

## **1 FREEDOM OF NAVIGATION - AN OUTDATED CONCEPT?**

We all know that there is no freedom above the law and that, consequently, freedom means only choices individuals are able to make within the context of an established legal order. In the case of freedom of navigation, I submit to you that it was a freedom always conditioned by its submission to the legal order of the flag State, namely to flag State jurisdiction.

Certainly, this jurisdiction was in the beginning no more than a notion. The so called “genuine link” between the flag State and the seafarer was rather tenuous in the beginning, since there were no international treaties imposing a flag States the obligation of supervising what ships flying its flag where doing, as long as there was a flag there was a law which at least nominally implied both protection of the seafarer and the seafarer’s submission to a legal order.

The evolution of the concept of freedom of navigation shows features similar to that of any other freedom in international law. You start with customary principles and you end with a heavy regulated legal order. You still have a freedom of choice but whatever you choose, your choice is regulated by law.

## **2 NEGATIVE INTERNATIONALIZATION**

While appropriation of land through conquest is at the core of the establishment of any Western nation, the sea cannot be conquered according to the same principles. It is on the basis of this distinction that Hugo Grotius, after explaining how sovereignty on earth operates as the basic tool of domination by States over their subjects, elaborates on the oncept of freedom of the seas as the absence of State sovereignty over ocean spaces.

Grotius's approach to the freedom of the seas is essentially based upon the conceptualisation of the sea as *res communis* and accordingly not subject to territorial appropriation. Although the expression *res communis* implies common property, the concept is essentially a negative one. *Res communis* is in fact *res nullius*. To say that something belongs to everybody in the same way means exactly the same as saying that it belongs to nobody. It is in this regard that the freedom of navigation was

originally conceived as a principle of *ius gentium* of a negative kind, that of no man's sea.

At the time of Grotius this doctrine was peacefully accepted because the sea in itself was not seen as a source of economic wealth. Freedom of the sea could not mean freedom to exploit the sea's resources, in particular the seabed because this was by definition an impossible task. Freedom at sea in Grotius's times could only mean freedom of navigation. The principle of non appropriation of the seas only meant that coastal States were not entitled to intercept foreign ships on the basis that they were entering appropriated territory.

The obvious consequence of this notion is that the law at sea was only the law of the flag State on board ships. There was not, there could not be any law governing ocean spaces as such.

### **3 UNCLOS: POSITIVE INTERNATIONALIZATION**

**PUBLIC LAW NOTION.** In article 87 UNCLOS includes the freedom of navigation amidst other freedoms essential to the high seas. Then in article 90 it defines the right to navigation as the right of every State "to sail ships flying its flag on the high seas". It is a public law notion. Freedom of navigation relates not to the right of individuals but to the right of States which is asserted in plenitude in connection with navigation in the high seas, and then, *mutatis mutandis*, in the EEZ, and then as right to innocent passage in the territorial sea.

**ASSERTED AGAINST RIGHTS OF APPROPRIATION.** Why this need to assert the existence of this right? Because it must be asserted *vis a vis* the right of territorial appropriation acknowledged upon coastal States in the TS and the appropriation of resources in the EEZ. It is upon this affirmation of the right to navigation against the right of appropriation that a concept of positive internationalization is built. We are not talking anymore of something belonging to everybody and to nobody. We are regulating the limits to the freedom implied in the exercise of flag State jurisdiction *vis a vis*, territorial claims and claims upon natural resources made by the coastal State.

**HEAVILY REGULATED RIGHT.** Moreover, the shipowner was free to take risks. The flag State was not interested in safety of navigation or the protection of lives at sea. This was a private business. There was no environmental law. So, the notion of damage to coastal interests was inexistent as a subject matter of law. Nowadays, the shipowner's activity

is heavily regulated. As a result, he must comply with traffic regulations, safety and labour law and law on the prevention and reduction of marine pollution.

