's authority to board vessels to verify the vessels nationality, either within South African waters or on the high seas, SAMSA is the lead agency and similar to that of customs and immigration, before any boarding operations commence SAMSA is to approve it and if any discrepancies are found, SAMSA will inform the agency on what actions to take. The reason for this is, besides SAMSA being the lead agency regarding this matter; they have the necessary

¹⁹⁸ Merchant Shipping Act (note 108) Ch 1 Sec 9.

¹⁹⁹ UNCLOS (note 3) Art 110 (1)(d).

²⁰⁰ Merchant Shipping Act (note 108) Ch 1 Sec (9)(1)(d).

²⁰¹ South African Maritime Safety Authority Act 5 of 1998. Sec (5)(3), (4).

resources to verify any documentation regarding the ships registration and are educated in knowing what formalities and procedures to follow in determining a vessels nationality.

Unauthorized Broadcasting – The monitoring and regulation of unauthorized broadcasting is predominantly an SAPS function within South Africa, but due to the vast spectrum of platforms one can use to transmit broadcasts, other law enforcement agencies assist the SAPS.

Within international law UNCLOS provides the authority for a State to board a vessel suspected of transmitting unauthorized broadcasts.²⁰² If the States suspicion is verified once onboard the suspect vessel, they are authorized to arrest the vessel and seize any broadcasting apparatus is necessary.²⁰³ This provision is only applicable on the high seas.²⁰⁴

Similar to the law governing stateless vessels within South African waters, there is no law that specifies unauthorized broadcasting and the right to board vessels that are suspected of committing this offence. Authorization for South African law enforcement agencies which intend to board a vessel suspected of transmitting unauthorized broadcasts within South African waters is provided for in the Merchant Shipping Acts²⁰⁵ provision to authorize the boarding, searching and inspection of any vessel within its territorial waters. If a vessel is guilty of unauthorized broadcasting, the vessel may be arrested and prosecuted within South Africa under the Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002.²⁰⁶ Cognisance must be taken that, before South Africa can prosecute the vessel of an offence such as unauthorised broadcasting within its waters or on the high seas, there must be a nexus between the country and the vessel or the person transmitting the broadcast.

²⁰² UNCLOS (note 3) Art 110 (1)(c).

²⁰³ Ibid, Art 109 (4).

²⁰⁴ Ibid.

²⁰⁵ Merchant Shipping Act (note 108), Ch 1 Sec 9.

²⁰⁶ Communications Act (note 116) Ch 9 (51).

The SAPS and the SANDF both have resources to monitor and regulate broadcasts from the maritime environment. The SANDF are regarded as having a far more extensive resource with the SA Navy, who can patrol South African waters and beyond to the high seas, the SANDF also have a number of communications centres strategically placed within South Africa to be able to monitor any broadcasts being transmitted including any transmissions from South African waters or the high seas. Due to this, the SANDF and SAPS assist each other in regulating and monitoring broadcasts from the maritime environment. If a naval vessel encounters a vessel transmitting unauthorised broadcasts or has been instructed to investigate a suspect vessel regarding this offence by either the SANDF or SAPS, the vessel is authorised to board the suspect vessel and conduct the necessary searches and inspection. If the vessel is found to be guilty of an offence within the Act²⁰⁷ or for unauthorised broadcasting,²⁰⁸ the vessel is to be arrested and taken back to a port in South Africa, whereby either SANDF or SAPS officials will take matters further, depending on what the offence was and which agency it affected.

Piracy – The SANDF are the only law enforcement agency that are authorised to board, search, detain or arrest a vessel suspected of being involved in acts of piracy.²⁰⁹ Provisions in both domestic²¹⁰ and international law²¹¹ authorise SA Naval vessels to exercise law enforcement against acts of piracy, but only on the high seas.

In international law piracy is a crime that can be committed only on or over international waters which includes the high seas, exclusive economic zone, and the contiguous zone, and in other places beyond the territorial jurisdiction of any nation. The same acts committed in the internal waters and territorial waters of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.²¹²

²⁰⁷ Ibid.

²⁰⁸ UNCLOS (note 3) Art 109 (4).

²⁰⁹ Defence Act (note 21) Ch 4 Sec (24), (25), (26).

²¹⁰ Ibid.

²¹¹ UNCLOS (note 3) Art 105, 110.

