INL3000 SELECTED TOPICS IN INTERNATIONAL LAW

The European Law Students' Association

MALTA

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International Criminal Law

Part I: Introduction and Enforcement
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Introduction

This may be considered a relatively new branch of law with some associating this area with the International Criminal Court statute only. This is, however, a mistake, as international criminal law, to a large extent, is decentralised, i.e., there is no one focal authority which is tasked with application and enforcement. ICL does not start and stop at the International Criminal Court statute but is far more complex and broader. As a general rule, criminal law is enforced territorially and is based intrinsically upon principles grounded upon territorial jurisdiction. There is a reason for this, however. The territory within which a crime committed is what is known as the forum convenience, the most suitable place where to prosecute, as possibly the accused is present, or the witnesses, or the documentary evidence, the scene of the crime is there etc. Hence, there is a more reasonable prospect of a conviction if one can prove one's case beyond reasonable doubt in situ. As one knows, territorial jurisdiction is the first ule to be applied from the procedural pint of view, even from an international point of view as international law expects States to prosecute persons who have allegedly committed a crime within the boundaries of that State. Note that this sounds like an obligation, and it is one, but it is also a right. Essentially the right is State sovereignty and one of the hallmarks thereof is the power and ability of the State to ensure respect to its criminal laws, namely by pursuing three allied obligations: first, prevention (or protection); second, prosecution; third, punishment.

These three are linked because if one adopts the theory by means of which one considers deterrents as a main objection of punishment as many jurists and judges do, one will soon realise that crimes are prevented when they are prosecuted and when there is a punishment meted out. Punishment can be a goal in itself, but it is also a means to an end because punishment can prevent other prospective crimes from being committed. The weakness of ICL is enforcement as it relies on a system of subsidiarity by means of which States are expected to perform their duties, i.e., a duty of care towards its citizens which incorporates the duty to prosecute when crimes are committed. In the same way that punishment can be a means to prevent more crimes, the lack of punishment or the lack of a prosecution is the breeding ground for the commission of other crimes. In fact, one will note that when we deal with ICL although it is a combination of various areas and fields of law, it is a branch of law in its own right. Depending on the applicable treaty, certain rights and obligations emanate from the actual literal interpretation of the treaty. In this context, IHL is a subset of ICL. Similarly, IHRL, although it has developed with a life of its own, it is very much related to ICL. Take, for example, the Genocide Convention of 1948 which is intended to protect the human rights of members within groups, preceding the Universal Declaration of Human Rights and has been referred to as one of the most important human rights instruments. This treaty may be a human rights instrument but really and truly it establishes that genocide is a crime under international

law. Up and until this point, genocide had been politicised to the extent that it was almost excusable by States. That is why the Convention was so criminalised, this in spite of the fact that it had already been criminalised by customary international law.

With regard to the International Criminal Court statute, a more recent development, one will note that it has been described too as a human rights instrument to the extent that some have actually argued that the statute is very similar to an international constitution, possibly more than the UN Charter. The International Criminal Court statute might get close to this because it establishes some basic principles of humanity and of international law, most basic that in article 25, individual criminal responsibility, a major development. The concept was crystalised in the Statute, but it had existed before. Really and truly, it was a development of the individual becoming a subject of international law. In the law of nations IL used to regulate the relationships between States only, whereas today it regulates the relationship between States, international institutions, and even individuals. We owe these developments to the development of human rights law itself. HRL has been crucial to ensure the individual becomes a subject of PIL, and possibly without HRL we would not have the protection we have today. Criminal law and ICL, including the Rome Statute for the INTERNATIONAL CRIMINAL COURT, has developed further HRL protection, and has been a source of inspiration for the continued development of HRL itself. If one looks at the Rome Statute, for example, pre-trial rights are explicitly stipulated whereas in many human rights' regional mechanisms (e.g., ECHR) does protect rights at the pre-trial stage but not explicitly (*vide* article 6 ECHR). A criminal charge follows various processes which lead to that charge (i.e., when a person is a mere person of interest, reasonable suspicion, interrogation, and the rights connected to thereto) and there are many rights which follow such processes but are not expressly stipulated in the ECHR, but in the Statute. Thus, we can see how the Rome Statute has qualified human rights protection. Another such example is that in many countries the prosecutor has the moral obligation to bring tender evidence both in favour and against the accused, an obligation made legal by the Rome Statute. These are examples of how the Rome Statute to the International Criminal Court has assisted HRL.

This subject has evolved as follows: Although ICL is not intrinsically linked to war per se, it largely developed as a result of the two World Wars. As one knows, a war brings with it a total lawlessness where nothing is regulated, and no governing law is imposed. After the First World War the preliminary attempt in the form of the League of Nations and the Treaty of Versailles to develop what was called an International Criminal Code. However, this did not materialise. There was an advisory committee tasked with the drafting of this Code and although there was an initial draft it was not adopted. Eventually, after the Second World War the London Charter effectively gave rights and powers to the International Military Tribunals to prosecute those responsible for the crimes committed. These were important from a conceptual point of view as it marked the first time that an international tribunal would have power and jurisdiction over individuals who were subject, because they were citizens of certain nations, to the laws of a particular State. In fact, at the time international criminal lawyers would argue that this was an impossibility. One of the main pleas was the lack of legitimacy of the tribunal itself because internationally it was unacceptable to many that an international tribunal to such an extent could be formed, prosecute, imprison, and execute. There was therefore opposition from a conceptual point of view, which was reflected in the pleas of the defence. It was ground-breaking for this very reason, however, as for the first time the international community gave the proper jurisdiction to a tribunal which was able to conduct a trial and, if guilt was found, convict and imprison. What was most important in the Nuremburg Trials was the judge-made law, especially the Nuremburg Principles. Here, we are dealing with a few principles of

international law still applicable today and which, to a large extent, if one placed them together cumulatively, one can summarise them in three main words: individual criminal responsibility.

These principles are as follows: first, the fact that an act can constitute a crime under international law although it is not punished domestically. In other words, if Germany did not punish torture of POWs at the time, and hence the law of Germany did not allow a prosecution for torture, that torture still constitutes a crime under international law. A related principle is that a crime punished domestically, is not necessarily a crime under international law, but simply violations of the local criminal law statute. Here, we see certain concepts develop in this case. Second, another important development from Nuremburg is that there is no exemption if the act committed does not constitute a crime locally. Most importantly, one will appreciate that wars are engendered by a chain of command that leads to the top, hence, a commander in chief can, by means of his or her decisions, literally trigger a world war.

A principle of international law developed to ensure the prevention of wars and ulterior crimes is that IL will not and cannot exempt heads of State on the pretext that they have diplomatic privileges and immunities. In a nutshell, functional immunities protect acts of heads of State when committed in their official capacity and in the performance of their duties. Nuremburg has told the world that crimes, and hence the order to commit crimes, can never be considered an official act because a state can never perform acts in an official capacity which are intrinsically illegal. This is reflected in the oft-repeated phrase: the rule of law, i.e., the equal subjection of all citizens towards the law. One cannot simply because one is the head of state order the commission of crimes and then argue that one was acting in one's official capacity. Up until a few decades ago this was extremely debated whilst it may seem obvious today. Similarly, there is no defence of superior orders. Therefore, if one's Commanding Officer orders one to commit crimes, one cannot plead that one has committed such crimes because one was so ordered. When these four principles are synthesised, one has, to a large extent, what is crystallised in the Rome Statute today, which is reflected in the various modes and methods through which one can be considered as responsible for a crime.

Why was there the need to enter into this detail? Because ICL does not deal with a crime which is simply committed at one point in time. Here we are dealing with crimes committed throughout a protracted span of time. War crimes is the typical example. Crimes against humanity are another such example as they rely on the requirement that they are in furtherance of a systematic attack against a civilian population. When Muammar Gaddafi ordered the killing of those protesting against his rule, the crimes were not committed at one fixed time, but over a protracted span in the form of a systematic, coordinated attack against a civilian population. This is what makes this area of the law different to domestic criminal law, i.e., the nature and type of the crimes dealt with. These crimes are acts of the State and so ICL forces the State's obligation to prosecute and punish when it fails to do so through international tribunals. No one could expect the attorney general of Libya to prosecute military commanders and Gaddafi himself, and so we see a clear conflict of interest. Here, we do not only have the inability to prosecute, but an unwillingness to do so. What is worse, in typical scenarios of ICL the State itself is committing the crimes. There must therefore be an external intrusion into the domestic affairs of the State to ensure justice is served, an exemption of the rule of non-interference in State sovereignty. The international community was therefore forced to create a body of laws to supersede the local criminal law should the need arise. We speak of two main words here: Unable to prosecute and Unwilling to prosecute.

The last main point relating to the Nuremburg principles is the right to a fair trial, which has developed much further since then. When one deals with crimes one should not limit oneself to the Statute only. It is a multilateral treaty built upon the consent of States which have bound themselves and undertaken to respect the treaty itself. However, it just one of the sources of ICL. Other examples include the four Geneva Conventions. There were then as well, after Nuremburg, a lull in ICL development during the Cold War until 1989. Things began to move again when the international community reacted to the atrocities of the Balkan wars and the genocide in Rwanda. It was an era when things were televised, and one could know on a live basis what was happening in real time, and all was duly documented. The former Yugoslavia and Rwandan tribunals set the stage for the International Criminal Court Statute. Unfortunately, the international community was reactive rather than pre-emptive, but they set the stage because, for the first time, the ICTY and the ICTR were the result of resolutions of the UN. The fact that these are creations of the UN says a lot: first, the international community embodied in the UN itself felt that an ad hoc international criminal tribunal had to be created to prosecute the horrors of these wars as the result of an inability and unwillingness to prosecute the perpetrators of these genocides in which even judges and prosecutors were killed. The State was in a situation of total collapse, what is known as inability, and so help was provided in the form of the ICTR. In the case of the former Yugoslavia the situation was different as the political and military leadership remained in place and the apparatus of the State functioned. As the result of the crimes perpetrated by the State itself, we therefore find a situation of unwillingness to prosecute, a situation which got out of hand completely and led to massive international harm, including a massive influx of migrants from the Balkans to the whole world and loss of life. Bosnian women, for example, were not killed, but raped. The crime of rape was not used as a means to a satisfactory end, but as a weapon of war. Bosnians are largely Muslim and with their belief a girl or a woman who was raped, besides feeling a sense of shame, would generally leave the place where she was living. Rape would therefore lead to ethnic cleansing. As a result, others would therefore take the place of those who left. Slobodan Milošević was brought before the ICTY accused of genocide and other crimes whilst still arguing to be the current head of State of Serbia. At the same time Serbia was the defendant in a claim against it by Bosnia. The development ensuing from these cases have developed in such a way that those in power within the State can be punished.

The areas of the law can coexist and run in parallel, but their ultimate aim is different. Criminal law is punitive whilst the law on State responsibility is reparational. ICL heavily relies on individual criminal responsibility whereas the ICJ can determine what is known as State aggravated responsibility (when the State perpetrates a crime by means of its political and military leadership it is probably committing the most heinous crime envisaged in ICL). Here we have two different branches of law which can coexist. E.g., when in February of 2006, during the proceedings against Milošević took place in the International Criminal Court and he claimed that he should be party to those proceedings before the ICJ as a head of State (not to be confused with the case brought by Bosnia against the State of Serbia for the crime of genocide and the failure to prevent it before the ICJ). A State has an obligation not only to ensure that it prosecutes crimes committed, but to use all the legal means possible, including but not only legislation, to prevent such crimes from taking place. If one speaks of the trafficking of human beings, for example, the State must, to prevent it, *inter alia*, ensure education in schools, avoid extreme poverty, ensure no labour exploitation, control State borders to prevent migrant smuggling, prosecute corruption, ensure proper immigration controls, issue permits, visas, passports, etc. after due diligence, monitor entertainment systems, brothels, and other means of entertainment, and updating current best practices. This demonstrates the many tools at the State's disposal to prevent one particular crime.

One of the major ways States can intervene in domestic affairs is by exercising universal jurisdiction. It may not have any links with the genocide committed in another State, but it would have the right to intervene. If Maltese persons are committing genocide in Malta but are still physically therein, States can only enforce universal jurisdiction if the individuals leave Maltese territory. However, countries like Italy and the Netherlands which allow judgements in absentia can exercise universal jurisdiction even if the individuals do not leave, triggering an international arrest warrant. Thus, through the power of ICL, rendering an individual a prisoner in his own home. Upon his arrest, Saddam Hussein, once the leader of Iraq, was found literally in a ventilated hole in the ground. Generally, proceedings take place in a neutral State. Complication arises when we find unwillingness which is itself shrouded by States which offer the impression of a willingness to prosecute, sometimes by prosecuting a few choice individuals, without revealing the ultimate impression of offering amnesty to those convicted years after. In Romania, under Nicolae Ceaușescu, those convicted were often released after a few years as the result of falsified evidence of a change in character. In response to this abuse (because the moment the person is tried and convicted they gain *ne bis in idem* protection), the International Criminal Court devised a system through which it could identify whether a prosecution was *bone fide* or not and if it is proven to be *male fide* the *ne bis in idem* rule will not apply, meaning those convicted under *male fide* prosecutions remain subject to prosecution by the International Criminal Court for the same facts.

The International Criminal Court Statute contributed so heavily to international law by crystalising the basic principles of customary international law; it made explicit what seemed to have been general uniform practice. In doing so, it consolidated the principle of individual criminal responsibility and it dispelled pleas and defences which were previously tendered at Nuremberg, such as *nullum crimen sine lege.* The Statute itself therefore contributed extremely heavily to human rights law. The International Criminal Court Statute also incorporates the principles of procedural rules for international criminal law. the ICTY and ICTR Statutes also aided greatly in the development of the procedural rules and evidence in ICL trials.

The third main legislative text of the International Criminal Court is the elements of crimes. The International Criminal Court wanted to avoid any allegation of breach of *nullum crimen sine lege* so much that for every crime there is a corresponding list of elements. To that end, the test is not only quantitative, but qualitative, and it is the latter which renders a crime grave. Hence, we see how international criminal law has developed in such a manner as to protect those groups which are most truly vulnerable. The common denominators in all of these crimes of war are that they are not prosecuted, at which point international criminal law is introduced. One must distinguish the platforms on which criminal law operates. The criminal law operates on a local platform whilst ICL operates on an international platform. However, one must not be misled into thinking that the fact that a crime is penetrated on a specific local area means ICL is not applicable. The word ‘international’ does not necessitate the involvement of many States or jurisdictions.

The Core Crimes of the Rome Statute

These crimes are there as violations of the peremptory norms of IL and are largely on the Statute because they have been crimes punishable under CIL before the Statute was signed. Certain other crimes, which are still extremely serious, can involve a lot of pain and hardship but would not have made it to Statute because they are not punishable under CIL or necessarily violations of *jus cogens* norms.

Genocide

Colloquially, genocide is the extermination of a particular group. When one examines this concept, one will note that this is similar to what journalists refer to as ethnic cleansing, a term often greatly exaggerated. Like at the local level, both the *mens rea* and the *actus reus* are required for this crime to be proven. When one reads reports that the attacks on 9/11 was a case of genocide it is therefore incorrect because the necessary ingredients are not satisfied. The ingredients are:

Actus reus: In the international community there is general consensus on this definition. Legal certainty is crucial in ICL, and it gives assurances. This definition was coined in 1948 and the Rome Statute, in article 6, defined genocide as such:

> **Article 6 Genocide**
> *For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:*
> (a) *Killing members of the group;*
> (b) *Causing serious bodily or mental harm to members of the group;*
> (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> (d) *Imposing measures intended to prevent births within the group;*
> (e) *Forcibly transferring children of the group to another group.*

Here, States undertake to prevent and to punish genocide. Criminal law is generally reactive, declaring the existence of criminality after the fact. The idea of a prevention mechanism introduces a new dimension by creating a binding obligation that States take steps to prevent the crime of genocide. The Argentinians described the spirit of this law as *'never again'*, hoping that genocide could be prevented. In reality, the horrors in Rwanda and the former Yugoslavia proved otherwise. The first section of the law is telling, bearing in mind the obligation to prevent. International Criminal Law needs to intervene in situations where States are unable or unwilling to prosecute. When an organisation claiming to be a State controls a territory and applies its own laws there, the States involved are unable to prosecute. The hostage taking that took place in Colombia by the FARC continued to such an extent that the judicial police were unable to enter the territory. Here we have scenarios were organisations attempt to gain an illegitimate legitimacy in a given area by functioning as a State. This is the difference between these organisations and lone terrorists. Although both are capable of massive damage, those crimes committed by organisations by Farc, Daesh, ISIS, etc., are core crimes under the Rome Statute because of the State-like status of the perpetrators. It is the contextual element of these crimes is what gives rise to a crime against humanity, in the sense that the crimes are part of a series of events leading to the furtherance of a goal. To that end, a crime against humanity is a widespread and systematic attack against a civilian population.

One of the major contributions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is the creation of an exhaustive list of overt acts which constitute genocide, as found in article II:

Article II
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
(a) *Killing members of the group;*
(b) *Causing serious bodily or mental harm to members of the group;*
(c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
(d) *Imposing measures intended to prevent births within the group;*
(e) *Forcibly transferring children of the group to another group.*

Mens Rea: First, the *mens rea* is required for the individual, underlying crime as listed in the above-mentioned article II. Here, however, the law demands an ulterior *mens rea*, known as the *dolus specialis*, i.e., the intention to destroy the group in whole or in part. One commits an act of harm against an individual as part of a widespread and systematic campaign of harm and serious damage to a particular group either in part or in whole (for genocide to subsist it is not necessary that the entire group be destroyed). For genocide to be committed, according to the definition, the victim must be part of a national, ethnic, racial, or religious group. The main characteristic of these four groups, and the reason as to why the Convention did not include political or social groups, is because the law wishes to protect the most vulnerable who were born into a group through no will of their own. The law seeks to protect permanent and stable groups and individuals who belong to such groups through no choice of their own. Here, we already see the nature of the law and the extent to which the Convention protects individuals.

Besides the responsibility to protect, what is important here is the various modes of liability which include what are known as inchoate crimes, i.e., crimes which do not give rise to a result (such as solicitation or attempt). That is why, in article III, the Convention punishes the following act:

Article III
The following acts shall be punishable:
(a) *Genocide;*
(b) *Conspiracy to commit genocide;*
(c) *Direct and public incitement to commit genocide;*
(d) *Attempt to commit genocide;*
(e) *Complicity in genocide.*

It is an advantage of this provision that the law considers other modes of liability in order to invoke the preventative mechanism of the offence. In ICL major responsibility lies far away from the scene of the crime, unlike in national criminal law, *viz*., it lies in those individuals with command and control over those who perpetrate the crimes constituting genocide. This is confirmed in article 25 of the Rome Statute on individual criminal responsibility. It is difficult to measure such distant responsibility and so prosecutors tend to focus on the actual persons who developed an organisational policy and ordered the crimes. The difficulty in proving genocide is that *mens rea* can be proved objectively whilst being fundamentally subjective. The prosecutor is attempting to prove the foresight and desire of the perpetrators at the moment

of the commission of the crime. The ICTY was a major contributor to war crimes, but the ICTR was particularly important in the development of the offence of genocide by contributing to particular the offence of genocidal rape. Although rape is not one of the five *actus rea,* but it can be proved that rape itself was a weapon used in a war as a measure intended to prevent births. This was proven by presumptions of fact, by the scale of the atrocities, by the nature of the atrocities, by what happened before, during, and after the atrocities, etc. If after the rapes persons were thrown into areas in order to be placed far from where the rape was committed the intention was clearly to disband the group.