**BASIC RESIDUAL CONCEPT.** If in doubt, freedom of navigation. Flag State jurisdiction is not only regulated by obligations imposed upon the flag State but can also be intercepted by two other types of jurisdiction, namely coastal and port State jurisdiction.

#### 4 COASTAL STATE JURISDICTION

**Territorial appropriation.** The notion of *mare liberum* was maintained its original *groetian* shape until the post World War II period. Then, Grotius's approach to the freedom of the seas as a result of the notion of the sea as *res communis* not subject to territorial appropriation, began to be contested by claims to sovereign rights launched by coastal States over waters adjacent to their coast. (see book, Trumann proclamations). Coastal State jurisdiction is the result of appropriation and involves rights of a restrictive kind, namely rights developed against a background of a freedom they curtail within treaty law limits.

**Not a customary but a treaty law notion/ a conflict solving one.** On the contrary to flag State jurisdiction coastal State jurisdiction is not a customary law notion but a notion regulated by treaty law. It has been developed through a relative short period of time (as from the 50s), under the motto of territorial expansion through appropriation and this development has taken place through conflict. UNCLOS solutions here represent a settlement to conflicts on the features of this appropriation implied in the exercise of coastal State jurisdiction.

At the time of Grotius the sea in itself was not seen as a source of economic wealth. Freedom of the sea could not mean freedom to exploit the sea's resources, in particular the seabed because this was by definition an impossible task. Accordingly, freedom at sea in Grotius's times could only mean a concept of freedom of navigation closely related to the principle of non-appropriation. The principle of non appropriation of the seas meant that coastal States were not entitled to intercept foreign ships at sea. The obvious consequence of this notion is that the law at sea was only the law of the flag State on board ships. And as the flag State restricted simply to "registration" namely to the granting of the use of the flag, the seafarer was really free to navigate wherever he wanted at his own risk.

The only activity of exploitation of sea resources known at Grotius's time, namely fishing, was never understood as an exploitation implying appropriation of territory under the concept of coastal State jurisdiction. By its very nature, fishing was an activity exclusively to be exerted by fishermen of coastal States. The notion of foreign vessels coming from far away to fish on sea areas historically exploited by coastal fishermen was unthinkable until a few decades ago. Neither the technology nor the economic rationale existed to justify a fleet crossing overseas distances in order to appropriate themselves of fish stocks traditionally serving as the source of nourishment and economic activities which only made sense for local fishermen.

This status quo did not change until well into the 20th century, when scientific research and technological progress demonstrated the extent to which marine resources were a source of economic wealth. It is from this moment that coastal States start claiming sovereign rights over extensive sea areas. UNCLOS settles conflicts with the introduction of the Exclusive Economic Zone, the Archipelagic Waters, the Regime for the Islands, and the new definition of the Continental Shelf, etc.

**Restrictive kind.** While the right of the flag State to free navigation is residual, the rights of the coastal States are basically restricted. They have limits established by treaty law.

## 5 PORT STATE JURISDICTION

**Right of a State to interfere with the navigation of the foreign ship voluntarily in its ports.**

**Territorial scope:** internal waters. So, the question of sovereignty or appropriation does not raise.

There is nevertheless an international element: port State jurisdiction coexists with flag State jurisdiction.

Defining feature: again here, we have a limited, restrictive notion: port State can only interfere with flag State jurisdiction in order to prevent and correct deficiencies on board.

**Not customary but entirely developed by treaties, in particular IMO treaties.** The development of the notion of port State jurisdiction reflects a response to a dramatic change in the way flag States used their right to freedom of navigation. Traditionally, this right was entirely unregulated

and unburdened by correlative obligations. The golden age of the open registries extended until the sixties. You could rent your flag and cash the money without having to invest in equipment or training to ensure safety of navigation or prevention of marine pollution. From then onwards, obligations in this regard were imposed upon flag States. As a result, freedom of navigation became more regulated and costly. Flag States had to invest money to supervise compliance with international safety and antipollution treaties. In this supervision they became checked by port State control. Port States can inspect certificates, and eventually board ships to ensure compliance with these international treaties. Ships may be prevented from sailing until they solve deficiencies resulting in non-compliance. Proceedings can be instituted against foreign ships.