²¹² Ellen, *Contemporary Piracy*, 21 Cal. West. Int'l. J. 105-79 (1990).

In South African law, piracy can only be committed on the high seas or in a place outside the jurisdiction of any state and South Africa 'does not have any laws that equate acts of armed robbery against ships in South Africa's territorial waters with piracy.'²¹³

In any discussion of the definition of piracy cognisance must be taken of the definitions of piracy by the International Maritime Organisation (IMO) and the International Maritime Bureau (IMB). The IMB, a part of the International Chamber of Commerce (ICC), established the Anti-Piracy Centre (APC) for the explicit purpose of reducing the incidence of piracy. The IMO and the IMB agree that piracy involves an attack on a ship but their definitions of piracy differ significantly in other ways. The IMO follows UNCLOS which declares piracy a criminal act²¹⁴ and restricts piracy to the high seas. This aspect of the definition of piracy restricting it to the high seas means that an alternative term needs to be created for attacks against ships within territorial waters. The IMO thus defines criminal attacks on ships within territorial waters with weapons as armed robbery and not as piracy. A further element of the UNCLOS and South Africa's definition of piracy is the two-ship requirement. Pirates need to use a ship to attack another ship, which excludes mutiny and privateering from being acts of piracy. Piracy needs to be committed for private ends, which may also exclude the acts of terrorists or environmental activists from being acts of piracy. In the definition, attacks by naval craft fall outside of the bounds of piracy because pirate attacks have to be committed by the crew or passengers of a privately owned vessel.²¹⁵ In contrast to IMO's definition, the IMB defines piracy and armed robbery as, 'an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act'. This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor or at sea.

Currently coastal states are authorised to extend their areas of jurisdiction beyond their territorial waters to their EEZ, therefore acts committed in certain waters that

²¹³ H. Fouché, *Policing Piracy and Armed Robbery of Ships* (note 25) p 38.

²¹⁴ UNCLOS (note 3) Art 101.

²¹⁵ D. Johnson & E. Pladdet, 2003. *An Overview of Current Concerns in Piracy Studies and New Directions for Research* (paper read at the conference on People and the Sea II: Conflicts, Threats and Opportunities, August 1, Amsterdam).

were previously part of the high seas now fall under the jurisdiction of coastal states. In order to address this shortcoming and to avoid acts of piracy from going unpunished the Comité Maritime International (CMI) a non-governmental organisation, is at the forefront of an international campaign for states to adopt a Model National Law on acts of piracy and maritime coastal violence committed within the extended waters which now fall within a state's jurisdiction.²¹⁶ In the proposed Model National Law of the CMI the definition of piracy makes provision for the UNCLOS definition of piracy and includes acts of piracy under the criminal code of the state enacting the legislation. The adoption of a national law criminalising acts of piracy committed in waters within the jurisdiction of the enacting state, however, would be problematic. 'If the state is a signatory of UNCLOS as that state would in effect be adopting legislation contrary to the convention to which they are a signatory.'²¹⁷

Canada and New Zealand have adopted measures in their criminal code which criminalise piracy in terms of the law of nations. In the case of Canada piracy can be committed while in or out of Canadian waters and in the case of New Zealand the act of piracy can be done within or outside New Zealand waters.²¹⁸ These two states have thus effectively legislated that piracy can be committed within their area of jurisdiction, specifically in their territorial waters and further abroad. In support of this approach toward acts of piracy the former Chairman of the IMO Legal Committee and member of the Canadian Department of Justice argues that UNCLOS is merely a guideline to nations and he does not believe that the legislation adopted by Canada is contrary to the spirit of the convention.²¹⁹

Even though South Africa's law does not address acts of piracy directly, when committed within the country's territorial waters, it does however make provisions for attacks and acts of violence against vessels when in the territorial waters. Robbery, whether armed or not, is a common law offence which would cover an armed robbery directed at any ship, crew or passengers within this area. Other common law offences

²¹⁶M. Meija & P.K. Mukherjee, 2004. Selected issues of law and ergonomics in maritime security. *Journal of International Maritime Law*, 10(4) August – September: 301-325.

²¹⁷H. Fouché, Policing Piracy and Armed Robbery of Ships (note 25), p 39.

²¹⁸P. van Wyk (pvanwyk@salawcom.org.za). 2004. Piracy Measures Canada New Zealand. H. Fouché (note 8), at 39.