Another notable difference between local and international criminal law concerns the penological aspect thereof. Many justice systems have developed orientations which favour rehabilitation as an objective of punishment. Cap. 156 of the Laws of Malta, in fact, is known as the Restorative Justice Act, as punishment tries to restore the dignity and anything else which the victim has lost as the result of the crime. This Act refers to victim-offender mediation, and also contemplates situations of eligibility for parole. ICL has a completely different platform as therein one finds it difficult to reconcile the importance of rehabilitation in the context of punishment. The ultimate objective of ICL leans more towards punishment, deterrence, and retribution as opposed to the rehabilitation of the offender. The International Criminal Court Statute itself, in the preamble, establishes itself in the fight against impunity through the deterrence of the commission of other crimes.

Another principle which explains the choice of these core crimes over others is that they are the most serious crimes of concern to the international community for multiple reasons: first, because the territorial State does not punish them (or may even be committing them, both a flagrant breach of the obligation to deter such crimes); second, that these crimes are often committed by those with a duty of care towards the group making it in the most vulnerable position it could possibly be (hence the need for the international community to step in and prosecute on their behalf). The need to send a clear message on the internationalisation of the rule of law is the direct result of the rise of ICL. These offences give rise to *hostis humani generis* (i.e., enemies of all mankind), as the perpetrators of such crimes are not just enemies of one group, but of all mankind. As such, in ICL we find competing requests amongst States who demand the extradition of a particular individual. The International Criminal Court Statute itself determines how rules of international law should apply and creates a hierarchy for these requests.

The Genocide Convention excludes the consideration of genocide as a political offence. Genocide is committed in a rather politicised context and the political offence exception is an exception to the extradition of an individual. As a general rule, the political offence exception impedes extraditions, and the Genocide Convention makes it clear that genocide as a political offence cannot give rise to such an impediment.

With regard to jurisdiction the Genocide Convention offers it purely to the ICJ in Article 9:

> **Article IX**
> *Disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.*

Crimes against humanity differ from genocide by not requiring the intent to destroy. Another such difference is that the former is not holistically punished by one multilateral convention but by many. Crimes against humanity are characterised by an organisational policy (note the absence of the word 'State'). If the criminal organisation is not robust and solid enough to not have State-like features, cannot vaunt control over land, and cannot endanger the power of the State, but is a mere organisation of a few who cause public disturbance but not such as to trigger the attention of the international community and endanger stability and security in a region, in such case the international harm principle is not triggered. Such an organisation is still guilty of crimes, but not of crimes against humanity. It would be guilty of local crimes or, possibly, of transnational organised crimes (*vide* the UNCATOC as supplemented by the Palermo Protocols). In TOCs the State is a victim and is therefore not unwilling or unable to prosecute. Many a time in core crimes the State is involves somehow, either as a perpetrator or as a complicit party through non-prosecution. The main difference is that these crimes are carried out for profit and that the State has an interest in the prosecution of these crimes. As such, there is no need for the international element of prosecutions to take place. These offences are not perpetrated by organisations of such a magnitude as to endanger the ability of the State to function in a given area or to prosecute.

The widespread and systematic requirements and the organisational policy requirements are therefore the main contextual elements of these crimes. Take, for example, the immolation of a Jordanian pilot by Daesh members. If he had been killed in any other context it would have been wilful homicide, but as part of the surrounding armed conflict this particular instance was rendered a war crime. Had this instance taken part amidst widespread or systematic attacks against a civilian population then this individual instance could have alternatively been a crime against humanity. The ICTY determined that the killing of Bosnian Muslims only in one city constitutes genocide as an attack against part of the group in a widespread and systematic fashion. Unlike war crimes, there is no such exhaustive list of crimes against humanity as the law includes an umbrella provision by referring to other inhumane acts. To that end, the American philosopher David Luban described crimes against humanity as *"politics gone cancerous".* Crimes against humanity are often so systematic that in Argentina there were so many cases of forced disappearances that the courts ruled that when an individual disappeared it was presumed that such a disappearance was forced.

Jurisdiction

In trans-jurisdictional crimes many different jurisdictions can be invoked. States have a duty of care towards the citizens in the territory and a duty to protect them. By prosecuting and punishing, States are also protecting individuals from prospective crimes. Take, for example, the Lockerbie case. When a crime has a trans-boundary nature and various States have an interest, we have a multi-jurisdictional scenario. On the other hand, we can find an entirely localised crime that is still a crime under international law.

When States completely refuse to exercise their jurisdiction, there are cases where the INTERNATIONAL CRIMINAL COURT can exercise a very limited jurisdiction, *ratione temporis,* i.e., any crime carried out before the coming into effect of the Statute cannot be prosecuted because the Rome Statute is a multilateral Treaty built upon the consent of States. The International Criminal Court is limited in terms of time as well as subject matter, *ratione materie*, i.e., the fact that they can only prosecute those crimes resulting from the Statute. What elevated these crimes to the stature of a core crime is the fact that these crimes have always been considered as crimes under CIL as well as the fact that because these crimes have always been considered as such, hence even before they were explicitly penalised under a Convention,

they breach a *jus cogens* norm, i.e., a norm which can admit of no exception or derogation. One such consequence of a crime under international law which found its way in the Statute, that is, a core crime, as opposed to a transnational organised crime, is an important obligation under international law, *aut dedire aut judicare*, i.e., the obligation to extradite or prosecute.

A State has an erga omnes obligation to either extradite or prosecute an individual who is in its territory and subject to an international arrest warrant, or who is wanted by a State. One cannot simply wash one's hands of this situation as a State, but it becomes an obligation under international law if one cannot or does not want to prosecute. It may be the contrary, where one does not wish to extradite because it perceives that if this were to take place the individual would be tortured or subject to the death penalty. In this case the person must either be prosecuted or subjected to prosecution, such as through multilateral structures, such as the ICJ, which determines the liability of States as a dispute-resolution mechanism. Following the case of *Belgium v. Senegal* (2012), the African Union established the Extraordinary African Chambers to ensure justice could be properly delivered. This illustrates the concept of complementarity, that is, the International Criminal Court will supplement national jurisdictions through multiple means: by assuming national jurisdiction if the State is unable or unwilling to prosecute, helping national justice systems in their daily management of the courts, training of prosecutors, proposals for amendments to law, transposition of laws, suggestions for cooperation with neighbouring States, mutual legal assistance, the improvement of legal aid within a State, ratification of Treaties, budgeting, financing, training of judges and magistrates, proposals for rule of law mechanisms, recommendations for improvements in the system, etc. In fact, the International Criminal Court does this through the use of a complementarity toolkit.

Jurisdiction *ratione loci*, i.e., jurisdiction in terms of space, means the International Criminal Court can either prosecute crimes committed in the signatories of the Rome Statute, or by their nationals. There are situations where one can have the acceptance of jurisdiction of the International Criminal Court without acceding to the Statute itself, as per section 12(3). The International Criminal Court structure is very different to a national structure, in the sense that the triggering mechanisms differ in both. These mechanisms are the ways in which a case can end up before the International Criminal Court. If one is in Malta and there is an allegation of a crime it follows a structure before the matter is brought before the criminal courts. In the International Criminal Court there are three main methods: first, a State referral against individuals in another State (the International Criminal Court can only prosecute individuals); second, the prosecutor *proprio motu* (the prosecutor can, further to investigations he wishes to conduct, refer matters to the pre-trial chamber review which, with the preliminary examination of the prosecutor and the findings thereof, see if there is a reasonable basis to proceed against an individual, which lies between the *prima facie* and the balance of probabilities standard); third, this process relies upon a political organ, the UNSC, which confers jurisdiction to the INTERNATIONAL CRIMINAL COURT, as has happened in the case of Libya (in spite of the fact that Libya is not a party to the Rome Statute), by referring cases thereto, as per articles 15 and 13(b) of the Rome Statute). This final mechanism illustrates a certain power of the International Criminal Court to act even without the explicit consent of a State. This is conceptually ground-breaking as it shows the extent to which the international community is willing to fight impunity at all costs. This also took place in the case of the Darfur genocide in Sudan.

The International Criminal Court in a sense is weak as it cannot invoke the universal jurisdiction ground, whereas certain national criminal courts can. However, the

INTERNATIONAL CRIMINAL COURT has the luxury of also being placed in a situation where its decision to a large extent goes unchecked as it has what is called *'kompetenz-kompetenz'*, meaning it is the arbiter of its own jurisdiction. Therefore, it is the International Criminal Court itself which has to determine whether it has jurisdiction or not. Some would say that the International Criminal Court is a powerless court as the result of these jurisdictional limitations. But others would counter this by saying that it has the ultimate power, i.e., the power to decide one's jurisdiction. Some have argued that the International Criminal Court's only limitations result from the Statute itself which gives it a certain flexibility, and when one has a certain flexibility and leeway, courts have a tendency to adopt a teleological approach, that is, a judicial law-making approach. In domestic structures we are used to a structured system with a set Code, something which has no counterpart in international law. Therefore, international courts in order to enhance the progressive development of international law must occasionally indulge in innovative ways of thinking, but always within the purview of the constitutive instrument which gives them authority *ab initio*, i.e., the Rome Statute itself. Ultimately, these powers are crucial and in international law they are even more important.

Those tried at Nuremberg pleaded, *inter alia*, a lack of jurisdiction on the part of the tribunal. The idea of such an international tribunal trying individuals from a sovereign State was foreign at the time whilst today such efforts are much lauded. International criminal law has had to embrace a *corpus juris* which is supranational as the result of the fact that States are occasionally unwilling or unable to prosecute. ICL is, by design, catered specifically for this *lacuna.* Other structures beyond the INTERNATIONAL CRIMINAL COURT exist which the international community has helped to create when no other structure can assume jurisdiction. When the INTERNATIONAL CRIMINAL COURT has no jurisdiction because of one of the limitations inherent in the Rome Statute, the international community has still embarked onto a certain idea which guarantees that, at the very least, those suspected of serious crimes be prosecuted. This ideal that some form of prosecution must be undertaken has prevailed such that when the International Criminal Court does not have jurisdiction or should not investigate for political reasons, a system of hybrid tribunals is put in place to bridge the gap and ensure that justice prevails above all else. Hybrid tribunals are as such because in some form or another they rely on other systems. Take, for example, the hybrid Special Tribunal for Lebanon which was chaired by an Italian professor, or a tribunal operating on foreign funding. Another important feature of hybridity could be the applicable law. take, for example, the case of Sierra Leone which, in its criminal code, did not have clear prohibitions on the crimes prosecuted, thus requiring the application of international criminal law. The international community moved towards hybridity where the International Criminal Court lacked jurisdiction, and as then result of advantages distinct to hybridity. Criminal law has a distinct territoriality which is opened up to hybridity through support from overseas.

Hybridity shows that the local State is willing to pursue the course of justice, meaning the message sent by the local State is a positive one. The local State also benefits from the advantages inherent in prosecution *in situ* as well as from the knowledge, training, and expertise from the various experts involved. Hybridity was to a large extent the rule until a few years ago. Although at an international community level some talk of hybridity still takes place, there is a move towards specialised judicial panels for the purposes of enforcing ICL. There are talks, for example vis-à-vis Ukraine and Russia, that could prosecute those crimes committed. These panels are generally the construct of the willingness of many States, sometimes within the auspices of an *ad hoc* convention. The need to prosecute is so important it emerges also from the Rome Statute itself and the international community is so willing to prosecute that when it cannot directly because no tribunal was formed, it has found ways and

means at the very least to collect and preserve evidence. The international community has created the International Independent Impartial Investigative Mechanism (IIIM), a quasi-prosecutorial structure which collects evidence, places such evidence in a repository, and preserves it for future prosecutions. This is similar to the local structure of the magisterial inquiry. The scope of this structure is obvious, it allows the guilty to be punished in the future when the circumstances are such that prosecutions are possible.

One of the ways in which ICL is hampered is by reason of certain special measures adopted by States which are designed to disrupt the judicial process or to ensure that there is no judicial process *ab initio*. One such measure is the amnesty mechanism which, unlike the parole or pardon mechanisms, is not granted after the criminal charge or convictions are issued. Instead, amnesties are granted constitutionally and as a result no political administration can come to change them subsequently. These amnesty laws determine that throughout a particular period those responsible for certain grave crimes should not be prosecuted on the pretext of a period of democratisation. Because of these politically sensitive cases, however, in many instances in spite of these amnesty laws, courts have nullified these provisions *ab initio.* Here we see the link in the enforcement between human rights law and criminal law, which both typically have completely different scopes of application. The unwillingness and inability admissibility test to a large extent mirrors the tests employed by human rights courts in determining whether States have fulfilled their positive obligations. Under the ECtHR States, including Malta, have positive obligations to prevent the breach of human rights. Similarly, other structures, reflect one another because the evidence which can be tendered to prove that the State is either unable or unwilling before the International Criminal Court can be the same evidence which can be tendered for an applicant to argue that the State is unable or unwilling to prosecute. Many a time these are the same pieces of evidence. ICL has moved towards creating a more victim-oriented criminal justice system. Incidentally, in judgements where amnesties were declared unconstitutional demonstrated the ultimate power of the courts.

The fact that States are willing to relinquish the power to prosecute individuals who hail from or committed crimes on or against their territory is an immense indication of the Rome Statute Member States' willingness to prosecute and confidence in their ability to mete out justice. The preamble to the Statute in a sense established the governing criteria for ICL setting out its goals and ambitions:

> ***Conscious*** *that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,*
>
> ***Mindful*** *that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,*
>
> ***Recognizing*** *that such grave crimes threaten the peace, security, and well-being of the world,*
>
> ***Affirming*** *that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,*

Determined *to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,*

Recalling *that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,*

Reaffirming *the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,*

Emphasizing *in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,*

Determined *to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,*

Emphasizing *that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,*

Resolved *to guarantee lasting respect for and the enforcement of international justice.*

Admissibility

Admissibility, on the other hand, differs from jurisdiction. Whereas in jurisdiction we peak of the general legal power of the court, in admissibility we speak of the appropriateness to deal with a specific situation. The International Criminal Court can have jurisdiction, but the case will not be admissible, but for it to be as such the International Criminal Court must have jurisdiction. Admissibility relies on state action and genuineness. The state action test is simple as the International Criminal Court asks one question: *did the State where the crime was committed investigate and prosecute?* The International Criminal Court must consider the evidence to determine whether the State prosecuted or at least investigated. At times we can stop here, but there are instances where we must move on to the second. If the State did not investigate and prosecute, we do not need to go on to test two as the case would be admissible, meaning the International Criminal Court would be allowed to exercise jurisdiction by hearing the case. The rule is that there is a *juris tantum* presumption that the State has investigated and prosecuted because that is what is expected of it, but the International Criminal Court jurisdiction is the exception to the rule. There are instances where the State action test is not enough, thus leading to the second test of genuineness. Here, the State has taken action and it appears that it has performed its job. But the International Criminal Court must analyse and measure the extent to which the prosecution was genuine. If the International Criminal Court determines that the prosecution was genuine it would not interfere. But if the International

Criminal Court determines that the prosecution was in *male fides* the case becomes admissible. Bad faith in a prosecution is noticed by indicators. Worse still, are instances where the national courts appear at face value to have provided a valid prosecution, but pardons the individual after the fact, thus shielding them from further prosecution as the result of *ne bis in idem.*

The admissibility test starts with a general rule, and the presumption is that the International Criminal Court does not have jurisdiction, that is, inadmissibility is presumed. The exception to the rule is that the case is admissible. This is the result of the fact that States are presumed to enforce international law in good faith and when States do not do so, when the International Criminal Court has jurisdiction, the case becomes admissible.

The Right to a Fair Trial

This right is most definitely a hallmark of international law. It is reflected in many multilateral conventions, stipulated in various declarations of principles, it found its way in international treaties like the ICCPR, it is applied continentally, regionally, and nationally. The word trial refers also to fair hearings and the word hearing is generally used as it includes both civil law and criminal law contexts. The deprivation of one's liberty must only be undertaken after a rigorous process. The protection our laws afford to this process is such that anyone has the right to a fair and public trial before an independent and impartial court established by law. The publicity of the trial is a safeguard of the accused, but the absence thereof can also be a measure imposed to protect the identity of the victim or a witness. Fairness is a difficult concept. It can be both objective and subjective, however it can be described in three words: equality of arms. This does not mean total equality, but it is the opportunity to plead one's case in a situation whereby one is not at a substantial disadvantage. One's right to prepare an adequate defence, which includes the need for time and proper facilities, embraces the right to be notified clearly with the charges against one. An overarching right is at least to know one's rights. One's right to legal representation, for example, is indicative of the overarching right not to eb wrongfully convicted.

To determine a fair trial, proceedings must be observed in their totality. A trial comes with many circumstances, decrees, provisional decisions, etc. The presumption of innocence is another essential element of the right to a fair trial, and it is illustrated by the burden of proof, an absence of wild statements made by high-ranking public officials, and the standard of proof. Independence and impartiality of the judge is another hallmark as the judge may, amongst other things, sway the jurors who naturally look to him for guidance. In some jurisdictions, the victim has the right to participate in proceedings as a *parte civile*, giving them a limited number of rights, such as the right to counsel, to make final submissions on guilt and punishment, and to examine and cross-examine witnesses. The right to a fair trial, however, is not absolute, and exceptions do exist. The only absolute rights are the *jus cogens* norms, all others have exceptions. Criminal tribunals have determined that there could be extraordinary measures adopted consisting in witness anonymity, voice distortion, and even witnesses testifying being a curtain, and hence no image of their person. these measures were adopted to balance the rights of the accused to cross examine witnesses and those of the witnesses themselves to be able to testify, as in many cases these witnesses were victims too. Generally, the conditions and criteria used to determine that one has the right to testify without publicising one's identity are as follows:

1. There must be a real fear for the witness or his/her family,
2. The testimony must be relevant and important for the case of the prosecution,

3. The tribunal must be convinced, at least *prima facie*, that the witness is not untrustworthy,
4. The lack of an effective witness protection program in the country,
5. That witness anonymity is a measure of last resort (i.e., that the prosecutor's case cannot be proven without it).

Introduction to Air and Space Law

An Introduction to Public International Law

Sources of Public International Law

The simplest split in law is between national and international law and another such split in the latter is public and private international law. The latter is the law applicable between persons in an international relationship whilst the former is that law which operates outside and between States. PIL is different to national law in terms of structure. Whilst the latter follows a hierarchical structure with its three branches of government, the former is made up of a horizontal structure as the States are the one's legislating, choosing whether or not to be bound by legislation, and the ones enforcing international law and meting out punishments. The main differences between the two are that there is no singular legislature creating legislation applicable to all States, there is no court with binding jurisdiction, and there is no singular system of punishments. What there is in the international context is the Security Council of the United Nations, which, according to Chapter 7 of the Charter of the UN can enforce certain sanctions but only in certain limited circumstances.

The sources of PIL are understood to mean the analysis of the process by which rules of international law emerge, i.e., an analysis of how rules of PIL emerge. Before analysing the said sources, it is worth noting a fundamental distinction between them, *viz.*, that between hard and soft law. The former consists of legally binding obligations whilst the latter deals with non-legally binding preferences. Hard law refers to legally binding obligations that are precise whilst soft law refers to non-legally binding instruments used in contemporary international relations. The main difference is that hard law must or shall be applied whilst soft law should. Article 38 of the ICJ Statute is the epicentre of those sources of law and but does not create these sources, simply reflecting them instead. When the drafters of the Charter of the UN and the Statute of the ICJ were drafting they wrote in article 38 what they believed to be the sources of international law today and it still holds true today. This article contains two types of sources: material and formal sources. The latter are the primary sources of PIL and are those from which a legal rule derives its legal validity. The formal sources are the rule *per se.* The material, i.e., secondary, sources denote the provenance of a formal source, i.e., they denote what the formal source is.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations ;
    d. subject to the provisions of Article 59, judicial decisions, and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bond* if the parties agree thereto.

Articles 1 (a)-(c) consist of the formal sources. Article 1 (d) consists of the material sources meaning they do not create the law but instead quote and interpret it. One should not presume that obligations on States exist, instead they must be found in one of the listed sources. In the *SS Lotus case* (PCIJ) it was said that international law governs relationships between States and that the rules thereof originate from their own free will. It was held that restrictions upon the independence of States cannot therefore be presumed.