**Not customary but treaty law.** As in the case of coastal State jurisdiction, port State jurisdiction is not customary law but entirely a treaty law notion. It is regulated in treaties. It is also restricted to clear procedures.

**Corrective kind.** Its purpose is to correct deficiencies resulting in non-compliance with international treaties.

## 6 FREEDOM OF NAVIGATION TODAY

**To sum up**

**The right of the flag State to freedom of navigation is progressively burdened by duties that are internationally regulated.**

**Internationally regulated.** Right of the flag State to free navigation is subject to compliance with international treaties drafted in answer to the changing risks posed by ever changing technological progress. New types of ships bring new risks and call for new security measures to protect persons and goods at sea. In the case of safety of life at sea, search and rescue, etc. it now happens what it did not happen at the time of Grotius. Humanitarian law prevails. The flag State has the duty to protect lives. Navigation is not an “at your own risk” business anymore. (IMO treaties)

The flag State right to freedom of navigation is further conditioned to compliance with labour law (ILO treaties) dealing with labour and welfare conditions on board. Labour law certainly did not exist in Grotius times or even in Truman’s time.

Environmental law. When the right to freedom of navigation became part of customary law and even part of the first two law of the sea conventions, the high sea was the obvious place where you could drop all sorts of wastes without violating any law. This is why environmental law (like aviation law) has not a single particle of customary law. It is treaty law par excellence and even contradicts an accepted and long practiced principle, namely the principle according to which, freedom of navigation implies freedom to dispose of any waste or garbage generated as a consequence of navigation. Nowadays environmental law, antipollution treaties (notably MARPOL and other IMO treaties ) forbid pollution anywhere at sea.

**Interaction / monitoring.** Compliance with international regulations is monitored through the interaction of the three types of jurisdiction, namely flag State as the basic one, coastal State jurisdiction as an expression of appropriation and port State jurisdiction as corrective jurisdiction.

Let's revisit for a moment, the way in which UNCLOS conditions the right of the flag State to free navigation.

## 7 UNCLOS AND FLAG STATE JURISDICTION

**Registration.** In accordance to UNCLOS, 91.1 Grant of nationality, registration of and right to fly the flag is acknowledged by UNCLOS to be a subject matter regulated by national law.

**Operational requirements.** On the contrary, operational requirements, namely, technical measures concerning safety of navigation, prevention of marine pollution, social measures regarding conditions of labour and welfare on board should be implemented in accordance with international treaty law, in particular rules and standards carefully regulated primarily in IMO, but also in ILO treaties.

**Genuine link.** In all cases, the law applies to ships primarily by the operation of the requirement of a "genuine link" , in UNCLOS words: there must exist a genuine link between the State and the ship. Although UNCLOS does not contain a definition of "per se", we can assume that the genuineness of the link resides in the effectiveness with which the flag State exerts its jurisdiction. It is in this regard that the "genuine link" requirement should be associated with the requirement at the beginning of article 94: "Every State shall effectively exercise its jurisdiction and

control in administrative, technical, and social matters over ships flying its flag”.

## 8 THE PRESTIGE INCIDENT

All the principles I have just referred to were questioned in the wake of the Erika and most notably the Prestige incident. In trying to cope with the public reaction to this incident politicians engaged in an aggressive public relations game of blaming the existing legal framework governing international commercial navigation. They avoided the question of whether the existing law had been properly applied. Instead they engaged immediately in tasks aimed at changing the international legal order.

**Should UNCLOS be amended?** The most dramatic but in the end irrelevant questioning related to UNCLOS itself. After the Prestige we hear about this continuously in Europe, but we never hear a word of it at the United Nations New York. The moment EU delegates join official meetings there, the question of amending UNCLOS becomes tabu, much to the amusement of many of us.