²¹⁹H. Fouché, Policing Piracy and Armed Robbery of Ships (note 25), p 40.

could also apply, such as murder, damage to property and assault.²²⁰ Within statute law there are a number of Acts which have provisions for these offences and related offences. The Intimidation Act No 72 of 1982 provides for any person who assaults, injures or causes damage to any person or even threatens to kill, assault, injure or cause damage to any person, are liable for a fine or imprisonment.²²¹ Seizing or exercising control over a ship (hijacking) by force or threat of force or other form of intimidation is an offence in terms of Article 3 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The Merchant Shipping Act provides that 'no person shall without reasonable excuse do anything to obstruct or injure any of the equipment of any ship where ever registered, or obstruct, impede or molest any of the crew in the navigation and management of the ship or otherwise in the execution of their duties about the ship.'²²² Provision has been made in South African law in the Protection of Constitutional Democracy against Terrorist and Related Activities Act to give effect to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Section 10 of the Act provides a number of acts which constitute an offence and basically covers most acts which pirates would commit.

Another issue that must be addressed, especially in this day and age, is the relation between piracy and terrorism. In South Africa's legislation it is clear that to constitute piracy an act must be committed for commercial gain and that an act of terrorism has pure political motive.²²³ A meeting on piracy and maritime security was held in Kuala Lumpur in 2004 challenged the piracy / terrorism link and endorsed the view that piracy and terrorism are separate crimes.²²⁴ The view that terrorism and piracy are two different crimes has become internationally accepted, even though some instances are complex and have links to both crimes. Besides this distinction between the two crimes an act of piracy in the territorial waters of South Africa may result in the pirates being charged under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, even though it's not an act of terrorism.

²²⁰ Ibid, p 87.

²²¹ Intimidation Act No 72 of 1982, Sec (1).

²²² Merchant Shipping Act (note 108) Sec 316.

²²³ Defence Act (note 21).

²²⁴ International Chamber of Commerce. 2005, International Maritime Bureau. Piracy and armed Robbery against ships Annual report 1 January 2004 – 31 December 2004. Essex: Maritime House.

Passage within South African Territorial Waters Deemed not to be Innocent –

The issue of a States right to innocent passage within another States waters has been the topic of many discussions including what actually constitutes a vessels passage not to be innocent. Both international law²²⁵ and South Africa's domestic law²²⁶ have provisions for a vessels right to innocent passage and when a vessels passage is deemed not to be innocent.

One of the concerns raised by critics of UNCLOS's Article 17, the right to innocent passage, is that it could be used to sharply limit States military operations. Among the examples they cite is Article 20, which stipulates: 'In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag'. Due to this provision not mentioning 'innocent passage' it may provide opponents of one States military operations a pretext for claiming that the surfacing requirement applies to all submarines operating in their territorial waters, which would defeat the objective of a submarines military strategy of stealth and secrecy.²²⁷ This argument is unlikely to succeed with most countries that operate submarines, for the precise reason of a submarines military objective. But Article 20 also adds something completely new, being the requirement that 'other underwater vehicles' navigate on the surface. The surfacing requirement would thus presumably apply to Autonomous Underwater Vehicles (AUVs) and Remotely Operated Underwater Vehicles (ROVs). An AUV, unmanned underwater drone, and ROVs, have numerous military applications, including mine detection and neutralization, surveillance and inspection of underwater installations and topography, among others.²²⁸ Some of these activities are otherwise consistent with UNCLOS's definition of 'innocent passage'. An AUV or ROV used to detect mines to protect a ship exercising its right of innocent passage²²⁹ appears to meet the requirement that it is engage only in activities with 'direct bearing on passage'. But because "these vehicles must be submerged to be used effectively they would be considered 'prejudicial to the peace, good order and

²²⁵ UNCLOS (note 3) Art 17.

²²⁶ Marine Traffic Act (note 137) Sec (2).

²²⁷ D.A. Ridenour, Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage, no.542, August 2006.

²²⁸ Design Report: Littoral Warfare Submarine, VT Total Ship Systems Engineering, Aerospace and Ocean Engineering College of Engineering, Virginia Polytechnic Institute, Blacksburg, Virginia.