Treaties and CIL are the most common sources of PIL. Treaties themselves are an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; Art. 2(1), Vienna Convention on the Law of Treaties 1969. Treaties stipulate a time at which it should come into force, typically doing so when a certain number of States have ratified it. Article 31 of that same Treaty states *"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".* This particular Treaty has not been ratified by many States but there appears to be agreement in the international community that this article 31 appears to be a principle of CIL, making it a formal source of PIL. Note that there are two types of States: monist and dualist States. When a State ratifies a treaty, they are bound thereby on the international plane. According to the monist view, once a treaty is ratified it applies on both the national and international levels without the need to act. On the other hand, the dualist approach stipulates that, to have binding effect nationally, a treaty must be legislated in the national parliament.

Customary international law, meanwhile, according to the International Law Commission, refers to those rules of international law that derive from and reflect a general practice accepted as law. There is naturally an element of subjectivity to CIL as it lacks the black and white text of treaties, and to that end CIL has both an objective and subjective element to it; both must be satisfied for it to be law. The objective component is State practice, which refers to both acts and omissions by the State. This depends on the facts of the case and is measured accordingly. The subjective element is known as *opinio juris*, which, according to the ICJ in the North Sea Continental Shelf Case 1969, is the belief of a State that the State practice is obligatory by the existence of a rule of law requiring it. In this case the ICJ was quoted as saying that "State practice must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. the need for such a belief is implicit in the very notion of *opinio juris*". A resolution can have both legally binding and non-legally binding provisions, in spite of the fact that they constitute hard law.

Subjects of Public International Law

The foremost subjects are States: they create the law, decide whether they would be subject to it, enforce the law, etc. The second most popular subject would be international organisations, such as the United Nations. The Montevideo Convention of 1933 gives the criteria of Statehood, i.e., what is required in order for a group of people in a specified territory with a government to be defined or considered legally as a State. The four elements imposed are:

I. Territory,
II. Population,
III. Government,
IV. The capacity to enter into relations with other States ('independence').

The final criterion of recognition has been added into the modern thought surrounding Statehood. One school of thought, known as the constitutive school, argues that a State must be recognised by other States in order to be one. On the other hand, the declaratory school argues that this is not necessary. These two schools will go on to have a heavy weight in a political context. Once a State satisfies the criteria of the Convention, the two most important principles of being a State are sovereignty and equality. These principles are evidenced in all of public international law. Being sovereign, States do not accept any superior authority and has exclusive authority to impose and enforce commands on any individual in its territory. The State is at the pinnacle of PIL because it is sovereign. What follows then is the principle of equality of sovereignty, that is to say all States are equal, irrespective of size or any other factor.

State responsibility is also evidenced throughout PIL, and it refers to the fact that if a State does something wrongful or wrong, then in principle it must respond. In international law, reference in terms of State responsibility is always made to internationally wrongful acts. The Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 is technically soft law but it has been opined that most of the articles on State responsibility reflect principles of CIL, meaning they would still apply and bind States. Article 1 of this draft states "Every internationally wrongful act of a State entails the international responsibility of that State". Article 2, meanwhile, states "There is an internationally wrongful act of a State when conduct consisting of an action or omission", thus opening the possibility of wrongful omissions. What makes an act an act of State is defined in Chapter 2 of these articles, known as attribution of acts or omissions to a State. The articles also provide for circumstances that preclude wrongfulness by offering mitigating factors.

The United Nations

Two of the more relevant UN special organisations for this topic are the International Civil Aviation Organisation (ICAO) and the International Telecommunications Union (ITU). Also relevant is the Committee on the Peaceful Uses of Outer Space (COPUOS).

International Air Law

Air law is a body of rules governing the use of airspace and its benefits for aviation, the travelling public, undertakings, and the States of the world. In Roman Law there was a simple legislation of air law, according to which there was a distinction between air and airspace. The former was common to all, whilst the latter was either under the control of the State or subject to private ownership, depending on the land beneath it. in 1784 police directives in France stated that in order to fly a balloon one needed permission. This demonstrates the fact that in many cases the law is continuously catching up to new technology as opposed to being proactive. In 1903 there was a renewed interest in aviation with the invention of the Wright brothers' flying machine. There are various sources of air law today, namely treaties, CIL, air services agreements, and other miscellaneous sources such as national law and jurisprudence. Air law does not only include aviation and aircraft financing, but also includes private international air law, for instance in case of crash, and competition law.

The Chicago Convention on Civil Aviation 1944

Prior to this there was the Paris Convention relating to Aerial Navigation (1919). Both Treaties embody the cautious outlook there was at the two respective times at both Wars' ends. There was a renewed drive to use aviation to boost the global economy and reconstruction efforts and both drafters had this in mind. The Chicago Convention can be considered the constitution of the air and it currently has 193 Member States, with Malta ratifying it in 1965. This Convention

is currently the one with the most signatories, followed by the ITU Constitution, with 191 signatories. The basic principles of this Convention are co-operation, non-discrimination, and uniformity. The Convention had to ensure that all States would apply the same standards of safety and uniformity.

Along with this Convention are the Standards and Recommended Practices (SARPs). *Vide* articles 37 and 54(1) of the CC, as well as those annexes to the Convention. The CC is the convention on international civil aviation. Aviation refers to the flying or operating of aircraft, whilst aircraft, in turn refers to an object capable of flying and carrying persons or goods. The CC applies to aviation that is civil and international, but article 3(a) CC says that *"This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft".* State aircraft is in turn defined in article 3(b) as *"aircraft used in military, customs and police services".* These three activities are *acta jure imperii*, i.e., acts of States which are sovereign. It is understood that the CC also does not apply to, for instance, firefighting aircraft, aircraft used by the government for surveying purposes, etc. If a civil aircraft is transporting a head of State, it is considered as being of a mixed nature. State aircraft, however, must still comply with safety standards, with article 3(d) stating that *"the contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft".* With regard to unmanned aircraft, they are defined as aircraft intended to operate with no pilot onboard. EU Law also defines it as any aircraft operating or designed to operate autonomously or to be piloted remotely or without a pilot onboard.

Topic III: International Dispute Settlement

This shall consider the various procedures used by States to settle their disputes peacefully. This, of course, is designed to avert the unlawful and lawful use of force. An international dispute is to be differentiated from an international conflict, with the former referring to a more specified issue characterised by a claim and a counterclaim, whilst the latter refers to a general condition of hostility between the parties and can be comprised of a number of different disputes and historical problems. Whilst one may solve a dispute, one may not necessarily solve the conflict thereby, owing to the prevalence of surrounding issues and engendered feelings of hostility superseding the particular disputes. The dispute, therefore, is the legal issue tied down with specificity.

We are considering general international legal disputes, mainly those between States or between States and non-State entities. This is also the peaceful settlement of disputes as we are considering this as a corollary to the prohibition of the threat or use of force. This branch of international law has two main types of procedure: the legal and non-legal. The legal branch is made up of adjudication and arbitration and these always give rise to a binding solution, and the non-legal, diplomatic branch. The latter lead to non-binding solutions, such that States are not bound to take up the solution reached. One will note that starting from the non-binding and moving upwards, from the first non-binding procedure to the last binding procedure, the extent of formality and to which third parties are involved increased. One will also note that the law plays an increasingly important role as one moves up this ladder, leading to the ICJ.

The General Framework

The general framework is imbued in the UN Charter and is a requirement in the opening paragraphs thereof that States seek to settle their disputes peacefully in article 1(1):

> The Purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and inter- national law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Article 2(3) and (4) also state:

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4), the international prohibition of the use of force, is one of the major *jus cogens* norms of international law.

Article 33 of Chapter VI, that Chapter dealing with the Pacific settlement of disputes states:

> 1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, re- sort to regional agencies or arrangements, or other peaceful means of their own choice.*
>
> 2. *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.*

Article 1 enshrines the general principles of peace whilst article 2 places the obligation on States. Article 33 codifies procedures which had already existed prior to the UN Charter, applying as part of CIL as well. Note that there is no hierarchy amongst those methods for dispute resolution mentioned. Article 33 has been described as a "toolbox" which allows those parties involved to choose the method best suited for the specific dispute involved. Furthermore, States are not limited to this list, which instead simply offers examples to guide them. The one duty of cooperation underpins all procedures without which none would be successful. Cooperation is working proactively together serving objectives which cannot be obtained by a single actor. The importance of this duty was highlighted in the Nicaragua case against the US in 1986 which highlighted that the duty to cooperate with a view to reaching agreement is inherent in the duty to settle disputes peacefully. States have an obligation to attempt to settle their disagreements and within that obligation lies that to cooperate which is necessary to reach such an agreement.

The Political Forms of Dispute Settlement

Negotiation

In negotiation we shall cover a number of features common to the other forms of political dispute settlement too. Negotiation is the simplest and most utilised form of dispute settlement. The common feature amongst all political forms of dispute settlement, as has been said, is that they all result in non-binding agreements unless the State chooses otherwise. Negotiation was mentioned first in article 33, not because of any priority, but because it is the simplest form of dispute settlement procedures, thus making it the most utilised. What negotiation means, legally, is discussions between interested parties regarding their divergent opinions. We are considering States with a dispute and only both States are involved. The crucial element is that there is no third-party involvement such that it is up to the States to deal with the dispute as they wish. This has been universally acknowledged by both the ICJ and its predecessor the PCIJ as the main method for political dispute resolution. In the North Sea Continental Shelf Cases the ICJ stated that there is no need to insist on the fundamental character of this method.

A question often brought up is what is the resolution between negotiation and other forms of dispute settlement? Take, for example, what happens if negotiations are ongoing when one party institutes proceedings before the ICJ. This applies also to mediation. Should the judge or mediator involved differ until the negotiations conclude? The existence of ongoing negotiations

does not preclude the existence of other ongoing dispute resolution proceedings. There is no general rule that they must be concluded before other proceedings can be instituted. There were two main cases which dealt with this: The Aegean Sea Continental Shelf Case of 1978 involved a dispute between Greece and Turkey over certain areas over the Aegean Sea. Turkey kept calling for negotiation whilst Greece wished to involve the ICJ for judicial settlement. The Court held that it was not a problem that negotiation and judicial settlement were listed together in article 33 and that there was no hierarchy between them. If negotiations result in a settlement, then the case before the ICJ would become moot. The aim is not to give priority to any one procedure, but to settle the dispute. "The fact that negotiations are being actively pursued during the present proceedings … judicial function". In principle there is nothing wrong with these two proceedings or others being carried out at the same time. The idea for this is that respondent States cannot rely on pending negotiations to block adjudication. There may be a State that does not want to go to Court but for optics-purposes pretend to be negotiating. This does not allow States to prevent access to the Courts or arbitration but gives them the widest fora to deal with their disputes, assuming that it is dealt with on the principle of good faith. States must act in good faith. Take, for example, negotiations ongoing to the extent that they are nearing their resolution where one State leaves to pursue the matter before the ICJ. The Court can decline jurisdiction on the grounds that this would be an abuse of the Court process with a State coming to the Court in bad faith with the sole aim of stopping successful negotiations. Bad faith is not presumed but must be proven.

The Concept of Negotiation

A wide, but good definition was given by Judge Moore in the Mavrommatis Palestine Concessions case who defined it as *"the legal and orderly … settle their differences"*. This definition is wide because it also considers that point in time before the dispute arises whilst also involving the process of consultation where States deal with issues of potential controversy by consulting with other States that would be involved with the dispute.

Negotiations can be bilateral or multilateral, depending on the number of States involved. They can be carried out by diplomatic channels or within the UN itself. There are also certain set-ups, such as joint commissions, used in cases of recurrent problems or for a situation which requires constant supervision.

The Nature of the Obligation to Enter into Negotiations

There is no obligation to enter into negotiations as a first step. The ICJ has discussed the rejection of the stepladder approach such that there is no need to move from negotiations upward, stating that neither the Charter nor international law mentions any general rule that the exhaustion of diplomatic negotiations constitutes a prerequisite for the matter to be seen by the Court, which was also discussed in the 2018 case of Bolivia v. Chile. This does not mean that States use this as a first step, it is extremely useful for its flexibility, ease of setting up, and use for clarification purposes. States may also create a Treaty obligation by which they must involve negotiation as the first step, which would involve a dispute settlement clause. In this case negotiation has been made the subject of a Treaty obligation. At customary international law there is no obligation to resort to any procedure first and foremost.

Good faith underpins the entire process. The Court in the Nuclear Test cases stated that *"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential"*.

What the ICJ is saying is that in order to cooperate properly one must cooperate in good faith. There is no definition of good faith, but we do have examples of bad faith from the Lac Lanoux arbitration, including an unjustified breaking off of discussion, abnormal delays, disregard of agreed procedures, or systematic refusals to take into consideration adverse proposals or interests. States are not bound to find a solution, but they are bound to ensure that negotiations are meaningful and held in good faith. States must do their best to agree. Good faith, meanwhile, is the idea that one must act with a view to reaching an agreement, not necessarily with the uncontested pact to reach an agreement, which is never ensured. Formal or informal, there is no obligation to agree, but agreement must be the aim. In the Southwest Africa Cases, this was explained well. Any obligation to negotiation does not imply an obligation to agree and it was stated that *"it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issue of the question involved"*.

In his dissenting opinion, Judge De Visscher stated: *"while remaining free to reject the particular terms of a proposed agreement, [a State] has the legal obligation to be ready to take part in the negotiations and to conduct them in good faith with a view to concluding an agreement"*.

Advantages of Negotiation

Negotiation saves States a lot of the expense and trouble of international litigation. It can be brought into exist very quickly and it is useful as a great many disputes between States occur over an adjustment of differences and changing circumstances, in which cases it would be easiest to simply clarify. This is why we say there must be a climate for negotiation. The type of dispute is important, but it also depends on the particular State because the compromise must be reasonable with both States believing that the benefits to be gained by compromise outweigh the disadvantages thereof. Intransigence created by diametrically opposed interests do not create an environment for successful negotiations.

Limitations of Negotiation

A 1966 report of the Special Committee on the Principles of International Law Concerning Friendly Relations and Cooperation Among States the following limitations were highlighted:

1. The lack of a third-party moderating influence, exaggerated claims, creating no guarantee of impartial/objective laying out of the facts. Thus, weaker States are at a disadvantage.
2. The putting forward of exaggerated claims which might aggravate a dispute cannot be prevented.
3. Nor can fair and just terms be ensured since one of the parties is in a weaker position.
4. Negotiation is plainly impossible if the parties to a dispute refuse to have any dealing with each other.

Mediation

Mediation is used when a degree of animosity exists between parties such that negotiations cannot be allowed. This is the first form of dispute settlement with a third party involved. This has been around since 1899 in article 4 the Hague Convention for the Pacific Settlement of International Disputes which states that *"the third party assumes the task of reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance"*. Collier and Lowe define mediation as participation of a third State, a disinterested individual, or an organ of the UN with the disputing States in an attempt to

reconcile the claims of the contenting parties and to advance proposals aimed at a compromise solution, thus creating a dual role. In textbooks one will also notice the term 'good offices' which are not mediation. In the mediation the mediator takes active steps of his own to put forward proposals to settle the dispute. Someone exercising good offices does not help to solve the dispute but helps to continue or restart negotiations which have broken down by persuading the States involved, thus taking the form of a neutral conduit for communication. The person exercising good offices does not attempt to solve the dispute but becomes a mediator once negotiations are restarted. Shaw speaks of this progression as **QUOTE** The Hague Conventions (arts 2-4) note no difference between the two, whilst article 33 omits good offices entirely. Sometimes they are discussed as distinct procedures, like in the Pact of Bogota of 1948.

Mediation must be set into motion with the availability of a willing and accepted mediator. The mediator is introduced either on its own initiative which is accepted by both parties or by the acceptance of an invitation from the disputing States. Mediation, however, remains subject to the acceptance by all parties involved. The main feature of mediation is at an end once it is declared that the means of reconciliation proposed is not accepted as per article 5 of the Convention. Article 6 explains this further and says that the results have exclusively the character of advice and never have binding force. Consent by the mediator and to mediation is required at all times.

The main stages are as follows:

1. Consent to accept mediation.
2. Diagnostic phase: the mediator sits down with one and the other party; isolates the actual dispute and finds out what each side is prepared to offer.
3. Attempt to reach consensus.
4. Post-mediation phase: implementation of the mediator's proposed settlement.

One will note that the ideas of cooperation and consent are even more required during this process. It is required by all sides at its commencement, during the process, and at its termination. The advantages of mediation over negotiation include the third-party involvement without the need to honour suggestions, which is especially useful when negotiations have been deadlocked. Also, mediation could be a face-saving compromise which would make it politically easier to make the necessary concessions in the course of mediation rather than direct mediation. Mediation generally tends to occur when:

1. Parties do not want to communicate with each other directly,
2. Disputes have been protracted,
3. Individual efforts have reached stalemate and there seems no way out, and/or
4. Parties refuse to shift ground on their positions.

If States believe that their position is the correct one and they would noe consider otherwise, then they should not consider political forms of dispute resolution. The limitations of mediation are: first, parties need to make the necessary concessions and where we have one State needing to abandon its original position entirely mediation is entirely; second, it may be difficult to find a suitable, willing, and acceptable mediator for the dispute; third, there mut be a readiness to mediate. In political forms of dispute settlement, the parties are at great liberty to dictate proceedings.

Enquiry

The purpose of this procedure is to facilitate the solution of disputes arising primarily from a difference of opinion on facts by elucidating these facts. In its traditional form, enquiry only considers facts with their being no investigation or application of the rules of law. The issue is that if we are going to take the States' interpretations, they are likely to blame the other. The Hague Convention created the Commission of Enquiry composed of an impartial group of people to settle the dispute. These can clarify the factual portion of the dispute leaving the legal aspect for another method of dispute settlement, meaning enquiry is often used in combination with other forms thereof. The UN defines fact-finding as *"any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent UN organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security".*

There are two main meanings of enquiry: first, in its institutional sense, there is a commission which is impartial and charged with looking into the facts of the dispute and through this the dispute may well be settled because what was happening was States appointing a number of national commissions of enquiry which are inherently biased. The Red Crusader enquiry is a notable example of this method. Enquiry, in its traditional form, gives rise to a non-binding result but there is nothing preventing States from giving the report a binding nature which has happened in a number of ad hoc enquiries instituted over the years. The UN Convention on the Law of the Sea includes in Article 5 of Annex VIII which recognises an inquiry procedure whose results, unless the parties agree otherwise, are to be considered conclusive by the parties to the dispute, subject to the special procedure under that article.

States are sovereign and the aim is not to stick to the purest form of procedure but to reach agreement, which is why these dispute resolution methods are so interchangeable and modular. This method has been carried out rarely under the umbrella of the 1899 and 1907 Hague Conventions. Disputes may appear to have different interpretations of facts, but they may be quite amenable to negotiations. At times, clarifying the dispute's facts but does not assist with the resolution of the dispute at all, and if conciliation is applied enquiry is subsumed and therefore not necessary.

For an enquiry the dispute must be one of fact, not law or policy, and the parties must accept that their version of events might be proven wrong, which is quite rare.

Conciliation

Conciliation is defined as a combination of the characteristics of mediation and inquiry by encouraging the contenting parties to come to a settlement and offering an impartial elucidation of the facts at the basis of the dispute. This involves a third part investigation of the basis of the dispute with a quasi-judicial role. Conciliation goes beyond fact-finding by moving on to suggest solutions. Brownlie states that a conciliator must elucidate the facts, hear the parties, and offer solutions. This introduces a slightly more formal procedure which is common in Treaties because it is exceedingly versatile. It has been used in legal, political, technical, human rights, and trade disputes natures. The traditional form of conciliation involves an optional third-party procedure where States are not forced to take on the suggestions proposed. The new conciliation procedure as per the 1969 Vienna Convention involves the resorting to the procedure compulsory with the composition of commissions done by a third party not by the parties themselves.