**Conditions of registration.** There was also a discussion on conditions of registration. Open registries was also blamed as the source of uncertainties regarding ownership and responsibility of the ship owner re: compliance with international regulations. However the question of ownership is a matter closely related to corporate law and the capitalist system would not be contested. (Differences between Erika and Prestige).

Action was taken in three important fronts.

**Operational requirements. Single hull** The right of the flag State to freedom of navigation in accordance with existing treaty law was questioned and eventually curtailed through the acceleration of the phasing out of single hull tankers. From an operational point of view the European Union and the European Commission proposed the acceleration of the phasing out of single hull tankers by amending MARPOL. Until the phasing-out provisions enter into force, treaty law principles indicate that the transit of single hull tankers in the EEZ should not be forbidden and. Neither should be forbidden the transit of single hull tankers through territorial waters as long this transit is effected in accordance with the rules of innocent passage. Furthermore, port States parties to MARPOL should not forbid entry into port of single hull vessels until their phase out date has occurred. MARPOL is law among parties. If this law says

that up to a certain date certain type of ships can navigate, they can certainly enter into port until that date. In forbidding navigation and entry into port some EU directives contradicted international law (as expressed in UNCLOS)

**PSSA.** The right of the coastal State to strengthen its jurisdiction through means other than amendments to UNCLOS was implemented through yet another limitation to freedom of navigation, namely the establishment of a mega Particularly Sensitive Sea Area (PSSA) nearly coinciding with the western limits of the European EEZ (Belgium, France Ireland Portugal, Spain and the United Kingdom). IMO members accepted the establishment of this area, but not without serious objections coming mainly from the Russian Federation. The question of the PSSA relates to provisions in UNCLOS enabling coastal States to adopt exceptional measures restricting navigation in areas requiring special protection on account of ecological, socio-economic or scientific reasons and which may be particularly vulnerable to environmental damage. As in the case of every exception to general rules, a restrictive law-making criteria should be followed. The need to impose these measures should be proved. The assessment of this need should be based on ecological reasons, but not on jurisdictional notions. This means that you cannot use the notion of political boundaries to define a PSSA. You cannot declare a PSSA in your entire EEZ just because it is your EEZ. You must acknowledge that in accordance with UNCLOS the EEZ status is basically a status of freedom of navigation. Thus exceptional measures aiming at restricting this freedom can be taken only after proving exactly which area requires a regime of exception on ecological or socio-economic grounds. Another important principle is the need to balance ecological interest with the interest of commercial navigation. You can establish areas to be avoided by certain ships, but you must also indicate alternative routes in order to ensure that commercial navigation is disrupted to a minimum.

### **Duty to provide refuge**

Flag States confronted coastal States with their duty to provide places of refuge to ships in distress. Bearing in mind the features of the Prestige Incident, some flag States counter attacked at IMO with proposals to adopt a treaty regulating the duty of coastal States to provide refuge for ships in distress. In their view, duties of the coastal State should not be restricted to save lives. Coastal State duties extended to the protection of the marine environment, so that refuge should be provided as an alternative to avoid that a major pollution incident occurs in open seas.

This was not considered a strictly law of the sea question because it involved internal waters. States were not ready to have their right to grant or not refuge regulated in an international treaty. At most guidelines were adopted at IMO.

And what about the very notion of genuine link?

## 9 UN AND THE GENUINE LINK

I have sent you in advance the report of the meeting because it contains comprehensive information of the work undertaken by international organizations and the problematic behind its division of work. The issue was brought directly to the UN by non-governmental organizations (Transports Union Federation, Friends of the Earth, World Life Fund.

Obviously, it was not for the Secretariats of the participating organizations to question UNCLOS present features be it in connection with registration, operational requirements of rights and duties of coastal States. What the organizations did was

**To draw conclusions on the features of the genuine link and**

**To produce recommendations on how to apply existing legal remedies to strengthen flag State jurisdiction.** The message was clear: rather than trying to change the public law order of the oceans States should better concentrate in implementing the existing one.