²²⁹ D.A. Ridenour, Ratification of the Law of the Sea Treaty (note 227)

security of the state²³⁰ by doing so, even though advancing the peace, good order and security is precisely the purpose for which they would be used.²³¹

The right of innocent passage and the obligation to protect the marine environment conflict when applied to the issue of vessels carrying radioactive cargo; many contend that the right of innocent passage dominates.²³² Citing the customary international law aspect of the freedom of the seas and freedom of navigation, they claim that forbidding innocent passage through a coastal State's seas is a violation of international law.²³³ However, not all states believe that the right of innocent passage is the dominant theory in the conflict between innocent passage and marine preservation. 'The precautionary principle mandates that ships transporting radioactive materials have a duty to warn, or notify, coastal states through whose exclusive economic zones the ships plan to pass. Furthermore, the precautionary principle suggests that coastal states may officially deny a ship's request for innocent passage by withholding its requested consent to allow the ship in its waters.'²³⁴ In the case where a State denies a vessel innocent passage through its waters, coastal states may be forcing these ships into rougher waters or bad weather.²³⁵ In which case, coastal states may not only be violating the international law of innocent passage, but may also be intentionally endangering the crews and cargoes of the ship and contributing to the cause of a disaster.²³⁶

South Africa's definition of a vessels passage not deemed innocent, does not mention specific incidents which constitute an offence regarding this provision, it rather has a broad definition, which can cover a number of different incidents.²³⁷ This provision in the Act allows law enforcement agencies the authority to board any vessels within the country's territorial waters for any suspicion they might have that the vessel may constitute a threat against the sovereignty, territorial integrity or political

²³⁰ UNCLOS (note 3) Art 19 (1).

²³¹ D.A. Ridenour, *Ratification of the Law of the Sea Treaty* (note 227).

²³² E.R. Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAW 757; see also R.A.F. Pedrozo, *Transport of Nuclear Cargoes by Sea*, 28 J. MAR. L. & COM. 207, 221 (1997).

²³³ *Ibid.*

²³⁴ L. Marin, *Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment*. 13 Fla. J. Int'l L. 361. Summer 2001.

²³⁵ Pedrozo, *Transport of Nuclear Cargoes by Sea* (note 232) p219.

²³⁶ *Ibid.*

²³⁷ *Marine Traffic Act* (note 137) Sec (8).

independence of the country.²³⁸ Even though this provision allows a wide scope to authorise a boarding by law enforcement agencies such as the SANDF or SAPS, which may vary from a vessel suspected of trafficking arms through the country to vessels transporting hazardous substances within the territorial waters, the law enforcement agency conducting the boarding and verification of the suspicion, are to ensure they have reasonable suspicion or reliable intelligence to justify the boarding and that it is only applicable to the limit of the territorial waters.

Slavery – The repression of the slave trade within South African waters as well as the high seas is bestowed upon the SANDF, who are authorised to board any vessel suspected of being engaged in the slave trade and take the necessary action against that vessel if their suspicion is well founded.²³⁹

Cognisance must be taken that a vessel engaged in the slave trade and a vessel transporting refugees are two different acts, even though they might seem the same. A vessel engaged in the slave trade is a vessel transporting people against their will to another destination, where as a refugee has boarded the vessel willingly in order to get to another country or destination. Due to this distinct difference authorities must be aware of the legal implications that accompany these two different acts before conducting any boarding operation. As mentioned before, a warship is authorised to board a vessel engaged in the slave trade, once onboard the vessel an officer may arrest the ship and return the people enslaved to their home country and any slave that takes refuge on board any ship, whatever the flag, shall *ipso facto* be free.²⁴⁰ But if the vessel has refugees onboard seeking either to escape their country of origin or seek asylum in another country, a warship has no authority to board that vessel.

Vessels transporting refugees are usually in a very bad state and often overloaded and people onboard are in need of medical attention. Due to these reasons a warship on the high seas that encounters such a vessel has a moral obligation to render assistance to prevent the loss of lives on that vessel.²⁴¹ In offering assistance to the refugee vessel, unless instructed by higher authority, the warship should not hook up and tow

²³⁸ Ibid.

²³⁹ Defence Act (note 21) Sec 26 (1), (2).

²⁴⁰ Ibid Art 99.