Article 66 of the Vienna Convention states

INSERT

In the Law of the Sea Convention conciliation is compulsory under Treaty law.

INSERT

The termination of the conciliator's role is at the presentation of his report.

INSERT

Topic IV: Maritime Migrant Smuggling

Migrant smuggling and maritime migration are intrinsically linked as most people travelling by sea and who find themselves in distress are actually smuggled. It is very rare to find individuals trying to enter Europe without the assistance of smugglers.

Why is migrant smuggling a threat to states? It can be said that migrant smuggling is when individuals are assisted in their attempts to enter another State via the sea in a covert manner, in violation of a State's laws, and evading detection by a State's border control officials. The key point to remember is that they are assisted and pay massive amounts for this. The security threats posed are:

1. States have the right to control who enters its territory with the lack of identification of these individuals being a threat,
2. Economic costs,
3. Quarantine and health risks,
4. Risk of terrorist infiltration,
5. Infringement of State sovereignty – violation of State borders.

International migrant smuggling in inextricably linked with organised crime.

Defining Migrant Smuggling Under International Law

Article 3(a) of the Protocol Against the Smuggling of Migrants by Land, Sea, and air defines migrant smuggling as *"the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"*. If one had to dissect this definition, one could argue that the smuggling of migrants under International Law has the following constitutive elements:

1. Facilitating the movement of persons across international borders
2. In a covert or clandestine manner
3. In violation of the State's laws
4. Which results in a financial or other material gain for the smuggler.

The Protocol itself does not elaborate on what is meant by the term "financial or other material gain". However, if one referred to the interpretive notes to the instrument, which are a collection of the records of the negotiations process leading to the adoption of the protocol, one can note that the intention of the drafters of the Protocol was for these terms to be interpreted and understood broadly to cover a range of gains for the smuggler, including not only payments, bribes, rewards, but also services including sexual gratification. Whilst, however, the term material benefit can cover non-economic benefits, this does not include humanitarian motives. For example, family members who help their relatives escape other countries would not fall under the definition of smuggling under the Protocol. A key feature which distinguishes the smuggling of migrants from another crime involving the movement of individuals, human trafficking, is that smuggling, even if it is undertaken in the most dangerous conditions, requires some form of consent from the individuals who wish to be smuggled.

Irregular Migration and the Smuggling of Migrants

Therefore, this begs the question, why would individuals subject themselves to human smuggling, why would individuals choose to make these irregular, dangerous journeys. We would now contextualise the smuggling of migrants within the broader discussion of irregular

migration. Irregular migration is generally driven by a number of push and pull factors. There are circumstances which push individuals to leave their countries of origin and others which pull them States of destination. A person may be motivated to migrate as a result of a combination of this push and pull factors. Examples of push factors include human rights violations and abuses, economic developments, political unrest and war, persecution and violence, famine, and environmental degradation. These are just some of the factors which continue to drive individuals to make these perilous journeys, fleeing their countries of origin, often falling subject to exploitation by ruthless smugglers. On the other side of the coin, pull factors include, *inter alia*, safety and security, employment opportunities, education, and improved living standards.

When discussing international law and irregular migration a very basic question we may ask ourselves is who is authorised to enter into a State territory. This depends on a number of factors, including the doctrine of State sovereignty. Under International Law States enjoy sovereignty which includes a right to control over their territory and to control who enters their territory, as well as broad powers to regulate the movement of individuals across their territory, and in support of these powers States can adopt laws to govern the admission of non-nationals and non-residents, to determine detention, and to govern border security. The State has the right to do this because of State sovereignty, which includes ensuring national security and public order, guaranteeing social and economic stability, and also to regulate the entry and departure of individuals from the State. The State can decide on conditions to impose on non-nationals or non-residents in order for them to legally enter and reside in their territory, and respect for these rules is sometimes threatened by what we refer to as mass irregular migration. Although there is no universally accepted legal definition of the term, various international organisations have provided their own definition of irregular migration. One well-established and respected definition is that provided by the International Organisation for Migration which defines it as the *"movement of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit, and receiving countries"*.

Whilst all States will have rules which govern entry and departure from their territories, these types of laws and regulations will vary. Some States impose very restrictive migration laws and policies where they are unable or unwilling to accept large groups of migrants within a short period of time. Sometimes there is a preference for a particular type of migrant and as a result many migrants who wish to migrate do not satisfy these legal requirements. It has been reported that very restrictive migration laws and policies imposed by States have not resulted in a decrease in irregular migration. Instead, it has resulted in an increase in the demand for smugglers to help individuals evade migration controls and to assist them to enter into States irregularly.

Dimensions of the Crime of Migrant Smuggling

Note that the smuggling of migrants constitutes one of the fastest growing transnational organised crimes which are regulated by the parent Convention to the Protocol, the UN Convention Against Transnational Organised Crime, making this the main international instrument to fight transnational organised crime. States which ratify the Convention commit themselves to adopting a series of measures to fight this type of crime which include developing frameworks of extradition, mutual legal assistance, and also law enforcement cooperation. There is a relationship between the UNCATOC and the Smuggling Protocol, in that CATOC applies to the offences in the SP and the SP should be interpreted in line with the provisions of CATOC. Before one can be a party to the SP, they must first become a party to the parent

Convention. Transnational organised crime under the Convention is characterised by transnational involvement and the involvement of an organised criminal group.

When we consider the smuggling of migrants, would the crime fall within the definition of a transnational offence according to the UNCATOC? Smuggling of migrants manifests itself in various different forms: by land, by sea, and by air. The modus operandi of smugglers is also diverse, and it depends on the form of smuggling which is undertaken. Whilst we tend to focus on the smuggling from North Africa to Europe, smuggling is taking place all over the world, including South-East Asia, South America, and Eastern Europe. We speak of smuggling being identified as a major threat to maritime security. Smuggling has even been labelled by the UN Office on Drugs and Crime as a "deadly business". The UNODC is responsible for overseeing the effective implementation of the Smuggling Protocol and it reports that smuggling is a big business with an estimated annual economic return between five to six billion US Dollars. Organised criminal groups operate within business-like structures focusing on demand and supply models, but unlike legitimate businesses the markets which they seek to exploit are illegal. This is obviously a very profitable operation but often at the expense of their clients. If we focus on smuggling of migrants by sea, the general modus operandi is to smuggle as many persons as they can into old, unseaworthy vessels. With respect to migrant smuggling by land, smugglers hide individuals in lorries, containers, boots of vehicles, often hiding them under goods being transported, and as a result many of them die from asphyxiation, such that in 2019 there was a very high-profile case where thirty-nine Vietnamese individuals were found dead in the trailer of a lorry in Essex, reportedly victims of a smuggling operation.

International Law to Prevent and Suppress the Smuggling of Migrants

These efforts culminated in the establishment of an intergovernmental ad hoc committee by the UN General Assembly in 1998 mandated to develop a new international legal regime to combat different forms of transnational organised crime. In 2000 it completed its work and adopted CATOC and its three Protocols, one of which is the Smuggling Protocol. It entered into force in 2004 and presently has 150 State parties. This presents a willingness on the part of the international community to combat this particular TOC and many States have taken measures to implement the international rules found in the protocol in their domestic legal systems.

The SP was considered to be innovative because prior to its adoption there was no comprehensive international legal regime which addressed the crime of smuggling of migrants, it was the first international instrument to define the crime of smuggling, and to require criminalisation on an international level. As we will see, the Convention also addresses various aspects of the crime, including the smuggling of persons by sea, but perhaps the most significant feature of the smuggling protocol is that it focuses on the punishment and prosecution of smugglers and not individuals who are being smuggled, and, as we shall see, the Protocol responds to the fact that here we have a crime which is not involving a commodity, like drugs, but with individuals. The Protocol aims to protect the fundamental human rights of smuggled individuals. The Protocol is often described as a criminal justice response to migrant smuggling. This includes various phases such as crime prevention strategies, identifying smugglers, prosecuting them, and imposing appropriate punishments. It is important to be aware of the fact that there are various challenges in the way of prosecuting smugglers, such as extradition, the well-organised nature of criminal networks, the rapid adaptability of organised criminal groups to law enforcement policing, and challenges in international

cooperation. All of these factors need to be taken into account when developing appropriate domestic legal response strategies to prevent this threat.

If we look at the objectives of the smuggling Protocol, there is a three-pronged approach to combatting migrant smuggling:

1. **Prevent:** State parties under the Protocol are required to adopt measures to prevent and combat the smuggling of migrants. These could include those aimed at enhancing the effectiveness of border control, capacity building and technical cooperation, the training of law enforcement officials, an exchange of information between State parties on smuggling investigations and increasing public awareness about the problem and campaigns.
2. **Protect:** This refers to the protection of the fundamental human rights of migrants. The SP requires that States, when taking any efforts to prevent and combat smuggling under the Protocol at all times respect the fundamental rights of smuggled individuals, and there may be various rights which are engaged in anti-smuggling operations including the right to life, the right not to be subjected to torture or inhuman or degrading treatment, etc. The instrument is unique as it recognises the multifaceted nature of the threat and calls for the protection of the inherent rights of the victims of the crime.
3. **Promote:** The transnational nature of this crime necessitates a combined effort from different States to effectively repress the crime. The Protocol seeks to promote a comprehensive framework to prevent and combat migrant smuggling that is predicated on international cooperation between States and their respective agencies. This is an obligation under the Protocol. In fact, this is manifested in various provisions of the Convention, such as articles 2 and 10.

The first major State obligation is the criminalisation of the smuggling of migrants. In order to be able to try smugglers before the courts of a State there must be laws in place to criminalise the act, *nulle crimen sine lege.* Under article 6 of the Protocol:

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
> (a) The smuggling of migrants;
> (b) When committed for the purpose of enabling the smuggling of migrants:
> (i) Producing a fraudulent travel or identity document;
> (ii) Procuring, providing or possessing such a document;
> (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

As State governments increase their efforts to combat irregular migration, people smugglers have now resorted to ever more dangerous ways to transport smuggled migrants, more dangerous routes, and dangerous means to conduct their operations. The Protocol recognises this reality and also requires States to adopt legislative measures to establish aggravating circumstances to offences:

> **3.** *Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:*
>
> (a) *That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or*
>
> (b) *That entail inhuman or degrading treatment, including for exploitation, of such migrants.*

Article 5 also states *"migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol".* The Protocol ensures the non-criminalisation for migrants being subject to the crime. Thus, they cannot be prosecuted as accomplices, and this is important as they may play a crucial role in providing testimonial evidence in investigations which could help convict actual human smugglers. However, important to note is that according to article 6(4) of the Protocol, *"nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law".* Whilst they are not subject to criminal liability as the result of being smuggled, nothing prevents the prosecution for other offences under local law. The State may choose to prosecute them for violations of national immigration laws.

The smuggling of migrants by sea is specifically addressed by a chapter in the Protocol. This has been identified by former UN Secretary General Ban Ki Moon as one of the major threats to maritime security. This emerges from the 2008 report on the Oceans and the Law, an annual report produced in the UNGA which cover pressing issues facing our oceans. This particular 2008 report is crucial for maritime security because it is the only report which has identified major threats to maritime security and also explains the legal regime to combat these threats. Smugglers typically aim at optimising their profits by keeping their costs low and they do this by smuggling as many persons as they can into old, unseaworthy, often unregistered vessels which are not usually capable of withstanding very hazardous conditions at sea. Vessels typically used include old wooden fishing boats, but more commonly rubber crafts, not usually equipped with proper equipment, and prone to capsizing. Conditions aboard are often inhumane, traumatic, and dangerous experience as migrants are packed into unstable boats for days, sometimes weeks. Voyages frequently take longer than expected or promised due to bad weather conditions or navigational equipment, leading to shortages of fuel, food, and water, resulting to many of the migrants dying of dehydration. Hygiene levels aboard the vessel tend to deteriorate rapidly and disease is often rampant, with Médecins Sans Frontières reporting that migrants suffer from serious mental health issues, include PTSD, and sexual and physical violence. The last few years have been the costliest in terms of loss of life at sea. Smuggling of persons also poses a danger to the safety of navigation at sea, jeopardising both the safety of persons and property at sea, as well as seriously undermining the operation of maritime services. Smugglers generally abandon their vessels at sea or leave unskilled persons to navigate, sometimes even the migrants themselves. The smuggling of migrants is often associated with other crimes which threaten the sovereignty of States, including drugs, arms, and human trafficking, and international terrorism. States are concerned that this may facilitate the entry of terrorists in disguise as refugees, as two of the Paris bombers did.

Chapter II of the Smuggling Protocol addresses specifically the smuggling of migrants by sea. It makes sense to have a chapter specific to this truth because of the maritime environment, its nature, and the underlying risk to human life which requires a distinctive approach to its suppression. Chapter II opens by imposing a general obligation on State parties to cooperate as much as possible to prevent the smuggling of migrants in accordance with the international law of the sea. This is a positive obligation placed on State parties. Article 7 states:

> *States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.*

This phrase, *"in accordance with the international law of the sea"*, implies that the rules found in Chapter II works within the well-established general framework of the law of the sea. The 1982 United Nations Convention on the Law of Sea (UNCLOS) is the primary source for the rules governing the sea. Moreover, there are other relevant law of the sea treaties, but it is the UNCLOS which has garnered the reputation of being the 'Constitution for the Oceans'. It was the culmination of Malta's diplomatic initiatives in 1967 at the UN General Assembly when it proposed that the UN should review the existing law of the sea and create a new maritime legal order for the oceans. This Convention is the product of the Third UN Conference on the Law of the Sea, which was the largest, longest, and most expensive conference in the history of diplomacy. The 1982 Convention is the product of this conference and a ten-year negotiation process from 1973 to 1982. The Third UNCLS involved the participation of over 150 States which for almost a decade met biannually to formulate rules regulating humankind's activities over the oceans. UNCLOS then came into force in 1994 and currently has 168 State parties to it making it a significant part of the international community. It is reasonable to argue that most of its provisions, in light of this general support, reflect customary international law, meaning it is binding even on States which are not parties to the Convention.

The preamble to the 1982 Convention identifies its aims and goals with the main one being to *"promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment"*. UNCLOS provides the legal basis for State action at sea, providing them with important jurisdictional powers and economic rights in maritime zones adjacent to their costs. The Convention divides the world's oceans into different maritime zones where one has varied levels of coastal State jurisdiction and the rights of foreign navigation on the other. The Convention attempts to strike a balance between the two. Up until the twelve nautical mile mark the coastal State exercises jurisdiction, and control and the further away we get from the coast the jurisdictional capacities will decrease until we arrive to those areas of ocean space beyond the control of any State and are referred to as the high seas or international waters.

Despite the broad ambit of the Convention, we can find no provisions addressing either irregular migration by sea or the smuggling of persons by sea. This is due to the fact that at the time, great migratory movements by sea simply were not as common or in the large numbers they are today. Consequently, irregular migration by sea may not have been considered a major issue and therefore not inserted in the Convention. UNCLOS provides general obligations supplemented by more specific rules and obligations found in other treaties. However, as we shall see, the jurisdictional principles which apply in the different maritime zones govern the intersection of smuggling vessels so there are certain UNCLOS rules which provide States with

mechanisms to prevent and suppress smuggling of persons by sea and the application of these rules depends in which maritime zone the incident occurs, or the suspect vessel is located.

The vast majority of smuggling of persons happens on the high seas and, as we have seen, just because the high seas are areas of ocean space beyond the jurisdiction and control of any one State, this does not mean that there is no law and order thereon. In fact, quite the contrary is true. The high seas are regulated by Part VII of the Convention which provides the legal regime regulating these areas. The main rules applying thereto are:

1. The high seas are reserved for peaceful purposes and no State can exercise sovereignty over any part of them (UNCLOS, Articles 89 & 89): They are not subject to appropriation by any State and are open to all.
2. The high seas are open to all States whether coastal or land-locked where they enjoy the exercise of certain freedoms, such as the freedom of navigation (UNCLOS, Articles 87 & 89).
3. In order to enjoy the right to navigate on the high seas, vessels must fly the flag of a State (UNCLOS, Article 90): Once a ship is registered in one State all events occurring on the ship are regulated by the laws of the flag State.
4. A ship which sales under the flags of more than one State, using them according to convenience, may not claim any of the nationalities of any of the States in question and is assimilated to a ship without nationality (UNCLOS, Article 92(2)): A Stateless vessel does not enjoy any protection on the high seas and therefore other States could potentially interfere with its navigation.

Jurisdiction on the High Seas

If the high seas are characterised by free use of the ocean space, the absence of any authority over ships sailing in this area may lead to chaos and destruction of order, and so the international law of the sea developed the principle of exclusive flag State jurisdiction on the high sea. Once a vessel is registered it is subject to a very important rule in article 92(1) which States:

> **92 (1).** *Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*

Subject to limited exceptions laid down in the Convention itself, any State which wishes to board a Maltese registered vessel on the high seas would have to obtain the authorisation of the Maltese government. This rule was established centuries ago and continues to be valid and applicable with States jealously protecting this principle. It also enables the maintenance of the legal order on the oceans because given the absence of a supranational authority international law is maintained through State enforcement and accountability. This exclusive flag State jurisdiction works in practice as with this right comes also certain duties for the flag State under UNCLOS, Article 94(1) which states:

> **94 (1)** *Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.*

The reality is that in practice not all flag States will exercise the same level of jurisdiction and control over their flag vessels. Some, often referred to as flags of convenience or open registries, allow ships which have little or no connection with the State to register under its flag. The attraction for ship owners is usually that it allows them to evade certain taxation or crewing standards which would have been required in their State of nationality or incorporation. These open registries have a reputation for having little interest in the affairs of their ships, providing minimal surveillance, and enforcement of certain international requirements and standards is often weak. This is a problem as on the high seas the primary remedy for a State to act against a foreign flagged vessel which does not comply with international standards is to report it to the flag State. If one has a flag State which because of a lack of political will or resources does not intervene in relation to its flag vessels there would be problems of vessels being used for illegal activities, including the smuggling of persons. As a general rule, it is not possible for another State to intercept or to interfere with the navigation of a foreign flagged vessel on the high seas without authorisation from the flag State. The ability to of other States to interfere with the activities of a foreign flagged vessel on the high seas, even if they are flagged with flag of convenience States, is very limited.

There are some exceptions, meaning this doctrine is not absolute, and one such exception is the right of visits under Article 110 UNCLOS. The right of visit gives warships of a State the right to board suspect vessels on the high seas without flag State consent or authorisation. However, this is only allowed in certain circumstances:

> **110.** (1). *Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:*
>
> (a) *the ship is engaged in piracy;*
> (b) *the ship is engaged in the slave trade;*
> (c) *the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;*
> (d) *the ship is without nationality; or*
> (e) *though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.*
>
> 2. *In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.*
>
> 3. *If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.*
>
> 4. *These provisions apply mutatis mutandis to military aircraft.*

> 5. *These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.*

The right of visit allows non-flag States to board and search and only if one of those circumstances presents itself, but does not allow any unilateral enforcement action, such as arrest or seizure of the vessel. This weakens the ability of this right to adequately suppress the threat. The right of visit is limited to the above cases unless some other treaty gives one a right, such as the Smuggling Protocol.

Maritime Interdiction

Maritime interdiction is the principal tool used by State law enforcement officials to prevent and suppress crimes at sea, by stopping the movement of vessels. Smuggling vessels typically spend a considerable amount of times on the high seas and therefore the advantage of maritime interdiction for law enforcement is that it allows the State to investigate a suspect vessel before it reaches its destination. Maritime interdiction is a two-step process which has been described by Guilfoyle as follows:

> *"First, the boarding, inspection, and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures, including a combination of arresting the vessel, arresting persons on board, or seizing cargo".*

Maritime interdiction is contemplated under the Smuggling Protocol in Article 8. Whilst the smuggling of migrants is not considered a specific ground for which the right of visit may be exercised under UNCLOS, Article 110 contemplates that this right may derive from powers conferred by treaty, as reflected in article 8. The drafters of the Protocol did not deem it necessary to include a procedure for investigating and conducting arrests of smuggling vessels of areas which fall within the jurisdiction of States as these principles are well-established in that the coastal State would have authority. The situation is therefore more complicated on the high seas. Article 8 provides for the interdiction of smuggling vessels on the high seas in two cases: first, if the suspect vessel is flagged; second, if the suspect vessel is Stateless.