## 10 GENUINE LINK AND REGISTRATION

**Role of national law.** Bearing in mind the clear terms of UNCLOS (article 91.1) organizations participating at the Ad Hoc Interagency Meeting concluded that their present mandate could not, in accordance with existing international law, extend to regulate conditions of registration, in particular the conditions related to ownership requirements of the ships registered. This issue remained entirely within the purview of national legislation of the flag State:

*Paragraph 28 of the Report: participants at the meeting took the view that the exclusivity attached by UNCLOS to the right of states to fix conditions for the grant of nationality was a matter beyond the purview of the organizations participating at the Meeting.*

This conclusion not only reflects the interpretation given by the participating organizations but also the authoritative interpretation of an international tribunal, namely the International Law of the Sea Tribunal (ITLOS) in the *Saiga* (nr. 2) case. In this case the Tribunal stated that the purpose of the UNCLOS provision on genuine link is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in the flag State may be challenged by other States. Hence the conclusion arrived at by the Tribunal in the same case, to the effect that determination of the criteria and establishment of procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.

In the political environment of the sixties, the system of open registries or “flag of convenience” was featured as detrimental to the effectiveness of flag State compliance on account of their laxity regarding conditions of ownership or employment. In connection with the occurrence of maritime accidents open registries are seen by many as more prone to enlist substandard ships. There is more “freedom of navigation” because there is less control by flag States. They simply cash the money without investing in the development of a maritime administration capable of controlling inspections and behaviour of ships around the world.

**UNCTAD and the Registration Convention.** UNCTAD sees so-called “flags of convenience” as the major problem and regrets the failure of the 1986 United Nations Convention on Conditions for the Registration of Ships, which attempted to provide minimum requirements for a “genuine link” between a ship and the State in which it is registered. This treaty represents an attempt to internationalize some of the elements referred to in UNCLOS 91.1: Yes, in principle registration is a question of national law; this, unless States decide to cede sovereignty by means of a treaty. The 1986 UNCTAD Convention lays down conditions on nationality of ownership and nationality of crews. From UNCTAD’S perspective, an economic and legal link between the flag State and its ships is essential to ensure proper enforcement.

**ILO.** ILO agreed with the conclusion of the meeting regarding the lack of mandate to internationalize the question of registration. However for one of the “social partners” (obviously the seafarers) open registries are decidedly means to avoid implementation of basic standards of work and welfare on board. In their view, nationality, or dare I say nationalization, at least partial, of crews and ownership is important to establish a really genuine link between real owners and the crew.

**FAO. Not so much freedom of nativation but fishing** In the field of fishing, reasons to introduce more strict regulations could be more justified by the need to prevent illegal, and unreported fishing in the high seas. It could also be justified as a means to prevent that the reflagging of vessels from parties to regional regimes to States non parties to those regimes. This reflagging undermines the effectiveness of international fishing management. This is why, in the negotiations leading the adoption of the FAO 1993 Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, (the Compliance Agreement) a proposal was made to regulate a provision on genuine link which included consideration of the nationality or permanent residence of the beneficial owner and the place where effective control over the vessel was exerted. However, it became soon clear that if such requirements were included the Agreement would follow the same destiny as the Convention on Registration. This is why in the end, the concept of genuine link included in the agreement does not go much further than UNCLOS:

Article 3, para.3 provides that no party to the Agreement “shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless that Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessels”

**IMO: not registration but only operational requirements should be regulated internationally.** From IMO’s point of view, the type of registry does not provide the decisive clue to address the issue of compliance with international safety and antipollution regulations. In its opinion it can certainly be accepted that if a State has an open registry, the money it gets from registration must be invested in the development of a sophisticated maritime administration, because, no matter who the owner is, and where ships flying its flag are, a State will be ultimately responsible in accordance to international law for any violation to international standards resulting from the lack of effective jurisdiction and control over these ships.