²⁴¹ Ibid Art 98.

the vessel to its intended destination or even take members from the refugee vessel and put them onboard the warship. The reason for not rendering this form of assistance is that the members from the refugee vessel are entitled to claim refugee status to the nationality of the warship once connected up to the warship or onboard it, due to a warship being sovereign territory of that State. Warships may however offer other forms of assistance such as, medical personnel being transferred to the refugee vessel with the consent of the master of that vessel to administer any medical needs, or even mechanical personnel to help prevent the vessel from sinking.

Duty to Render Assistance – Even though the SANDF have sole jurisdiction to board vessels and render assistance when they are in distress,²⁴² international law obliges all vessels to render assistance to any vessel or person that might be in distress when at sea.²⁴³

A problem that may arise from any vessel, specifically the NSRI responding to a distress signal, is that the vessel in distress may not be sinking and instead may be under attack from pirates. If this is to happen, the NSRI are not trained or equipped to render any assistance to that vessel and would refer it to the SANDF.

When the SANDF is called upon to assist a vessel in distress in any situation, the SA Navy will provide the platform for the rescue operation with the South African Air Force providing either a Maritime Patrol Aircraft or helicopter to accompany the naval vessel on the rescue. Flag Officer Fleet (FOF) is responsible for any naval action taken on receipt of a distress call. All distress calls are to be relayed to FOF immediately on receipt. If a SA Navy ship receives a distress message, the Officer in Tactical Command (OTC) or the Officer Commanding (OC) of the naval vessel is to be informed immediately. Whenever possible, a direction of frequency bearing is to be taken. No acknowledgement of a distress call is to be made until ordered by the OTC/OC. No amplifying message is to be made unless ordered by the OTC/OC. The OTC/OC may order an acknowledgement to be made after considering the circumstances, having regard to the fact that acknowledging a distress call imposes a

²⁴² Defence Act (note 21) Sec 28 (1), (2).

²⁴³ UNCLOS (note 3) Art 98 (1).

moral obligation to alleviate the distress.²⁴⁴ Warships and military aircrafts may only assist or proceed to a rescue if it can be effected without serious danger to the warship or aircraft and their crew; and in times of armed conflict, it can be effected without prejudice to an operation which they are engaged in.²⁴⁵

Terrorism – With the advent of the Soccer World Cup being hosted in South Africa in 2010, the country's anti-terrorism measures on a whole are going to have to expand and improve to meet international standards, especially against potential seaborne threats. Besides improving the resources to meet this objective, South Africa has to ensure it has the necessary legislation to justify and authorise its actions. Even though the country has provisions in its domestic law with the Terrorist and Related Activities Act, which authorises law enforcement agencies such as the SAPS and SANDF to apprehend offenders,²⁴⁶ the Act still needs clear provisions which will authorise these agencies to take the necessary steps to prevent a disaster from happening during the up and coming prestigious event and for future purposes. South Africa is fairly inexperienced in dealing with modern terrorism and need to draw from other countries experiences to develop the best approach to this challenge.

The exposure in 2004 of an extensive and long-running nuclear black market based in Pakistan, which peddled weapons technology to Libya, Iran, North Korea and perhaps other places, has amplified fears that countries or criminal organizations will pass Weapons of Mass Destruction (WMD) related materials to terrorists, who may use them to attack counties around the world.²⁴⁷ North Korea and Iran are primary sources of proliferation concern. Hence, the USA and several of its NATO allies combined forces in the Mediterranean Sea to track and board ships suspected of carrying WMD.²⁴⁸ Dubbed the 'Proliferation Security Initiative (PSI)', this initiative aims to disrupt and deter the illicit trade in WMD by searching ships and planes suspected of carrying nuclear, chemical or biological weapons, or materials that could be used to make them.²⁴⁹

²⁴⁴ SANCP 1E, Chapter 7, Section 1.

²⁴⁵ Defence Act (note 21) Sec 28 (2).

²⁴⁶ Terrorist and Related Activities Act (note 164) Ch 1, See Def 'police official'.