With respect to the former, the procedure is as follows:

1. A State party must have 'reasonable suspicion' that a flagged vessel is engaged in the smuggling of migrants.
2. If it wishes to act, the interdicting State must first contact the flag State and request confirmation of registry.
3. Once confirmed, the interdicting State party may request authorisation from the flag State to board and search the vessel and, if evidence is found that the Bessel is engaged in the smuggling of migrants, to take *"appropriate measures with respect to the vessel and the cargo on board, as authorised on the flag State"* (Article 8(2)).

Article 8 is designed to facilitate cooperation in obtaining consent for boarding and taking other appropriate measures. The Smuggling Protocol does not alter the role of the flag State in is exercise of exclusive jurisdiction. Flag State exclusivity is preserved throughout as reflected in various provisions of the Protocol, namely articles 8(5) and 9(3)(b). However, the flag State has a number of obligations and duties under the Protocol: first, it has an obligation to respond

expeditiously to requests from other States wishing to Board suspect vessels and should also designate an authority to receive and respond to requests. In theory, a flag State can refuse authorisation to board a vessel, but there are a number of considerations to keep in mind. The first being the obligation to cooperate under Article 7 of the Smuggling Protocol as well as the overall objective of the Protocol, such that State parties have a positive duty to provide consent to board and take other measures which are necessary and appropriate to prevent migrant smuggling. Furthermore, according to the principle of *pacta sunt servanta*, a treaty is binding on parties and must be performed in good faith, which is another reason States should grant consent.

With respect to Stateless vessels suspected of the smuggling of persons, the procedure is more straightforward:

1. A State party must have reasonable suspicion that a vessel is engaged in smuggling of migrants and that the vessel is without nationality or may be assimilated to a vessel without nationality.
2. The State party may board and search the vessel.
3. If evidence confirming the suspicion is found, the State party shall 'take appropriate measures in accordance with relevant domestic and international law' (Article 8(7)).

This final step reinforces the view that once a vessel is Stateless it falls outside the protection of any State and allows the interdicting State to exercise enforcement.

In fine, UNCLOS rules must be adhered to in order for interdictions under Article 8 of the Smuggling Protocol to be lawfully carried out on the high seas. Moreover, Article 8 does not provide State parties with any pre-existing enforcement powers. Finally, the main objective of Article 8 is to facilitate State cooperation for the streamlining of the procedure to seek consent from or give consent to other State parties interdicting smuggling vessels on the high seas such that the maritime provisions in Article 8 complement the law of the sea rules in UNCLOS such that the lacunae on the are addressed in a way that strengthens rather than challenges flag State exclusivity.

The Relationship Between International Law on Migrant Smuggling and other Branches of International Law

Whilst the Smuggling Protocol provides a specific regime catering for the prevention and suppression of smuggling, it cannot operate within a legal vacuum. The crime of smuggling of migrants is multi-layered and because we are dealing with individuals, we have the intersection of various branches of international law which seek to protect the rights of the individual. We have seen the intersection between the international law on migrant smuggling and the law of the sea and according to Article 31(3)(c) on the 1969 Vienna Convention: *"There shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties"*. This implies that in interpreting and applying the provisions under the Smuggling Protocol States must also consider relevant provisions under human rights law, refugee law, and the law of the sea.

The Law of the Sea

Rescue is considered to be an obligation to protect life at sea and therefore does not require flag State consent. This exception should be interpreted narrowly and restricted to cases of rescue. However, sometimes the boundary lines between interdiction and rescue at sea are

blurred in practice. For example, law enforcement officers may target a vessel for interdiction purposes and later find that it is in distress.

Human Rights Law

Protecting the human rights of smuggled migrants is a key aspect of the Protocol. In undertaking any interdictions under Article 8 of the Protocol, States are required to ensure a number of safeguards reflecting a number of human rights standards. Under Article 16 of the Protocol, all measures taken in anti-smuggling operations must preserve and protect the fundamental human rights of migrants and in fact special reference is made to the right to life, the right not to be subjected to torture and degrading treatment and punishment, etc.

Refugee Law

A number of migrants may be entitled to additional protection by virtue of being asylum seekers. The main guiding principle is that of non-refoulment as found in Article 33(1) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The practical limitation of this principle requires that migrants expressing a fear of being sent back to a place where they may suffer persecution or migrants seeking refugee status should be entitled to an appropriate procedure. Article 19(1) of the Smuggling Protocol is also applicable.

Effectiveness

The Smuggling Protocol provides a comprehensive regulatory approach to prevent and combat migrant smuggling, whilst continuously protecting the rights of smuggled migrants. However, there are some concerns regarding the rules found.

Contemporary Challenges Facing the Duty to Render Assistance at Sea

Current Situation Relating to Irregular Maritime Migration

Take, for example, a shipmaster of a large container vessel and you receive orders from a State's search and rescue authorities to change course to rescue 100 persons in distress from a small and unseaworthy vessel on the high seas. Unfortunately, such a situation has become a common occurrence with the intensification of irregular migration by sea in recent years.

We have considered previously that there are various factors which have led to this increase in irregular migration by sea, including economic and political instability, climate change, etc. Some of the major irregular maritime migration routes are located in regions like the Mediterranean but only, including Southeast Asia, the Caribbean, and the English Channel. Many of these maritime migration routes intersect with major commercial shipping lanes. Desperate migrants undertake these journeys often in old, unseaworthy, and overcrowded crafts not usually properly equipped. They are often abandoned out at sea by smugglers or traffickers or steered by individuals who do not have navigational skills, sometimes one of the migrants themselves. This situation has led to frequent distress at sea incidents which have placed increased pressures on those who have to render assistance at sea, including members of the coast guard, navy, civil society groups, and also the shipmaster and crew of commercial vessels. One often reads about such situations in the media covering the scenes emerging from the Mediterranean. Irregular migration across that region has attracted global attention over the last decade due to the unprecedented numbers of migrant crossings. The region has experienced a severe humanitarian crisis in recent years, so problems in African States have led to increased migration through the Med which is considered to be one of the most active maritime migration routes. North Africa continues to be a popular departure point for many migrants wishing to

reach Europe but the violent political conflict in Libya has made this route increasingly dangerous. The maritime crossing through the Med is long and perilous and unfortunately several international organisations have labelled it the world's deadliest destination for migrants. Also keep in mind that the Med is one of the world's busiest commercial shipping lanes.

Irregular migration by sea is being facilitated by people smugglers. Unfortunately, it is often the case that being smuggled by sea or turning to the services of smugglers may be either the cheapest or only option available for some individuals forced to flee their countries. Smugglers have become very sophisticated, now using social media or the deep web to advertise their services. The UN Office on Drugs and Crime has reported that smugglers frequently deceive migrants, sometimes pretending to be NGOs or European Agencies tasked with offering safe passage to Europe. As a result of increased smuggling by sea activities we have increased distress at sea incidents. Since the beginning of 2023 there have been a number of tragic incidents resulting in loss of migrant lives. In February of 2023, a migrant vessel carrying over two hundred individuals sunk after it crashed against rocks in rough weather as it tried to land in Italy. Eighty individuals were rescued, sixty-seven lost their lives, and the rest are presumed to be missing at sea. The police have detained three individuals on suspicion of people smuggling, having sailed the boat from Turkey to Calabria in bad conditions. Police reported that the smugglers asked the migrants for circa €8,000 to make this journey.

The International Legal Regime Regulating the Duty to Render Assistance at Sea

The international duty to render assistance at sea developed out of the moral obligation to protect seafarers' lives at sea. For centuries, seafaring was considered to be a very dangerous profession, with the shipmaster and crew setting out on very long voyages bracing the perils of the sea, often having little communication with persons on land. Therefore, when they were in distress, they turned to others navigating the oceans, and this practice developed into a rule of customary international law covering all human life at sea, and also codified in various international instruments. The duty to render assistance is a fundamental norm of international law and at its core lies the need to protect life at sea. Whilst the scope and contours of the obligation are firmly established in both treaty law and customary international law, over time the duty has had to adapt to contemporary circumstances and realities, including the intensification of irregular migration by sea.

This duty to render assistance emerges from and is regulated by three major international conventions: first, 1982 UN Convention on the Law of the Sea (UNCLOS); second, the 1974 International Convention for the Safety of Life at Sea (SOLAS); third, the 1979 International Convention on Maritime Search and Rescue (SAR). State practice reflects the implementation and enforcement of the duty as reflected in these treaties so we can find rules regulating the duty to render assistance in the national laws of major maritime States, like the US, but also large flag State registries, like Malta, Panama, and Liberia. Furthermore, the duty is also elaborated in a number of non-binding but authoritative instruments that have been developed under the auspices of various international organisations, including the International Maritime Organisation, the main UN agency responsible for the safety and security of shipping and the prevention of marine pollution from ships. The IMO is therefore heavily involved in issues relating to rescue at sea as it affects international shipping. The following instruments have been developed by the IMO and provide the shipmaster with guidance on the implementation

of the duty to render assistance and also address various technical aspects of the rescue at sea operation.

The cornerstone of the international regime regulating the matter is article 98 of the UNCLOS, as found in Part VII regulating the high seas. On the high seas, ships fall under the exclusive jurisdiction of the flag State, i.e., the State where the vessel is registered. It should be stressed that under international law it is States that are given the right to navigate and therefore ships exercise this right once they are duly registered, at which point all activities which occur aboard the ship fall under the exclusive jurisdiction of the flag State, and the vessel and all persons onboard are subject to that State's laws and Treaty obligations. From an examination of article 98 regulating the duty to render assistance, it would appear that the following are the constitutive elements of the duty under international law:

> *Article 98*
> *Duty to render assistance*
>
> 1. *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 the passengers:*
>
> (a) *to render assistance to any person found at sea in danger of being lost;*
>
> (b) *to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*
>
> (c) *after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.*
>
> 2. *Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.*

States can ensure that ships flying their flag give assistance to persons in distress through the enactment of national legislation imposing either administrative or criminal sanctions against the shipmaster in cases of failing to assist. On receiving relevant information from the authorities, a shipmaster can be proactive by taking steps to alter the ships course to attend to persons in distress and to offer the same type of assistance if the shipmaster happens to discover individuals in distress enroute. The duty to render assistance exists also in the case of collisions where the shipmasters of colliding vessels should provide assistance to each other. Finally, the shipmaster's duty to render assistance is complemented by the obligation of coastal States to provide effective search and rescue services. More detailed search and rescue obligations can be found in other treaties, like the SAR. The wording of the Convention seems to limit the duty insofar as the shipmaster can do so without causing serious danger to the ship, crew, or passengers, and insofar as such action can be reasonably expected of him. The duty to render assistance is therefore not an absolute duty and was never considered to be as such, even in the

early stages of its development. Whilst it is true that the duty to render assistance under article 98 is limited, a question then may arise as to how to determine whether these limitations exist. A major shortcoming of article 98 is the absence of comprehensive rules to gauge the seriousness of the danger and this is particularly relevant in the context of migrant rescue operations, where the shipmaster is continuously required to balance his duties towards persons in distress with those obligations to protect the safety and security of his ship, crew, and passengers. In the event of a conflict of these duties, the shipmaster can be expected to rely on his or her professional judgement in the light of the circumstances of the case or rescue, such as the size of his ship, the amount of the individuals to be rescued, the location of the rescue site, etc.

The international rules regulating the duty to render assistance in the national law of Malta can be seen in the Merchant Shipping Act (Cap. 234 of the Laws of Malta) in articles 305 and 306 on the obligation to assist vessels in distress and the duty to render assistance to persons in danger at sea, respectively:

> **305.** (1) *The master of a Maltese ship, on receiving at sea a signal of distress or information from any source that a vessel or aircraft is in distress, shall proceed with all speed to the assistance of the persons in distress (informing them if possible that he is doing so), unless he is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to do so, or unless he is released under the provisions of subarticle (3) or (4).*
>
> (2) *Where the master of any ship in distress has requisitioned any Maltese ship that has answered his call, it shall be the duty of the master of the requisitioned ship to comply with the requisition by continuing to proceed with all speed to the assistance of the persons in distress.*
>
> (3) *A master shall be released from the obligation imposed by subarticle (1) as soon as he is informed of the requisition of one or more ships other than his own and that the requisition is being complied with by the ship or ships requisitioned.*
>
> (4) *A master shall be released from the obligation imposed by subarticle (1) and, if his ship has been requisitioned, from the obligation imposed by subarticle (2), if he is informed by the persons in distress, or by the master of any ship that has reached the persons in distress, that assistance is no longer required.*
>
> (5) *If a master fails to comply with the preceding provisions of this article, he shall for each offence be liable to imprisonment for a period not exceeding two years or to a fine (multa) not exceeding one thousand units or to both such imprisonment and fine.*
>
> (6) *If the master of a Maltese ship, on receiving at sea a signal of distress or information from any source that a vessel or*

> *aircraft is in distress, is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to go to the assistance of the persons in distress, he shall forthwith cause a statement to be entered in the official log book of his reasons for not going to the assistance of those persons, and if fails to do so, he shall be liable to a fine (multa) not exceeding one hundred units.*
>
> (7) *The master of every Maltese ship shall enter or cause to be entered in the official log book every signal of distress or message that a vessel, aircraft or person is in distress at sea.*
>
> (8) *Compliance by the master of a ship with the provisions of this article shall not affect his right, or the right of any other person, to salvage.*
>
> **306.** (1) *The master or person in charge of a Maltese vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person who is found at sea in danger of being lost, even if such person be a citizen of a State at war with Malta; and if he fails to do so he shall for each offence be liable to imprisonment not exceeding two years or to a fine (multa) not exceeding one thousand units or to both such imprisonment and fine.*
>
> (2) *Compliance by the master or person in charge of a vessel with the provisions of this article shall not affect his right, or the right of any other person, to salvage.*

However, does article 98 UNCLOS offer adequate guidance in the face of contemporary challenges posed by irregular migration by sea? The provisions of Article 98 are based on formulations of a duty which dates back to the 1900s and has remained virtually unchanged with the adoption of the 1958 Geneva Convention on the Law of the Sea and eventually to UNCLOS. The first rules regulating the duty to render assistance were drafted to deal with seafarers in distress, either due to collisions or shipwrecks. It is also significant that UNCLOS contains no provisions which deal directly with irregular migration by sea. The records of the Conference reflect very little discussion on the problem and there are no provisions with the Convention which deal directly with it. Notwithstanding these lacunae, article 98 provides the model law upon which the duty to render assistance is built and the constitutive elements of article 98 are generally accepted by States. This article offers general guidance to the shipmaster but ultimately much would depend on the circumstances of the case, and this may be understandable in light of the diverse nature of rescue at sea operations. Whilst this article provides the basis of the international regime regulating the duty to render assistance, the provision *per se* is not sufficient to deal with contemporary problems associated with rescue at sea operations. The UNCLOS formulation of the duty fails to elaborate on, *inter alia*, what constitutes being in distress at sea, what a rescue at sea operation involves, what the shipmaster should do in cases of being unable to provide assistance, the fundamental issue of disembarkation of rescued individuals. These lacunae, to a large extent, have been addressed by other international treaties and instruments adopted under the auspices of the IMO.

The 1974 International Convention for the Safety of Life at Sea is the main international treaty that sets out minimum safety standards for the construction, equipment, and operation of merchant vessels. The very first SOLAS Convention was adopted as a reaction to the Titanic tragedy and the latest amendment was in 1974. Article 98(1) UNCLOS is largely reflected in Regulation 33 Chapter V of the SOLAS Convention. The SOLAS rules on the duty to render assistance complement those found in UNCLOS; however, here the duty is addressed directly to the master which increases the burden of responsibility. The SOLAS provisions include a specific reference to assistance being rendered regardless of the nationality or status of the person, or the circumstances in which they were found. Finally, there is an additional obligation placed on the shipmaster that in the event of being unable to provide assistance he must enter the reasons for failing to do so into the vessel's logbook, thereby increasing accountability for the shipmaster in cases of failing to provide assistance for frivolous reasons. The coastal State obligations in UNCLOS are also reflected in SOLAS which requires the coastal State to ensure that arrangements are made for distress communication and coordination and provide effective search and rescue operations along the coast.

The 1979 International Convention on Maritime Search and Rescue (SAR) is a reflection of the increase in navigation and emergence of the first large scale migratory flow at sea in Southeast Asia. It became evident that there was a need for communication between States to offer more effective search and rescue services. What was happening was that because States were overwhelmed by the growing numbers of arrival by sea during the 1970s Indochinese crisis, many governments in the region refused disembarkation which in turn discouraged individuals from performing search and rescue operations. This consequential loss of life pushed the international community to consider a more uniform and comprehensive approach to search and rescue based on international cooperation. The SAR Convention provides a comprehensive international system relating to search and rescue and the duty to render assistance is found in Chapter 2.10. Under the SAR States are responsible for delineated search and rescue regions wherein search and rescue services should be provided. Frequently, the fastest solution is to instruct commercial vessels sailing close to the incident to divert their course and attend to persons in distress. Note that the search and rescue region is not a jurisdictional maritime zone regulated by the 1982 UNCLOS, unlike the territorial sea wherein there is the presumption of coastal State jurisdiction. The search and rescue zone is purely a functional zone where States commit themselves to coordinate and provide effective search and rescue services.

The SAR Convention has also been helpful in elaborating in various aspects on the rendering of assistance. Significantly, we have a definition of what constitutes distress and rescue at sea, and there is an intricate relationship between distress and rescue, in that the shipmaster's obligation to rescue is brought into effect once a state of distress exists. A rescue operation is defined in Chapter I, para 1.3.2 of the Annex to the 1979 SAR. For a shipmaster to fulfil his obligation he must attend to the basic needs of persons in distress and deliver them to a place of safety. Disembarkation of rescued individuals is considered to be an intricate part of the rescue operation. Distress is defined in para 1.3.13 in the same Chapter and Annex. Despite these definitions, there have been varying interpretations in State practice, with certain States, such as Italy, considering all unseaworthy migrant vessels to be *ipso facto* in distress, whilst Greek officials consider distress to be dependent either on a call for assistance or immediate risk of sinking.

Luca Camilleri

The *MV Tampa* Incident and its International Legal Consequences for Commercial Shipping: The 2004 Amendments to SOLAS and SAR Regimes

On the 22nd of August 2001, a Norwegian flagged container vessel began a normal commercial voyage sailing from Australia to Singapore under the command of shipmaster Arne Rinnan with a crew of twenty-seven. On the 26th of August the Australian search and rescue authorities requested the shipmaster to assist an Indonesian flagged ferry boat, the KM Palapa, which was in distress somewhere in the Indian Ocean with over 400 migrants. The shipmaster attended to the vessel in distress and successfully brought on all migrants. The shipmaster's problems were complicated by the fact that certain individuals onboard required urgent medical attention. In light of these circumstances, the shipmaster of the Tampa felt compelled to disembark the individuals in the port of Christmas Island, and Australian territory. The Australian authorities, however, denied the Tampa access and it remained anchored for eight days. It was only after intense diplomatic negotiations that a solution was announced in terms of resettlement where Australia and New Zealand, agreed on a process to resettle. Eight days after its voyage began the Tampa was allowed to continue on its voyage. The incident put at risk the vessel's cargo and created commercial loss.