It is here that the development of IMO’s rules and standards throughout the years has made a difference: before the Organization came into existence, open registries meant that States could effectively cash a substantial fee for the use of their flags without having to invest in the development of a maritime administration. In such cases registration was a pure financial business. Nowadays, the obligation of flag States to

implement a comprehensive set of IMO safety and antipollution regulations wherever the ships may be, means that the more ships entered in a registry, the more sophisticated a maritime administration needs to be. Accordingly there is not such a thing as cashing money against granting of the flag. Substantive amounts and resources must be invested to ensure implementation of flag State's obligations.

In IMO's view, questions relating to ownership of vessels should be considered as subject matters of an economic corporate nature that clearly falls beyond the purview of the law of the sea and the mandate of the international organizations as defined in UNCLOS; in the view of IMO, what is important for the purposes of establishing a "*genuine link*" is to identify who assumes the responsibility for the operation and control of the vessel.

## 11 GENUINE LINK AS AN OPERATIONAL CONCEPT.

So, why then, this reference to a genuine link in UNCLOS? IMO, as well as the other UN organizations, understands that in terms of treaty law, the "genuine link" is an operational concept, namely a concept to be implemented through the way in which ships operate, rather than through who owns them, who profits of this ownership, or which is the nationality of the crew.

**Compliance with international rules.** This is why the reference to the need of a genuine link in article 91 is related to the duties of a flag State in article 94.

Article 94 provides that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters in connection with the operation of ships flying its flag. It also provides that the way of exerting this jurisdiction is to ensure that the ships comply with international regulations, procedures and practices.

In other words, what UNCLOS does is to impose upon every State the obligation and the responsibility to exert effective jurisdiction, so that ships flying its flag comply with IMO, ILO and FAO international treaties or agreements, irrespective of whether they are registered in an open or close way.

**Enforcement:** Certainly, we know that States cannot be easily brought to an international court to pay for damages caused by a substandard ship. But there are other means of compelling a flag State to exercise effective jurisdiction, the most important one being the exercise of an effective

method of port State control which could prevent sub-standard ships from trading, thus eventually bringing a flag State into disrepute. In this case, that State's registry will be *de facto* blacklisted, and the open registry will not be a good business anymore. Why? Because shipowners will not enter their ships in a registry which has fallen into disrepute. Inspections and detentions would simply prevent normal trading.

## **12 STRENGTHENING OF FLAG STATE JURISDICTION**

In the report the organizations list their efforts in devising ever new international regulations to strengthen flag State jurisdiction.

**IMO of the Voluntary IMO Member State Audit Scheme:** involves independent audits to be performed on States. Although the Scheme has been developed as voluntary, it could become compulsory in the future, should the IMO membership so decide. The objective of the Scheme is to provide an audited member State with a comprehensive and objective assessment of how effectively it administers and implements the key IMO technical treaties. Technical assistance can be provided, following an audit, to help with the introduction of any improvements that may be found necessary.

**ILO Labour convention:** builds upon the earlier maritime labour conventions but more clearly assigns responsibility to the flag State for all labour and social matters on board its ships; expressly provides for an effective compliance and enforcement system for labour and social conditions on board ships; it also moves beyond the previous ILO maritime labour conventions to establish a system for flag State certification of specified minimum conditions on board ships.

**Fishing: Imo treaties and the work of FAO to prevent illegal unregulated and unreported fishing (IUU)**

All these means depend on the flag State for their effective implementation. The problem remains on how to compel the flag States to use them. Here we come back to port State jurisdiction as a corrective notion. The organizations participating at the meeting produced important recommendations in this regard.

### 13 COMPELLING FLAG STATE COMPLIANCE

**Port State control: the meeting reaffirmed the notion that** port State control activities were complementary to, but do not replace, flag State control; but significantly participants praised the evolution of regional memoranda of port State control regarding the implementation of IMO treaties. These memoranda should also include ILO and FAO regulations.