²⁴⁷ A.M. Köknar, Maritime terrorism: A New Challenge for NATO. Institute for the Analysis of Global Security (IAGS), January 24, 2005.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

‘NATO is resolved to help deter, defend, disrupt and protect through maritime operations in the area of operations of Operation Active Endeavor (OAE) and to demonstrate Alliance resolve and presence in the campaign against terrorism. Under Article 5 of the Washington Treaty, underpinning the NATO military concept for defence against terrorism through specific actions, OAE was launched in the Eastern Mediterranean shortly after the September 11 attacks, and was expanded in March 2003 to include the Strait of Gibraltar. The operation, in which up to eight navy vessels keep tabs on cargo flows in strategic locations, will include the entire Mediterranean basin and could be extended to include the Black Sea.’²⁵⁰ ‘NATO commanders are aware of the holes in the defence of Europe against terrorism, particularly in maritime security, which they view as the ‘weak link’. While OAE has helped cut illegal immigration and smuggling, and enabled NATO to build a unique picture of Mediterranean ship traffic, which could eventually become part of a global database, current inability of NATO members to effectively screen cargo container traffic is worrisome.’²⁵¹

‘Recognizing that some developing countries will not be able to cope with the new maritime security threats, the United States and NATO countries are taking steps to render assistance.’²⁵² The U.S. is looking to relaunch what was formerly called the African Coastal Security Program aimed at improving the coastal navies and coastguards of participating countries, such as Morocco, Algeria, and Tunisia, so they can conduct better maritime surveillance.²⁵³ NATO has been urged to ‘get out, go forward and do some prevention,’²⁵⁴ especially as North African-based terrorist groups have become a major focus since the March 11 train bombings in Madrid. But unfortunately the NATO navies are still mostly configured for the Cold War, which means that they have a maritime surveillance capability that was designed to keep

²⁵⁰ Ibid, see also B. Whitmore, NATO faces challenges as it retools for the war on terror, *Boston Globe*, 28 March 2004.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ D. Osler, The cost of ISPS, *Lloyds List*, 22 April 2004.

²⁵⁴ C. Cobb Jr., General Sees Expanding Strategic Role for US European Command In Africa, *allAfrica.com*, 15 April 2004.

track of a few hundred big Soviet warships, hardly suited to gather intelligence on terrorists using rubber dinghies.²⁵⁵

From these two leaders in anti-terrorism, South Africa can draw a lot from the experiences of the PSI approach as well as the NATO approach to combat seaborne terrorist threats. The PSI has come under much criticism from around the world, for its principles which tend to blur the useful jurisdictional distinctions between ocean zones as well as erode hard-won certainties in that most basic medium of international relations, the oceans and for its robust approach to board and search any vessel anywhere²⁵⁶. However, the PSI also has the potential to strengthen the precautionary principle and thus lend support to environmental protections worldwide,²⁵⁷ and the robust boarding approach can work, but must be limited to certain areas within a countries waters. NATO who remain within all international legal frames while conducting boarding operations onboard suspected vessels, are often restrained to take matters further when their suspicion is verified²⁵⁸ or don't have the adequate surveillance capability. 'In order to overcome this deficiency, NATO and friendly nations need to create an intelligence network to monitor the world's main shipping lanes, providing a more coherent, fused intelligence position, so that NATO efforts in the maritime dimension are intelligence -led, instead of searching for a needle in a haystack.'²⁵⁹

Pollution – South African law and international law both have specific provisions which authorise law enforcement agencies to board vessels suspected of polluting the ocean. South Africa's jurisdiction for suspected polluters extends to the limits of its continental shelf²⁶⁰ and offences beyond this limit, regarding pollution, will be liable under international law.²⁶¹

²⁵⁵ C. Balmer, NATO commander says maritime security is weak link, Reuters, 8 March 2004.

²⁵⁶ Perry, *Blurring the Ocean Zones* (note 14).

²⁵⁷ *Ibid.*

²⁵⁸ On December 9, 2002, in the Arabian Sea, the Spanish Navy stopped the *So San*, a North Korean-registered vessel that had switched flags on the high seas. Within hours, American Naval officers joined their Spanish counterparts. Together, they boarded and searched the *So San*, uncovering 15 Scud missiles buried beneath a consignment of cement. The, Spanish and American officials reluctantly acknowledged that, while they may have boarded the ship legally, they lacked any basis to seize its cargo. The *So San* was subsequently released and allowed to sail on to port in Yemen.

²⁵⁹ Köknar, *Maritime Terrorism* (note 247).

²⁶⁰ Marine Pollution Act (note 166). See Def 'protected area'.

²⁶¹ UNCLOS (note 3) Art 220 (5).

Some countries around the world, such as France and Spain have taken even further measures to avoid any pollution from ships, by issuing a decree that said:

‘All oil tankers travelling through these two countries’ EEZs will have to provide advance notice to the coastal countries about their cargo, destination, flag, and operators.