The *MV Tampa* incident led the international community to examine more thoroughly issues concerning rescue conducted by the shipmaster of commercial vessels. Shortly after this incident the IMO examined the existing international legal regime regulating rescue to identify any gaps and deficiencies, leading to the adoption of the 2004 amendments to the SOLAS and SAR Conventions. These amendments aimed at reinforcing cooperation between States to support shipmasters in their efforts to render assistance. According to the amendments, all States have a responsibility to coordinate and cooperate to ensure that shipmasters providing assistance are not burdened with unnecessary deviation or delay, but then, a stricter obligation falls on the State responsible for the search and rescue region where assistance is rendered. In these cases, what we refer to as the SAR State has a primary obligation to ensure that cooperation to ensure that persons are disembarked to a place of safety as soon as reasonably practical. In practice, whilst the 2004 amendments were a positive development, their approach to disembarkation remained somewhat controversial, owing to the fact that the precise legal meaning of primary responsibility remains ambiguous and State practice is divided into mainly two groups on the obligation to allow disembarkation. The first view holds that the 2004 amendments impose a residual obligation on the SAR State to allow disembarkation in its own territory if all meaningful efforts to find a place elsewhere have failed. This interpretation is supported by certain IMO documentation. The second view finds the first interpretation to be inconsistent with general international law and argues that it is the State which offers the closest safe port from the location of the rescue that should accept disembarkation. It should be noted that not all States have accepted the 2004 amendments, including Malta, whose position is that the State with the closest port of safety should accept disembarkation. Most States follow the first view, including Italy, and these opposing views have often tested the friendly relations amongst Mediterranean States, and the lack of agreement between States on a place of disembarkation remains a big problem for those migrants onboard rescue vessels, as well as the shipmaster and his crew.

The SAR definition of the term *"rescue"* as reinforced by the 2004 amendments requires that persons are disembarked to a place of safety.[1] However, the definition of a place of safety is largely unclear under the major treaties regulating the duty to render assistance. Some guidance is provided to us in the 2004 non-binding Guidelines on the Treatment of Rescued Persons at Sea, with reference to a definition of a *"place of safety"*, stating:

> *"The SAR Convention does not define "place of safety". However, it would be inconsistent with the intent of the SAR Convention to define a place of safety solely by reference to geographical location. For example, a place of safety may not necessarily be on land. Rather, a place of safety should be determined by reference to its characteristics and by what it can provide for the survivors. It is a location where the rescue operation is considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination".*

However, not even the guidelines specify where such a place of safety should be located, and much depends on the circumstances of the case. In determining the place of safety States and shipmasters have to keep in mind not only rules and associated guidelines on the law of the sea, but also international rules found in refugee law, in particular the principle of non-refoulment. This is particularly relevant in the Mediterranean context where most operations occur near the coast of Libya which is considered to be a place of safety.

In light of the various regimes, article 98(1) UNCLOS has to be read in conjunction with a multitude of treaties and guidelines, and much like smuggling cases, a rescue at sea operation may also see the interaction between various branches of international law, including the law of the sea, refugee law, and human rights law. Despite this elaborate legal framework, the shipmaster of a commercial vessel still faces a number of challenges when assisting in rescue at sea operations including migrants and refugees.

Contemporary Challenges and Considerations for International Shipping Posed by Irregular Maritime Migration

Merchant vessels are typically manned by a small crew of around twenty to thirty persons so it is often the case that the number of rescued migrants would outnumber the crew. This creates great difficulties in ensuring safe and swift rescues. Commercial vessels are not designed to

[1]Guidelines on the Treatment of Persons Rescued at Sea, Annex 34, Appendix: "The SAR Convention defines rescue as *'an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'*. SAR services are defined as *'the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other craft and installations'*. SAR services include making arrangements for disembarkation of survivors from assisting ships. The SAR Convention establishes the principle that States delegate to their rescue co-ordination centres (RCCs) the responsibility and authority to be the main point of contact for ships, rescue units, other RCCs, and other authorities for co-ordination of SAR operations. The SAR Convention also discusses, with regard to obligations of States, the need for making arrangements for SAR services, establishment of RCCs, international co-operation, RCC operating procedures, and use of ship reporting systems for SAR".

approach and pick up individuals from small boats, and it can prove very challenging to bring aboard a large group of persons from a very small built in bad weather conditions as is often the case, such that shipmasters and crew risk their own lives in assisting in these operations. Once individuals are brought aboard there may be health and safety concerns, the shipmaster and crew may be exposed to infectious diseases and illnesses, security concerns, risks to the migrants themselves (such vessels rarely have provisions to accommodate such groups of migrants), law and order concerns, monitoring the movements of migrants onboard, risk to the vessel itself or cargo onboard, and commercial challenges.

The shipmaster is considered to be the representative of the shipowner and will be required to implement the commercial objectives of the voyage. Some of the rescue related costs may be covered by the vessel's insurance but it very much depends on the type of cover undertaken. Most ship insurance will cover limited expenses related to the rescue, such as the cost of extra wages, port fees, but do not cover loss of profit from the delay or detention of the vessel which can run into hundreds of millions of euros. There also exist ambivalence as to who should be responsible for bearing rescue related costs, whether it should be the shipowner or charterer, and insurers have indicated that much of the liability for the delay depends on underlying shipping contracts, many of which do not contain such clauses.

These challenges are further complicated by the shipmaster's duties to protect the human rights of his employees and embarked persons, as per Regulation 33-6, Chapter V, SOLAS. This may be a challenge for the shipmaster who may need to cater for hundreds of individuals in need of food, water, and possibly medical attention. Furthermore, there may be certain rescued individuals entitled to additional protection under refugee law by virtue of being asylum seekers. Whilst it is generally accepted that the shipmaster has no responsibility for determining the status of the embarked, if one indicates a fear of being disembarked in a particular port the shipmaster must take this into account in conjunction with international law principles, such as that of non-refoulment.

Shipmasters of commercial vessels are regularly requested to respond to distress at sea incidents which often happen long distances from the coast on the high seas. This generally places them in a better position to provide a rapid response, rather than a State's SAR vessels. The practice of shipmasters of commercial vessels rendering assistance is not a new phenomenon and was happening during the Indochinese crisis of the 1970s. With the escalation of the irregular migration by sea crisis of 2014-2015, hundreds of merchant vessels were involved in rescue operations saving thousands of migrant lives and the bravery and effort of shipmasters in these circumstances was recognised by the IMO. Whilst SAR patterns in the Med have changed over the last seven years with the introduction of NGO vessels providing assistance, migrant rescues conducted by merchant vessels remain steady. There have been many high-profile incidents over this period.

Addressing the Efficacy of the Current Legal Response Strategies to Render Assistance: The *Maersk Etienne* Test

Despite the international legal response strategies developed to the rendering of assistance in cases of irregular migration by sea, the challenges discussed continue to persist and this is best illustrated by the Maersk Etienne rescue. On the 4th of August 2020, the shipmaster of a Danish registered oil tanker was reportedly instructed by Maltese authorities to attend to a small fishing vessel in distress in Tunisia's SAR zone. The vessel diverted off its coast and twenty-migrants, including a pregnant woman and small child were rescued, were picked up. The vessel

remained anchored outside Malta which prohibited its disembarkation. After weeks at sea, conditions onboard the vessel began to deteriorate quite rapidly. Rescues were confined to the vessel's small deck space and forced to sleep on makeshift beds. Three migrants jumped overboard inducing a second rescue and this stand-off lasted thirty-eight days, the longest in history. All States involved refused disembarkation until the saga was brought to an end on the 11th of September when migrants were transferred to an NGO vessel which eventually disembarked in Sicily.

Conclusion

In the face of frequent rescue at sea operations involving migrants and refugees, the existing rules provide a certain amount of stability, but it remains difficult to argue that they offer comprehensive solutions to the challenges we have discussed. This does not bode well for the duty to render assistance. There is some evidence that cases such as the Maersk Etienne have been limiting the duty, with shipmasters switching off their automatic identification systems to avoid being called to rescue migrants. Despite the great progress which has been done in the formulation and application of the rules to render assistance, the failure to agree on firm rules obliging States to allow disembarkation may impose disproportionate burdens on the shipmaster and crew because whilst the law requires them to render assistance in the shortest time possible, there is no guarantee that they would be relieved of the obligation in the shortest time possible. In fact, they may face days at sea due to the procrastination of States to decide. Perhaps, the test of efficacy to the current legal response strategies can be a comparison of the delay suffered by the shipmaster of the MV Tampa and the Maersk Etienne, which happened almost two decades later. In the case of the former, the master suffered a delay of eight days, in the case of the latter the master suffered an unacceptable delay of thirty-eight days. It would appear that States need to give more attention to developing more effective legal response strategies and mechanisms to relieve the shipmaster and crew in the shortest time possible.

Topic V: Climate Change and the Ocean

International law has a great challenge ahead of this to address the challenges posed by climate change. In addition to current geopolitical tensions and various areas of political conflict and unrest, climate change is a non-political turmoil that affects the planet itself. International law must be dynamic enough to adapt to an unprecedented challenge. There are three major inter-related challenges, although we shall focus on two: the climate change itself and the degradation of the ocean. The ocean acts as the radiator of the world which distributes heat and current and that makes life on the planet possible. Through the damage we have caused to it and the way in which we have altered the climate through the use of fossil fuels, the oceans have become warmer, less acidic, and less saline in certain parts, especially the Antarctic and the arctic. This is forcing weaker currents and a more stagnant ocean. International law must address what is causing harm to humanity and this is part of that.

By 1992 the UNFCCC was the first treaty on the climate change, which was followed by the Kyoto Protocol and the Paris Agreement. For the first time, international law was influenced by science, a fairly recent development in a field which was previously shaped by public perception and concepts such as ethics and morality. As soon as scientific reports began identifying the challenges our planet is facing, a relationship between the sciences and the law was forged. The law was tasked with finding solutions to prevent this degradation and to foster cooperation as the result of these reports produced by an international organisation, making the validity of that science even more important politically. The law identifies the cause of the harm (i.e., the burning of fossil fuels) and has tried to remedy that harm and to prevent it altogether. If we understand how difficult that it one needs only to keep in mind that we are discussing energy generation, transport, manufacturing, and industrialisation. It is not easy to find alternatives to this energy generation, but this is the solution. The science demonstrates that if fossil fuels are phased out 2050, we would not be able to control the increase in temperature and survival is at stake. By the end of the century, we must reduce the increase in temperature annually by 1.5°C.

The sources of international law regulating climate are three major treaties:

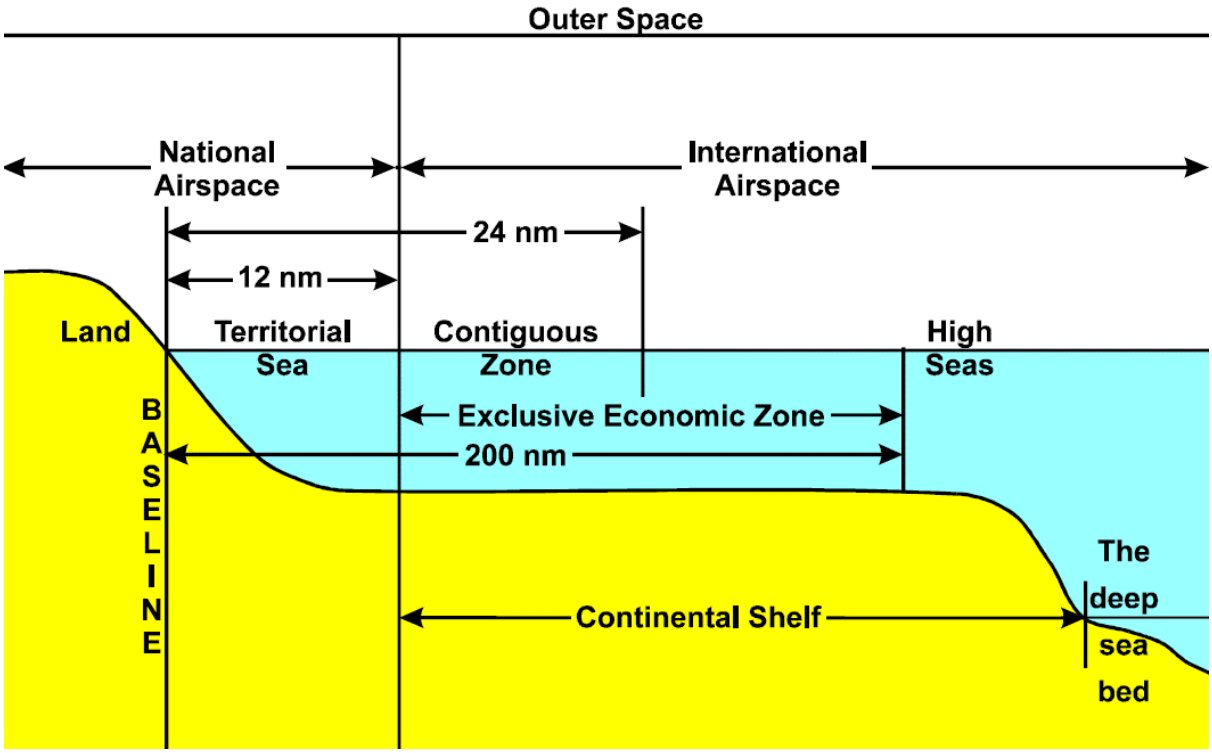
1. 1992 UNFCCC to stabilise greenhouse gases,
2. 1997 Kyoto Protocol to reduce emissions of industrialised States,
3. 2015 Paris Agreement to achieve carbon neutrality by 2050.

In protest of its disproportionate controls, the US never signed the Kyoto Protocol and Canada withdrew from it as the major polluters of the world were not party to the Treaty. In practice, however, in spite of the Paris Agreement, certain States are not complying with their agreements. Certain States even argued that they would not take any action as the damage was caused by the West following the industrial revolution. It is evident, however, that EU Member States are at the forefront of carbon neutralisation. The US withdrew from the Paris Agreement under the Trump administration but re-joined following the election of Joe Biden.

The sources of international law relating to the ocean are far older, having been developed over centuries since the 17th century, when the freedom to sale the high seas was established, and coastal States were given control over their territorial sea. This concept was developed by a Dutch legal theorist named Hugo Grotius. As technology improved, activities at sea changed. Take, for example, fisheries, an important commercial activity that provides food. Fisherman at the time did not sale out to sea during the period before refrigeration until Danish fisherman

developed the process of salting fish to preserve its shelf-life, which led them to sail into English waters to do their fishing, which led to controversy. Technological developments in the first half of the 20th century made it possible to search for minerals at sea. The law had to remain fit for purpose to balance the rights and duties of States. In the second half of the 20th century, we began looking at the ocean as an important habitat worthy of protection. The 1982 UNCLOS mainly embodies the sources of the law of the sea and has since been supplemented by a number of implementation agreements which take certain parts of the treaty and elaborate further. Customary International Law is also a source and UNCLOS is known as a norm-creating Treaty which creates CIL, binding States to a certain extent even if they are not parties to the Convention. Various other treaties regulate fisheries, the safety of life at sea, shipping, the prevention of pollution, dumping at sea, etc. There are also regional agreements for certain seas/oceans.

At sea, the coastal State has extended its jurisdiction over time, beyond which lies the high seas:



The vast majority of ocean space therefore falls under the high seas or the deep seabed wherein States cannot legislate beyond taking measures to protect it through treaties and CIL. Any States which refuse to join treaties or acquiesce to CIL ruin preservation for those States which do. This is why coastal States push for further control over their jurisdiction. However, in reality the ultimate motive is always to exploit those waters exclusively. In a way coastal State jurisdiction those provide a remedy by giving States control, but inextricably linked to this is their own misuse. Once on the high seas, it is the flag State with exclusive jurisdiction over the vessels and therefore it is up to that State to police the pollution of their own vessels. Whereas if that happens within the maritime area where a coastal State has jurisdiction, it has the right to take measures under its own laws. Therefore, to protect the ocean we must keep in mind the limitations of international law, the disbalance of giving States rights over maritime jurisdiction, and at the same time to preserve the freedom of the high seas to enjoy the oceans and the resources therein.

The sources of law that permit us to ensure that the ocean environment remains healthy are the following:

1. UNCLOS (specifically Part XII),
2. Part V of the EEZ Article 56(b)(iii) regulating exclusive fishing rights,
3. UNCLOS Part VI Article 79(2) on the use and rights of the continental shelf,
4. UNCLOS Part VII on the exploitation of living resources on the high seas,
5. UNCLOS Part XI on mineral resources on the deep seabed and the protection of marine habitats during drilling operations,
6. The overriding obligation to pay due regard to the rights of other States under UNCLOS.

Since UNCLOS, scientific evidence has confirmed the bad state in which the ocean is in. It has lost its ability to regulate currents and heat, the overuse and exploitation of its resources leading to a collapse in biodiversity, bringing about a change to climatic patterns and leading to extreme weather events, the increased acidity of the water leading to the destruction of certain organisms constituting the basis for the entire ocean food chain, and more. This has opened up discussions of changing UNCLOS to reflect science that was not available at the time of its promulgation. For the moment, UNCLOS is sufficient, in spite of a number of gaps. The major issue if our time is that many States are not shouldering their responsibility in the fight against climate change. Sometimes, the creation of a new treaty to replace a legacy treaty like UNCLOS lacks the legal gravitas and widespread adoption of its predecessor. Perhaps the best step forward would be to supplement UNCLOS, as is the case with implementation agreements, of which there are three: one, on Part XI on the deep seabed; another on fish stocks; another on the protection of biodiversity beyond national jurisdiction. Acidification remains unregulated, as does the heating of the ocean, and the fact that the ocean is losing its radiator capacity. Another problem is the phenomenon of the rising sea-level. Predictions even indicate that the sea level may rise by six metres by the end of the century.

There is currently a lot of momentum to address these gaps. The IMO is presently focusing on the decarbonisation of shipping, leading to interesting innovations. We find various treaties which continue to enhance the quality of life in the ocean and the quality of the ocean itself. However, the major issue of immediate concern remains the rise in sea-levels, acidification, and the slowing-down of ocean currents. All things considered; international affairs have come a long way in the past three decades to deal with an issue of this scale. Needless to say, progress is best made through a multilateral and holistic approach to international law and relations. It has been noticed how this issue cannot be tackled by one State or by decarbonising one industry, but a holistic approach of international cooperation is required.

Rising Sea-Levels: A Case-Study

The law has established baselines from which the maritime jurisdictional zones are measured, with the outermost point of a State forming an imaginary baseline. When submerged, these baselines shrink as they are measured from the land. If the sea were to flood the coast, the demarcation point would no longer be valid as land is lost. For large countries the populace could migrate inwards, but in the case of Malta that migration is hardly possible. Some State, such as the Maldives, would be submerged entirely. Coastal towns are often crucial, due to their historic connections to trade, such as New York, London, and Hamburg. In reality, we would find the loss of land, the loss of entire nations, the loss of enmities, and the loss of entire river deltas. Furthermore, to be considered a State under the Montevideo Convention on the Rights and Duties of States, the State must have territory. Therefore, Statehood would be lost,

something unprecedented in the history of humankind. We find a threat to territoriality not by the invasion of another State, but because of the rise in sea-levels caused by climate change caused in turn by human activity. Even for landlocked States, land could be so inundation that the sustaining of agriculture would no longer be possible, making residence no longer possible. Under UNCLOS it is clear that land territory without human activity is a rock which does not qualify for Statehood. These eventualities are actual predictions from the scientific community. Besides seawater intrusion, most enmities, including harbours, powerplants, and infrastructure, are often very well-developed by the coast and if the drainage system were to be intruded by seawater it would no longer function. This is known as the collapse of a country's critical infrastructure. One can understand the very tragic implications that this would have. The rise in sea-levels is more gradual than climate disasters but if icesheets continue to melt it is highly likely.

If international law is not in a position to protect us from this, it would not be fit for purpose. The rise in sea-levels would also constitute a threat to national security as it may bring about a loss of statehood for many individuals who would be forced to migrate. Food security is another major issue caused by inundation of agricultural land. Through the loss of their exclusive economic zones these States would also lose their livelihoods, impacting the global economy. If there is a change in the coastal level as the result of rising sea-levels, there is a movement to preserve Statehood and previous economic zones. This could prevent mass migration and economic collapse. Today, it is noticeable that State practice indicates that the rise in sea-levels should not change the rights which coastal States currently enjoy, and this could happen faster than a possible change in UNCLOS. The UN International Law Commission is working to assess the effectiveness in International Law, identifying gaps, and making proposals on this issue, which may generate a kind of evidence-based legislation which indicates the presence of the necessary *opinio juris* to form CIL in anticipation of necessary treaty amendments.