**Deter non compliance through disincentives.** Existing incentives for quality shipping, such as reduced inspection frequencies, or existing disincentives, such as potential detentions or increased inspections, may not be sufficient to counteract the profits obtained through substandard shipping. Incentives should be complemented by an effective deterrence system.

Deterrence: UNCLOS and other relevant international conventions require that the States parties establish adequate enforcement mechanisms, including, where appropriate, sanctions severe enough to discourage violations, as part of the implementation process (see UNCLOS, article 217). The obligation to establish an effective system of sanctions is primarily a matter for flag States. Aside from penalties of a financial nature, sanctions should include suspension from registration and the use of flag and, in cases of persistent violations, deletion from the flag State's registry.

In the case of financial penalties, in order to discourage violations and act as an effective deterrent system, the level of penalties would need to be sufficiently high to ensure that owners and operators could not compensate for these amounts with profits obtained from the operation of substandard ships. This kind of approach, which is reflected in the domestic environmental laws of some States, is called "profit stripping". Research by OECD has shown that, frequently, the profits gained by not complying with international regulations are greater than penalties for non-compliance. To be effective, such an approach would also require that third-party liability insurers not include the payment of financial penalties within the scope of their insurance coverage.

**Article 94 of UNCLOS** regulates how one State could act to respond to the failure of another State to implement its genuine link obligations *vis a vis* ships flying its flag. In this regard, please refer to paragraphs 17 to 24 of the report of the interagency meeting and note the various alternatives regulated in article 94 paragraphs 5, 6, and 7.

Paragraph 6 provides one possible avenue of importance for responding to a failure by a flag State to implement its responsibilities. When a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the fact to the flag State. In such a case, the flag State is obliged to respond by investigating the matter and, if appropriate, take any action necessary to remedy the situation.

There are, of course, alternative responses by coastal and port States available, including detaining a ship.

A further obligation imposed upon flag States by paragraph 7, is to hold inquiries into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. All these provisions, if effectively implemented, provide for a robust legal framework for a proactive interaction between flag, coastal and port States to effectively prevent navigation of sub-standard vessels.

The alternative to bring flag States to international tribunals should provide an appropriate deterrent.

## **14 THE HIGH SEAS**

Finally we are now we are now coming to a decisive issue within the context of the rights of flag States to freedom of navigation. UNCLOS provides for its uncontested supremacy in the high seas.

However, the evolution from negative to positive internationalization also implies not only extension of regulations on safety or protection of the marine environment to the HS but also the extension of coastal and port State jurisdiction to interfere in some way with the flag State so as to ensure application of international rules.

### **Ships routing and reporting**

The obligation to report and to provide information to the coastal State is yet another restriction being imposed upon freedom of navigation. It was originally discussed in connection with the transport of nuclear material by sea, and became more accepted vis a vis the need to prevent crimes at sea, notably terrorism.

The main IMO Convention (SOLAS, Safety of Life at Sea, recognizes the rights of states to impose mandatory reporting measures upon foreign ships navigating the high seas. See also UNCLOS 22(3) (a)

**However, post 9/11:**

**LRIT** Long-range identification and tracking of ships (LRIT).

However recent provisions introduced into SOLAS provide a mandatory requirement for passenger and cargo ships navigating up to 1000 miles off the coast to transmit to coastal States information for security and search and rescue purposes, including the ship's identity, location and date and time of the reported position. The regulations maintain the right of flag States to protect information concerning ships entitled to fly their flag, where appropriate, while allowing coastal States access to information concerning ships navigating off their coasts.

The new regulations state that they do not create or affirm any new rights of States over ships beyond those existing in international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS), nor do they alter or affect the rights, jurisdiction, duties and obligations of States in connection with UNCLOS. Whenever this *proviso* is included in a treaty, you know that its content is being contested.