All single-hulled tankers more than 15 years old travelling through the EEZs of Spain and France will be subject to spot inspections by coastal maritime authorities while in the adjacent EEZs and will be expelled from the EEZs if they are determined, after inspection, to be not seaworthy.’²⁶²

Shortly after the Spanish-French decree, Portugal announced that it would also take the same position on this issue.²⁶³ Morocco then announced that single hull oil tankers more than 15 years old carrying heavy fuel, tar, asphaltic bitumen or heavy crude oil would be subject to requirement that they provide prior notification and adhere to strict safety regulations.²⁶⁴ The European Union also banned large single-hulled tankers carrying heavy grade oil from coming into any European ports, and on April 3, 2003, the French National Assembly unanimously adopted a new law asserting the right to intercept ships out to a distance 90 miles from its Mediterranean coast that release polluting ballast waters and also imposing stricter controls on transient oil tankers.²⁶⁵

Countries have also submitted petitions to IMO to declare virtually their entire EEZs to be ‘particularly sensitive sea areas’ that would be completely off-limits for single-hulled oil tankers and other cargo vessels transporting dangerous cargoes.

South Africa can take cognisance from these countries efforts to protect their own coastal resources from pollution. Included in these countries efforts to prevent

²⁶² E. Daly, After oil spill, Spain and France impose strict tanker inspections, *New York Times*, November 27, 2002, p. A5, col. 3. Earlier, France had banned vessels over 1600 tons from coming within seven nautical miles of the coast around Cherbourg and Brest, to protect the fragile coastal environment. R Nadelson, After MOX: the contemporary shipment of radioactive substances in the Law of the Sea, *International Journal of Marine and Coastal Law*, Vol. 15, 2000, pp. 193, 224, n 189

²⁶³ J.M. Van Dyke, The disappearing right to navigational freedom in the exclusive economic zone, *Marine Policy*, Volume 29, Issue 2, March 2005, Pages 107-121.

²⁶⁴ Press release from Government of Morocco, January 23, 2003.

²⁶⁵ M. Simons, France clamps down on shipping pollution, *New York Times*, April 7, 2003, p. A8, col.1.

pollution and enforce their policies, they authorise boardings on any vessel suspected of polluting or potentially polluting. Some might argue that these measures are to extreme and contradict international law, but there is strong support for their view that 'it is legitimate to restrict maritime freedom in order to protect the resources of the EEZ from pollution or any other harm.'²⁶⁶

CONCLUSION

South Africa has provisions within their law, to a certain extent, to authorise law enforcement agencies to board, inspect, and if necessary detain vessels within their waters or upon the high seas. Around the world coastal states have had to take extensive measures to monitor and regulate their waters, fishing vessels are subject to the most restraints and must now give notice whenever they travel through the EEZ of another country. Oil tankers, especially those with single hulls are now subject to a wide variety of restraints, and any ship with a dangerous cargo must conform to international, regional, and national regulations. Ships carrying ultrahazardous nuclear cargoes have been told by many countries to avoid their EEZs, and these ships have in fact picked routes designed to avoid most EEZs. A new norm of customary international law appears to have emerged that allows coastal states to regulate navigation through their EEZ based on the nature of the ship and its cargo.²⁶⁷

'Security concerns have increased dramatically during recent years, and it has become almost commonplace for the major maritime and military powers to assert the right to stop and board merchant vessels to look for suspect cargoes in all parts of the oceans.'²⁶⁸ The issue of security cannot be more emphasised with the advent of the 2010 soccer world cup to be hosted within South Africa, and it is up to all the applicable law enforcement agencies to gather the necessary intelligence to exercise their right to board vessels and ensure the security of this event and for the future.

South Africa needs to evaluate what resources they have available to them to assert effective law enforcement at sea, once this is established these resources need to co-operate with each other, ensuring each agency knows what their role is in exercising this law enforcement. Present monitoring and regulation procedures of South African

²⁶⁶ Van Dyke, The disappearing right to navigational freedom (note 263).

²⁶⁷ Ibid.

²⁶⁸ Ibid.

waters need to be re-examined, and updated to deal with modern and practical conditions. Law enforcement agencies need to know what they can and cannot do, which includes higher authorities not on the scene, who need to make prompt founded decisions and relay them to the law enforcement agency at sea without delay.

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