If one had to look at a possible example, in international law it is argued that force majeure might not make the law applicable as is, and one can argue that existing International Law already provides for special circumstances of non-application of the law in cases of force majeure. However, there is a need for something more definite and stable than relying on force majeure to waive legal norms as the issue progresses.

The small island States are considered the most-effected States and therefore have the most weight with respect to *opinio juris*, who are claiming that their rights should be prejudiced legally because at the time when UNCLOS was written there was no understanding that a rise in sea-levels would take place. There are other legal norms which can be applied, such as the no-harm principle, the obligation to control the use of fossil fuels, the importance of the protection of future generations, and the recognition of Statehood. However, it is more effective and reasonable to pre-empt what will happen and to create Treaty norms to pave the way for what will arise. There are also technological and nature-based solutions, such as rehabilitated reefs and building dams, although this is more of a practical solution which would not work on a wide scale.

Unless the law evolves to address arising circumstances, whatever they may be, it is in danger of falling redundant and failing to meet its obligations to protect people and States.

Topic VI: The Law of the Sea

UNCLOS enjoys a widespread adherence, with the latest count putting it at 168 States, including Palestine and the EU. This treaty was adopted at UNCLOS III, which resulted from a Maltese initiative taken at the UN General Assembly taken in 1967 when in November of that year Ambassador Pardo proposed that the area and the resources beyond national jurisdiction be declared as the common heritage of mankind, and the idea of the Maltese government was to exploit the newly discovered manganese nodules (i.e., minerals that scatter the seabed) in order to channel the proceeds into the economies of developing States. Surprisingly, it was to lead to one of the greatest debates at the UN, with the election of Reagan who opposed this idea and started a controversy which was to take another decade to resolve. In any case the Maltese initiative led to the convening of UNCLOS III. Its predecessors were UNCLOS in Geneva 1958, which produced four treaties: first, the Convention on the Territorial Sea and the Contiguous Zone; second, the Convention on the High Seas; third, the Convention on Fishing and Conservation of the Living Resources of the High Seas; fourth, the Convention on the Continental Shelf.

Significantly, States could not agree on the maximum legal limit of the territorial sea. Some insisted on three miles like the United States, whilst developing States wanted to extend this to 12. The Convention was silent on this limit but led to the two superpowers in 1960 attempting at another conference, UNCLOS II, to settle this question. The conference failed and this became one of the important issues to be tackled at UNCLOS III which began in Caracas, Venezuela, and was attended by over one hundred and fifty jurisdictional entities with an agenda of almost a hundred items, and the determination to negotiate a text on the basis of a gentleman's agreement (i.e., where it is accepted that every effort would be made to agree on a text on the basis of consensus and only if no consensus was possible, would a vote be taken at the very end. After almost nine years of negotiations no vote was ever taken except in the final session when the US continued to oppose the common heritage of mankind and asked for a vote.

This Convention is known as the Constitution of the Oceans. Unlike the four Geneva Conventions of 1958 it attempts to regulate the vast spectrum of mankind's activities on the oceans in one single document. The idea is that the problems of ocean space are interrelated and therefore must be dealt with as a whole. It is a substantial document, and we shall deal mainly with those provisions that directly affect our island State. Also, consult Cap. 226 of the Laws of Malta which contains the Territorial Sea and Contiguous Zone Act.

The starting point of any review on the law of the sea is the treatment of internal waters. The baseline is the inner limit of every maritime zone that Malta claims. We shall begin with the legal status of the waters on the landward side of the baseline, known as internal waters and include ports, harbours, bays, the Comino channel. These internal waters are enclosed by these baselines. The importance of these waters is that under International Law they are considered to be part of the territory of Malta. If one reads the Constitution, one will see that internal waters are included in the definition of Malta thereunder. We therefore exercise territorial sovereignty over these waters. This exercise of territorial sovereignty has important ramifications, particularly with respect to foreign shipping. It has been established that entry into these waters requires the consent of the Coastal State. This fundamental principle was reaffirmed by the ICJ in the *Nicaragua v. US* judgement. The challenge, however, is what the position with respect to ships wishing to enter Maltese ports is.

To start with, here we must make a distinction between warships and mercantile vessels. Although States claim the right to require authorisation, it is not uncommon for States to designate some of its ports as international ports open for trade and commerce where the presumption is that such a port is open to *bona fide* trade. Permission is usually required, nevertheless there is a presumption that such trade would be given authorisation in the interests of international commerce. There are times when States enter into Treaties to consolidate this right. this could be on a multi-lateral level, and the most famous still enforced today is the 1929 Statute of Ports Agreement which foresees reciprocal treatment to its parties. However, more recently, there is a whole network of the so-called treaties of friendship, commerce, and navigation where access on a reciprocal basis, generally, is envisaged as part of the general commercial relations between the State parties. One finds within the IMO considerable work being done to facilitate the entry and exit of ships, particularly with respect to documentation, as one can imagine the costs of delay are quite high and generally shipowners are anxious to avoid it. When one considers a ship entering the Grand Harbour, from a legal perspective that vessel is accepting to submit itself to the sovereignty of the Port State, even though it may be registered in another State. Entry into a port implies that the ship is subject to the legislative and enforcement jurisdiction of the Port State. Essentially, this means that the State may expect the vessel to respect its laws and to be subject to the enforcement jurisdiction of the State. However, over the years, there has been a practice where considerable freedom is given to the master of a vessel, in the sense that he is allowed, usually, without interference, to regulate what is known as the internal economy of the vessel. In other words, generally, despite the legal submission to sovereignty, the Coastal State will allow the master to regulate such issues as crew discipline and work and would not interfere. However, the ultimate right of the Port State remains; and there are two views which explain the attitude of Port States in exercising their jurisdiction over foreign vessels in their harbours: the first takes the position that the authorities will only exercise jurisdiction if the ship, its crew, or passengers have violated the peace, good order, and law of the State (consequently if, for example, the master of the vessel unloads noxious substances into the port clearly he is inviting the intervention of the Port State); the second takes the view that the State will intervene even if there is no direct effect, but there is a presumptive effect (for example, authorities will intervene if a murder is committed on board the vessel, even if the vessel is a foreign ship and the victim and alleged perpetrator are both foreign. The view taken is that that effects the good order of the State and therefore requires intervention).

An interesting case arose some years ago when a murder occurred on a foreign vessel on the high seas, and therefore subject to the exclusive jurisdiction of the Flag State, and that vessel entered a Japanese port. At that stage, Japan refused to take action on the basis that the crime did not occur within the Japanese internal waters. However, this law has now been changed. The advent of cruise liners has created considerable problems in this regard. These cruise liners have become floating villages and sometimes when a crime occurs within the internal waters of a State the vessel would have already left and investigations become complex, if not impossible, because consent has to be given from the next board. a few years ago, the daughter of a prominent American Congressman was on her honeymoon in the Mediterranean and disappeared with witnesses saying they saw her pushed overboard. The problem is that once journalists were able to board the vessel and begin reporting, the enforcement agencies had problems of jurisdiction. This will prove to be a major challenge on the enforcement of crimes committed on such vessels which house thousands of people and can move through a number of jurisdictions within a short time span. Ultimately, however, the presence of a vessel in the internal waters of Malta render it subject to the legislative and enforcement jurisdiction of the State. This also clearly applies to civil jurisdiction, not just criminal, and in Maltese legislation

there are mechanisms to deal with the question of the exit of vessels and the role of Maltese courts in regulated said exit.

However, there is an exception on the right of authorisation. it has been a long-respected right that a vessel is entitled to enter one's internal waters for humanitarian purposes or *force majeure.* The general view is that the Coastal State will waiver its jurisdiction on this temporary visit which is expected to end when the danger no longer exists. A few years ago, the Maltese Prime Minister was advised by the Royal Navy that inside the Maltese internal waters were two Israeli gunboats fully armed, that had anchored outside his summer residence. Understandably this caused concern and the Prime Minister protested. Finally, the Prime Minister of Israel responded that the vessels were seeking safe harbour due to the bad weather, which of course was a reference to this exception. Others would classify it as what is known in naval warfare as flying the flag, demonstrating naval power to transmit messages to the Coastal State. An interesting development here has occurred with the advent of mass migration at sea. It is well-known that Malta is within the centre of one of the major irregular migration routes from North Africa to the southern European States, particularly Italy.

Within the context of what is known as the safe and rescue zone, which in the case of Malta is very large extending from Greece to Tunisia, there has arisen a dispute, particularly between Malta and Italy, as to whether individuals rescued in the Maltese SAR have not only the right of entry, but more importantly the right of disembarkation. The IMO has legislated in 2014 when it amended the Search and Rescue and the SOLAS Conventions to try and deal with this question. Whilst on the one hand the master of the vessel is required by the Convention under Article 98 and even by national law, in our case the Merchant Shipping Act, to deviate his voyage to render assistance. The problem is that when he does and the migrants embark for safety, it becomes extremely dangerous and expensive if no State will allow disembarkation. This whole incident began to hit the headlines in the so-called Tampa case where a Norwegian vessel was ordered by the Australian government to deviate its voyage and rescue individuals at sea. The master obeyed, however, the Prime Minister at the time was facing an election and refused entry, presumably because he feared the negative public opinion. In this case they paid neighbouring island States to take this people in. The Tampa was at sea for about a week and caused outrage, where the world record was taken by a ship made to wait 28 days for disembarkation. The position of Malta is quite reasonable, although it does not harmonise with the IMO position, although Malta has been a persistent objector, and the Maltese position is that the State nearest to the incident should offer a place of safety. The Italians claim it should be the SAR State, but this makes little sense if you look at the Maltese SAR which, to the east, is very close to Greece. This dilemma has really hit hard the central Mediterranean, particularly because many of the incidents, and now even more so with the exodus from Tunisia, actually enter the Maltese SAR but are closer to the islands of Lampedusa and Linosa.

There was one particular master who became a hero in Germany when carrying rescuees, refused to obey the orders of the Italian Coast Guard and forced her way into the harbour of Lampedusa, hitting the Coast Guard vessel, delivering her rescues to a port of safety. The interesting addendum to this case was that she was then prosecuted by the Italian authorities. The courts refused to prosecute her on the basis that saving human lives could not be characterised as a criminal act.

We come to consider the special challenges created by the presence of warships and government-owned vessels used for non-commercial purposes, such as a hospital ship or the royal yacht. In the case of these vessels, they enjoy immunity and, therefore, if allowed to enter

internal waters, are not subject to the jurisdiction of the Coastal State. These vessels are a reflection of the sovereign power of their Flag State, and therefore it is not possible even to board such a vessel in one's harbour without authorisation from the master or Flag State. given the sensitivity of this situation, there are comprehensive mechanisms regulating the entry of these vessels, particularly warships. This generally involves an application not of a normal permit, but an application through diplomatic channels. The Flag State will request the Port State permission to enter and generally the latter will respond to another non-verbal. If permission is granted, then Port State must take the consequences. In one particular case, the flagship of the Chilean Navy, a training ship, sought permission to enter the Harbour of Malta on a goodwill mission. The Government proceeded to authorise the entry of the Chilean warship and as is usual, particularly in this case, the cadets who had been out at sea for a number of days looked forward to the entertainment offered. One such group of cadets had a row with one of the bouncers at a Paceville nightclub who thought he was negotiating with Maltese teenagers and ended up fighting the Chilean Navy. The main culprit was identified, however, problem given their knowledge of International Law, the cadets rushed to the warship and the captain refused the Commissioner of Police to board and question the assailant. The vessel enjoyed sovereign immunity and when allowing it to enter the harbour the Government agreed that it would be immune from its legislative and enforcement jurisdiction, and therefore the remedies available were either to seek permission of the master, which was refused, of the flag State through the Consul, which was refused, or an extradition request which the Prime Minister rejected in light of the urgency of the situation. However, the Prime Minister could have issued an International Warrant of Arrest in the hope that if the alleged suspect is not within the safety of immunity, then he could be brought to justice. This indeed was issued and some years later when all seemed forgotten, the alleged culprit got married and decided to honeymoon in Miami. Perhaps fortunately, it was on his way out that the Miami immigration authorities discovered the warrant for his arrest and ordered his detention.

The question of the presence of warships can also give rise to problems of civil jurisdiction. In the ARA Libertad case, an Argentinian flagship requested the Government of Ghana to enter into its internal waters on a goodwill visit. The Government accepted and the vessel entered the said internal waters, when an American businessman who had bought hundreds of millions of defaulted Argentinian government bonds, took action in the Ghana courts in the hope of selling the Argentinian State property to make good for some of his bonds. The judge issued an impediment of the departure of the warship and was taking action to proceed with a judicial sale. When the Court Marshalls tried to board the vessel, they were met with armed guards and Argentina took Ghana to international arbitration as the Ghana government was refusing to allow the departure of the vessel because of the court order. The Court ordered the Government of Ghana to respect the immunity of the ARA Libertad and that, despite the court order which was invalid under international law, the Ghana government, to its credit, allowed the Libertad to sail out of the harbour avoiding a potential conflict.

Unless a SOFA or bilateral agreement is in place, once a foreign warship is allowed to enter internal waters it is virtually untouchable. However, foreign navies are expected to act in good faith.

The Renaissance of Port State Control

For decades, the port has been considered to be part of the territory of the State, falling within its sovereignty. It is also true, and is in fact becoming a reality, that there is an international character to ports and that they are not just the entry to the economy, but the gateway to ship safety. If one does not have safe ports, one runs the risk of attempts against vessels with arms

or terrorists boarding in an insecure port. Thus, port security is the first development. The second such development which has changed maritime shipping, particularly for flags like Malta, is, under traditional International Law, the responsibility of the Flag State to ensure that the vessel complies with international safety, labour, and security standards. In the past, however, we had the so-called flags of convenience. Ironically these were created by the American shipping industry that, in the Korean War, found their ships being impounded by the government for the war effort. They developed the flags of Panama and Liberia where practically everything was American. Panama obtained a tonnage registration tax and did not bother much about standards. Malta entered the game after Cyprus at the end of the 1980s and has made a success of attracting foreign tonnage, becoming the largest flag in Europe.

There are a number of reasons for this, one was attracting Greek shipowners in the 1980s that feared the election of the socialist party there, and more lately the success in attracting Turkish vessels as Turkish-flagged vessels cannot enter Greek waters. What is quite interesting is this process which began with the Paris Memorandum, which was an agreement by European ports where it was agreed that Port States would inspect vessels in their ports and would not allow the vessel to leave until it complied with the necessary international regulations. Suddenly the shipowner found himself with delays which created a bad image for him and the flag as well, because these States would produce a shame-list, and it did not help if, for example Cypriot flags were the number one on the list. A shipowner would probably argue that if one is flying that flag the chances of being arrested in a foreign port were higher. The Port State control put pressure on the Flag States of convenience, now called prestige registry, which has led them to clean up their acts. Through the classification societies they have managed to ensure that their ships are up to standard by obtaining classification certificates.

What has happened is that some ships have left these for smaller flags. The big registries have cleaned up their act but there is still a residual problem, complicated by a new problem: fraudulent registries. There are about a thousand ships whose owners believe them to be registered in a particular State were no such registry exists, rendering the ship Stateless. What is worth noting is the way in which Port State control has allowed States to ensure safer, secure, and cleaner shipping. When one of these cruise liners enters a harbour, in half a day it emits more emissions than a million cars put together. When in harbour the ship is required to tie into the local grid. Cleaning the ship industry is an important development in Port State control. Today, the inadequacies of Flag State control are being supplemented by Port State control.

The Regime of the Territorial Sea

This is where the UNCLOS begins to apply, as internal waters are dealt with on an incidental basis. The territorial sea is a belt adjacent to the internal waters which have a maximum breadth of twelve nautical miles measured from the baseline. A State can have less but not more than this. Under Article 2 of the 1982 Convention, it is stated that the territorial sovereignty of the State extends beyond the territory and internal waters to the territorial sea. It is a zone over which the State enjoys sovereignty. In fact, the Maltese Constitution includes the territorial sea in its definition of Malta. Under Maltese legislation, contrary to international practice, the phrase territorial waters (as seen in Cap. 226), a colonial term, is still retained in lieu of the internationally accepted phrase territorial sea. Therefore, the territory of Malta extends to twelve nautical miles from the baseline.

However, the sovereignty of Malta has an important restriction that is not usually found in internal waters, which is found under Article 17 of the Convention, i.e., the right of all ships to exercise innocent passage through the territorial sea, which states as follows:

Article 17
Right of innocent passage

> Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

This is an important limitation on the sovereignty of Malta, but one that is allowed by international law in the interest of international navigation. The title of this section refers to rules applicable to all ships, meaning the Convention does not distinguish between the type of ship, the type of propulsion system used, etc. All ships enjoy the right of passage through the Maltese territorial sea, a right confirmed in Cap. 226. There is no right of innocent passage accorded to planes, even though Article 2 extends the territorial sovereignty over the territorial sea and the airspace above. The right of innocent passage is accorded only to ships and submarines. As the title suggests, the doctrine of innocent passage limiting the sovereignty of the Costal State in the territorial sea has two constitutive elements, the first being relatively uncontroversial unlike the second.

Under the regime of passage under Article 18 of the UNCLOS, passage is required to be continuous and expeditious. A vessel cannot anchor and must pass in the shortest time possible. The whole rationale behind this obligation is that this right is a major burden on sovereignty and therefore must be exercised almost with restraint, but certainly without manoeuvring or stopping. However, for humanitarian reasons, a vessel would be allowed to stop if, for example, required immediate repairs or a member of the crew required medical attention. The right of innocent passage applies to two particular circumstances: either when the vessel is on its voyage and needs to transverse the States territorial sea, or when the vessel needs to transverse the territorial sea to enter internal waters. Article 18 states:

Article 18
Meaning of passage

> 1. Passage means navigation through the territorial sea for the purpose
> of:
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

What constitutes innocence is controversial. Here, the UNCLOS was divided between those States that wished to have a wide discretion as to what constitutes innocence, and those that were keen to limit objectively the right of the Coastal State to determine innocence as it was

feared that this would allow States to unnecessarily interfere with the innocent passage of ships. This is of particular importance to the naval powers because, particularly by extending the territorial sea from three to twelve miles, we now have a number of strategic straits falling under the sovereignty of the Coastal State. therefore, the fear was that if they allowed too much discretion, they would interfere with the innocent passage of ships, particularly warships. Under Article 19 of the Convention, we find the meaning of innocence described. In actual fact, this definition is twofold: there is a general criterion and specific prohibited activities.

The general requirement is that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the Coastal State, and conforms with the other rules of International Law. Article 19(1) states:

> Article 19
> Meaning of innocent passage
>
> 1. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

Article 19(2) then goes on to list activities which if engaged by the foreign vessel would deprive it of innocence. The Convention in this Article states that:

> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order, or security of the coastal State if in the territorial sea it engages in any of the following activities:
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (b) any exercise or practice with weapons of any kind;
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
> (e) the launching, landing or taking on board of any aircraft;
> (f) the launching, landing or taking on board of any military device;
> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
> (h) any act of wilful and serious pollution contrary to this Convention;
> (i) any fishing activities;
> (j) the carrying out of research or survey activities;
> (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
> (l) any other activity not having a direct bearing on passage.

This list is an exhaustive one which limits the discretion of the State to these particular activities whilst preserving its right to defence. Some States, but not the Convention, feels that the presence of a warship is per se a non-innocent act, but nowhere in the Convention is this said. The positioning of warships is extremely critical, with the US engaging in the protection of the freedom of navigation through the use of its warships. In one case, the Soviet Union insisted that innocent passage in the territorial sea outside its naval bases would require permission. The US Navy challenged this, and the two sides met to defend the position of the right of innocent passage of warships.