**The ISPS Code**

Anti-terrorist prevention became the source of another restriction to freedom of navigation, this time for the benefit of port States: The ISPS Code (International Ship and Port Facility Security Code) part of which will be made mandatory through amendments to SOLAS 74) contains detailed security-related requirements for governments, port authorities and shipping companies.

Maritime administrations are required to set security levels and ensure the provision of security-level information for ships entitled to fly their flag. Prior to entering a port, or while in a port within the territory of a Contracting Government, a ship shall comply with the requirements for the security level set by that Contracting Government if that security level is higher than the security level set by the Administration for that ship.

## SUA

It is on grounds of security and prevention of crimes at sea that there is now a noticeable political trend to interfere with navigation in the high seas. A 2005 Protocol to the IMO Convention on the Suppression of Unlawful Acts against the Safety of Navigation, introduces provisions for the boarding of a ship in the high seas where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. Here again we have the proviso that the boarding provisions do not affect UNCLOS and of the customary international law of the sea.

Up to now only the crime of piracy provided a justification for such interception. This is an entirely UNCLOS matter. We cannot say that freedom of navigation is affected here, since there can be no freedom to commit crime and piracy removes the protection of the flag and accordingly gives title to universal jurisdiction. No more interaction of jurisdiction because the ship hasn't got any and any State can take action against it. In UNCLOS, the right to board pirate ships should be seen as a consequence of regulating extraordinary, universal jurisdiction to punish piracy. In this case, the incorporation of universal jurisdiction into treaty law merely reflects a well-established principle of *ius gentium* customary law, according to which pirates are *hostes humani generis*, namely enemies of mankind. As such, acts of piracy not only inflict damage upon the victims against whom they are directed, they also imply a direct attack on universal values that every nation has the right to defend, in this case, freedom of commercial navigation in the high seas.

Accordingly, any State has the right to establish jurisdiction and take all measures to ensure its application, from seizing of the ship and detaining the pirates to their definitive punishment through due criminal process. The universal jurisdiction regulated by UNCLOS to suppress piracy is, technically speaking, a restriction to the principle of freedom of navigation: unlike the case of any other crime, ships used for piracy can be boarded and seized by anybody in the high seas.

From a strict criminal law point of view, however piracy does not differ from other offences. All criminal acts are normally considered not only an affront to individuals but also actions affecting society as whole. The peculiarity of piracy is that it takes place in a sea zone where freedom is equal to the absence of any particular State jurisdiction. Accordingly, the right to punish piracy as a crime against mankind is bestowed upon all States.

Measured against piracy, the crimes of terrorism at sea differ in one important point: UNCLOS does only lift the flag State jurisdiction in connection with piracy. Since it remains silent *vis a vis* other crimes, it can be concluded that, when they are committed in the high seas, their punishment remains an exclusive matter for the flag State, and the boarding by armed forces of ships flying the flag of another States remains subject to the consent of the flag State. The 2005 SUA Protocol not only provides so, but also carefully regulates the relationship between the flag State and the boarding State throughout the procedures. Nothing more telling than these SUA provisions to analyze the limits to freedom of navigation in the high seas and interplay between this freedom and the basic human rights of the crew and the alleged criminals.

### **UNIVERSAL JURISDICTION OF THE PORT STATE TO COUNTERACT POLLUTION IN THE HIGH SEAS**

I wish to finish my talk with a reference to the right granted by UNCLOS to port States to undertake investigations and institute proceedings against foreign vessels for violation of antipollution rules and standards committed beyond their jurisdictional waters. Unlike SUA this is not an interception in the high seas to prevent criminal acts, but implies a restriction to freedom of navigation which, legally speaking, can only be addressed as an example of the irruption of environmental law into law of the sea. Traditionally the high seas were the very place where pollution could take place without incurring in violation of international law.

The incorporation of port State jurisdiction to punish environmental crimes committed beyond their territorial waters implies a momentous change in the field of international law and the law of the sea. Somehow the high seas have really become a *res communis* that is NOT *res nullius*.