The formula drafted at the UNCLOS III and reflected in Article 19(1) and (2) is twofold: first, in Article 19(1) the Convention establishes a general rule requiring passage to be innocent and respect the territorial integrity and sovereignty of the Coastal State; second, as a counterbalance to the interpretation of this general rule the drafters adopted Article 19(2) which essentially enlists an exhaustive number of activities which, if a ship engages therein, does not retain innocence. Article 19(2)(a) is the general obligation to respect the principles of the Charter and the territorial integrity of the State. However, as one progresses down the list one will note a number of activities that are not surprisingly considered innocent, ranging from the landing of aircraft on the ship to the spying of the territorial sea and to fishing, pollution, and any other activity which is not incidental to passage.

In the case of *Ukraine v. Russia*, some three years ago Russia arrested Ukrainian warships and crew exercising the right of innocent passage in the Black Sea. Russia claimed this was an act of war. The tribunal decided in favour of Ukraine and ordered the release of the vessels to which Russia did in fact comply. Those who argued that warships do not have a right of innocent passage have a difficulty in disputing Article 20 which recognises the right of innocent passage for submarines so long as they fly their flag, stating:

> Article 20
> Submarines and other underwater vehicles
>
> In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

With respect to warships, it was extremely controversial as developing States took the view that the presence of a warship per se was not innocent. The maritime States took an opposite view and argued that the Convention did not discriminate against such ships. In fact, if one read the Title of this section in the Convention one would note that it refers to *"rules applicable to all ships".* Furthermore, under Article 20, the Convention allows for the innocent passage to be accorded to submarines. There are two conditions imposed: first, it must surface; second, it must show its flag. In the light of this rule perhaps it is difficult to sustain the view that warships are not entitled to the right of innocent passage. Nevertheless, there are some thirty States that depart from the UNCLOS model and require either prior notification, or authorisation from the Coastal State. this is strongly objected to by the maritime States and the US together with the then Soviet Union issued a declaration on the uniform declaration on the rules of innocent passage. This came about after US warships challenged a requirement by the then Soviet Union in its Black Sea military ports to require authorisation when the USS Yorktown took part in exercises by the above-mentioned port. In this respect the Soviet Union, now Russia, reversed course and recognised the rights of warships to exercise innocent passage. Indeed, the two major maritime powers issued a declaration asserting that warships had the right of innocent passage, that the Convention rules reflect customary international law, that the list in Article

19(2) was exhaustive (meaning nothing could be added to it) and denied the right of notification or authorisation. Indeed, this principle was affirmed by the aforementioned case of Ukraine v. Russia, with the Tribunal arguing that Ukrainian warships had the right of innocent passage.

In the mid-1980s the Prime Minister was alerted that a cargo-ship full of armaments destined for Lebanon was taken over by the crew and sought permission to enter the Grand Harbour. This was denied although the ship continued to make its way towards the Grand Harbour before changing direction. Entry into a State's territorial sea can only be for innocent passage unless there are: first, humanitarian considerations; second, caused by the Somalia incident, through the right to pursue pirates. The right to pursue pirates comes to an end when they enter the territorial sea of a State and the problem with combating Somali pirates at the time was that they would escape into the territorial sea of Somalia, rendering efforts to catch them fruitless. The Secretary-general of the IMO argued to the Security Council that in the interest of safety the Council should authorise other States to continue their pursuit in spite of the sovereignty of Somalia. Before the Council decided, the task force that was combatting piracy was being frustrated as these pirates rushed into the territorial sea.

There are States, like Malta, who *de facto* have given the Prime Minister the power to legislate with respect to requiring authorisation or notification. Indeed, this power is given under Cap. 226, and has been there for a number of years. However, it has not been put into force and therefore Malta does not require authorisation or notification. Notification may not be unreasonable, particularly in some areas, but it remains resisted. The US Navy's *Protection of the Freedom of the Sea* program opposes such moves. There has developed however an interesting *modus vivendi*, particularly in respect of those States considered to be strong allies of the US, and presumably this is the practise followed by other States which involves, on an informal basis, the naval attaché at the embassy calling upon the foreign ministry to inform them, without prejudice, of the passage of warships. This seems to calm down the waters and enables the US to retain its position without unduly upsetting allies.

Under Cap. 226 of the Laws of Malta, the government of the day is allowed to legislate in a manner that is consistent with Article 21 of the 1982 Convention on the regulation of innocent passage with respect to protecting its laws. The Coastal State may issue rules relating to, for example, fishing, environmental conditions, customs, fiscal matters, immigration, and sanitary rules. Under this Chapter, the law envisages the establishment of what it defines as a maritime enforcement officer. The definition elaborates on who could be an MEO and essentially it includes the police, customs and excise officers, members of the armed forces, and any other officers vested with general law authority. The reason for this wide definition is that many years ago, when the armed forces took enforcement action in the territorial sea, there was an interesting case where the defence argued that they did not have the authority to arrest, as this authority in the territory of Malta was that accorded to the police. At the time, the government issued a legal notice which gave the armed forces the necessary *vires* and a revision of Cap. 226 settled this question where the definition of such officers is wide enough to cover all maritime enforcement agencies.

Under Article 5 of Cap. 226 these officers may take appropriate action with respect to any foreign vessel, except warships, reasonably suspected on having onboard a person reasonably suspected to commit or having committed an offence against the law of Malta. This, of course, is the exercise of criminal jurisdiction over ships exercising criminal passage over the territorial sea. However, under Article 27 of the 1982 Convention, there are limits imposed on the exercise of criminal jurisdiction, which are reflected in Article 5(2) of Cap. 226:

> 5. (1) Subject to the provisions of subarticle (2), any maritime enforcement officer on board a relevant vessel or craft may, within the internal or territorial waters of Malta, take appropriate action with respect to any vessel, other than a foreign military vessel or a ship owned by a foreign state used only for non-commercial service, whether flying the Maltese or any other flag or not flying any flag, reasonably suspected of having on board any person reasonably suspected of being about to commit or of having committed any offence against any of the laws of Malta.
>
> (2) Subject to the provisions of subarticle (3), where the suspected offence has been committed on board the foreign vessel during its passage through the territorial waters of Malta, the power referred to in subarticle (1) shall not be exercised unless:
>
> (a) the consequences of the offence extend to Malta; or
> (b) the offence is such as to disturb the peace of Malta of the good order of the territorial waters; or
> (c) the assistance of the Maltese authorities has been requested by the master of the vessel or by a diplomatic agent or consular officer of the flag State of the vessel; or
> (d) appropriate action is necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
>
> (3) The provisions of subarticle (2) shall not affect the right of any maritime enforcement officer on board any relevant vessel or craft to take any steps authorised by Maltese law for the purpose of an arrest or investigation on board a foreign vessel passing through the territorial waters of Malta after leaving Maltese internal waters.

The third exception is essentially a reflection of the concept of nationality where officers can intervene if they are requested by the Flag State, the Consul, a diplomatic agent of that State, or the master of the ship. These are the limited cases when maritime enforcement officers can intervene in accordance with Article 27 UNCLOS.

It is also worth noting that under Maltese law the territorial sea regime applies not only to the water column but also to the seabed and subsoil of the said sea. In other words, Malta has sovereignty over the seabed and subsoil, allowing it to exploit any resources therein. Furthermore, under Cap. 226 of the Laws of Malta, as has been pointed out, the outer limit of the Maltese territorial sea is consistent with Article 3 of the 1982 Convention and stands at twelve nautical miles. However, there is an interesting sub-article which tries to combine contemporary international law with our colonial history where it is said that the territorial sea extends to 25 nautical miles for the purposes of the sovereign rights of Malta to explore, exploit, conserve, and manage, the living resources therein. In the old legislation, the reference was to extending sovereignty, however, that was inconsistent with international law which does not grant the State sovereignty over what is essentially an exclusive fishing zone, but sovereign rights for the purposes of conserving, managing, exploiting, and exploring marine life. The old

legislation, which we inherited from the British, extended the sovereignty for fishing up to 25 nautical miles, but this meant that one is exercising sovereignty, whilst by the mid-1970s customary international law allowed States a 200 nautical mile exclusive fishing zone without the exercise of sovereignty. There, States exercise not sovereignty, but exclusive sovereign rights over marine life. Indeed, Maltese legislation on this matter was also updated through the Fishery Conservation Management Act which reflects these new notions as found in the 1982 Convention.

The High Seas

Technically, the high seas commence, unless a State has declared an EEZ, at the outer limit of the territorial sea. The high seas are open to all States and are not subject to sovereignty and cannot be appropriated. However, they must be used for peaceful purposes. Within the high seas, as per Article 87, States enjoy the so-called freedom of the high seas.

Article 86 of the Convention announces which areas are not included under the high seas' regime:

> Article 86
> Application of the provisions of this Part
>
> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

If one looks at Malta, currently the high seas regime begins at the end of her territorial sea. As we shall see, the situation in Malta is about to dramatically change because the government has some months ago the Malta EEZ Act which gives it the power to establish exclusive economic zones, a power which has not yet been fully implemented but it appears that this soon will be the case. Although Malta has a 24 nautical mile contiguous zone and a 25 nautical mile fishing zone, the legal status of the waters of these zones is high seas. The rules we shall henceforth review apply to shipping activities in the high seas of Malta.

Under Article 87 of the 1982 Convention, there is a non-exhaustive list of the so-called freedoms of the high seas. The two freedoms which we usually encounter are the so-called freedom of communication and the freedom of navigation. Under Article 87, States enjoy the freedom of the navigation of their ships and the freedom of overflight in the airspace above the high seas of their airplanes. The freedom of communication is becoming additionally important and is the freedom to lie submarine cables and pipelines. This freedom has again become extremely important, particularly because we are in the process of rewiring the globe. In the late 19th century when telegraphy was invented there was a rush to lay underwater telegraphic cables, changing the geopolitics of the globe, particularly in the days of colonial rule where communication became instant. The first underwater cable was laid between the UK and the US and Canada, landing in Newfoundland, and was considered to be such an important event that the first voice transmitted is that of Queen Victoria. The point was that soon the vulnerability of these cables was discovered when in 1884 the first international treaty designed to protect these cables was born, still being enforced today as the only specific treaty dealing with the protection of cables. This gives powers to inspect a ship suspected of causing problems

to underwater cables, usually through its anchor, and was used by the US some years ago when it boarded a Soviet vessel suspected of causing damage. Today, one finds fibre optic cables that transmit millions of data channels, and to a certain extent underwater cables have proved to be so successful that they have become a major source of communications.

Similarly, States have the freedom to lay underwater pipelines, and this is a very important development because these are huge pipelines designed to transport generally oil or gas over huge distances. Prior to the Ukraine-Russia crisis it was generally felt that underwater pipelines were more reliable as they bypassed sensitive political areas. However, recent developments have shown that they are also exposed, as per the sabotage of the Nord Stream II pipeline. These pipelines are massive concrete structures and are designed to withstand great amounts of seismic activity. Therefore, these freedoms of communication of pipelines and cables are an important feature of the high seas' regime.

The freedom to establish artificial islands, structures, or devices is limited by Part VI of the 1982 Convention dealing with the continental shelf regime where in Article 60 the Coastal State is given the exclusive right to establish artificial islands and installations.

The freedom of fishing is limited by conservation measures. The freedom of scientific research is also limited by the distinction between applied scientific research (searching for oil and gas) and fundamental scientific research (research for the sake of knowledge and the benefit of humankind). It has been pointed out that this is not an exhaustive list and the reason for this is that given new developments in maritime activities the list develops as technology develops too. Take, for example, the dawn of autonomous shipping.

The more important freedom is that of navigation upon which 90% of the world's trade is carried out. These freedoms are not absolute, however, and must be carried with due regard of the right of other States to exercise their freedoms. Take, for example, Article 60(7) of the 1982 Convention, because although the Coastal State has the exclusive right to establish artificial islands on the continental shelf or in the EEZ, one cannot establish such islands if they interfere with internationally recognised sea lanes. In other words, there is there a protection of the freedom to navigate.

Navigation

The right to navigate the high seas is given to the State. It is the State that has the right under international law to sail ships, and that right applies whether the State is landlocked or coastal. In fact, States like Switzerland have a maritime registry and have ships sailing the Swiss flag exercising freedom of navigation. Bear in mind that a ship sails by virtue of its nationality. Ships are given the nationality by States which entitles it to fly the flag of that State. If a vessel is not registered with a State, in other words it is Stateless, it runs the risk of being arrested as a Stateless vessel; although it is not free from controversy, Stateless vessels are not entitled to the right to navigate. The conditions for registration are generally left to the State. However, there is a condition imposed under the 1982 Convention that there must be a genuine link between the vessel and the registry. This requirement is based on the *Nottebohm* judgement given by the ICJ and requires a link between the ownership of the vessel and the State.

In the post-Korea crisis American shipowners decided it was too risky to be registered under the US flag as the vessel could be expropriated, as happened during that period, if there was a war. Therefore, American shipowners created the Panama and Liberia registries where effectively the genuine link between the vessel and the State was a company established in

those territories, which in past could have been owned by bearer shares, but could also be owned by Russian citizens, and the ship would be owned by the Panamanian or Liberian company and on that basis as long as the yearly dues were paid the ship was allowed to fly either flag. In the late 1980s Malta and Cyprus established their own registries, attracting considerable shipping in response to the tax benefits and Greek political situation. These were known as flags of convenience as the standards were lower, creating problems which threatened the safety and security of navigation.

One is consequently not allowed to fly under two flags, and if one does so it could be considered Stateless. From this emerges one of the most fundamental principles of maritime law: that on the high seas the ship is subject to the exclusive jurisdiction of the Flag State. Consequently, a vessel in the Indian Ocean could be subject only to the jurisdiction of Malta and Maltese law applies. A ship can only fly one flag because ocean governance on the high seas is dependent on the control the Flag State exerts on its ships and therefore a very strict rule which has not yet been pierced despite the efforts of the US in cases of transporting weapons of mass destruction, that if one wants to board the vessel one needs the permission of the flag State.

Roughly a decade ago a Maltese-registered timber carrier owned by Russians was subject to piracy in the Baltic Sea, which the crew duly reported. This surprised the world because the Baltic is one of the most highly regulated seas. The crew took over the vessel and commenced sailing down to Africa. When the ship reached the Canary Islands the Sunday Times of London alleged that the vessel was actually carrying nuclear weapons for Iran. The allegation was that these nuclear parts were hidden in the ballast tanks which were sealed, and the timber was placed on top. The Russian government wished to put an end to the matter and wished to board the Maltese vessel a few miles of the Canary Islands. The Russian government applied for permission to board which the Maltese government gave. Once consent was given the crew and pirates were flown to Moscow to stand trial and the vessel was released to carry out its journey. The vessel was searched and if there were weapons, they must have been unloaded when the Russian Navy boarded.

It is not always easy to see which agency has the authority to grant permission to board. Under Cap. 101 of the Laws of Malta, the only person who can give authority to board a Maltese ship on the high seas suspected of drug trafficking is the Attorney General with the concurrence of the Prime Minister. States are understandably careful with regard to the granting of consent.

ITLOS has over the years developed jurisprudence regarding this genuine link. That is, it is not sufficient to establish a company and claim the existence of a genuine link. It must be proven that one has effective control over the vessel, that one exercises control either directly or indirectly over the vessel for which he remains legally liable. Over time we have seen the cleaning up of the flags of convenience and the reason for that is that we have seen the emergence of Port State control wherein ships in harbours would be inspected and arrested if they are not in compliance with international standards and requirements. This agreement, known as the Memorandum of Paris, ensures that there is a proper regulation of vessels where Flag States fail in their duties, and indeed it is true to say that registries like Malta, Cyprus, and Liberia have all cleaned up their registries and require from their ships the recognition and compliance with international standards to avoid the risk of being arrested in ports and giving a bad name to the reputation of the flag which would discourage owners from registering due to the risk of arrest. Malta is the largest ship registry in Europe, one of the largest in the world, and therefore plays an important role in ensuring that Flag State jurisdiction ensures the compliance of its vessels with international rules and standards.

The Regime of the Contiguous Zone

This is that zone which has been long recognised in international law and first codified in the 1958 Territorial Sea and Contiguous Zone Convention. The contiguous zone, to a large but not complete extent, after 1958 was incorporated in the 1982 Convention, Article 33. The contiguous zone is also established in Maltese law, under Cap. 226, Article 4.

The contiguous zone is what can be referred to as a functional zone, in which the State does not enjoy sovereignty, but the status of which being of a functional nature wherein, for very specific purposes, the Coastal State is entitled to exercise *"the control necessary with respect to certain laws"*, these being fiscal, custom, sanitary, and immigration. Therefore, with regard to these four areas international law grants the Coastal State control in the form of a buffer zone in order to protect itself.

Article 33(1) states:

> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

This is an important power given to the Coastal State to, for example, combat smuggling where at times the assets smugglers have are considered more powerful than those of the States such that twelve nautical miles would not be sufficient to punish the infringement. If one considers the 1958 Convention one notes that Article 54, the predecessor to Article 33, contains a subtle difference in terminology. This is due to the fact that, under the 1958 Convention, beyond the territorial sea was the high seas and given the functional nature of the contiguous zone, once the Coastal State, under Article 24(a) is given the right to exercise control, the legal status of the waters is that of the high seas. All high sea freedoms are enjoyed, subject to the exercise of the control, beyond twelve nautical miles, up to a limit of twenty-four nautical miles from the baseline, that is twelve further nautical miles from the territorial sea. Therefore, at least under the 1958 Convention, that contiguous zone was clearly part of the high seas.

A reading of Article 33(1) will indicate it having dropped the reference to the high seas found in the corresponding Article in the 1958 Convention, the reason being the establishment of the Exclusive Economic Zone under Part V of the 1982 Convention which has a maximum outer limit under Article 57 of two-hundred nautical miles and is a regime *sui generis*, such that the EEZ established under Part V is a specific legal regime which is neither part of the territorial sea nor part of the high seas, simply being a specific legal regime. Therefore, the new wording of Article 33 has had to recognise this regime. It is, however, a facultative regime, not an automatic one as the continental shelf regime is. In order for a State to declare an EEZ it must proclaim its claim and establish it. If a State fails to do so, then the waters beyond the territorial sea remain high seas. If a State does establish an EEZ, then the waters of the contiguous zone

are now part of the EEZ and not the high seas. A reading of Cap. 226 would indicate that the text on the contiguous zone, last amended in 1978 presumably to extend it to twenty-four nautical miles, would note that the Maltese legislator, some four years before the adoption of the 1982 Convention, extended the limits to twenty-four nautical miles but left the text of the 1958 Convention. Article 4 reads:

> **4.** (1) *Without prejudice to the provisions of article 3(2), in the zone of the open sea contiguous to the territorial waters of Malta as defined in article 3(1) (such zone being in this Act referred to as "the contiguous zone") the State shall have such jurisdictions and powers as are recognised in respect of such zone by international law and in particular may exercise therein the control necessary -*
>
> (a) *to prevent any contravention of any law relating to customs, fiscal matters, immigration, and sanitation, including pollution, and*
>
> (b) *to punish offences against any such law committed within Malta or in the territorial waters of Malta as defined by article 3(1) or (2), as the case may require.*
>
> (2) *The contiguous zone shall extend to twenty-four nautical miles from the baselines from which the breadth of the territorial waters is measured.*

Malta has promulgated an EEZ Act, but the Act provides for the Minister to establish EEZs on a designated basis. This has not yet happened, but according to the policy presented to the public this designation of zones is imminent, particularly as the government wishes to utilise the economic resources allowed under the EEZ as enlisted in Article 56 of the 1982 Convention. These powers shall be considered in greater detail later. However, it shall be noted now that if the Minister designates an area as an EEZ, then perhaps the wording of Article 4 referring to the open sea will have to be amended, that is, it will have to be brought into line with the reality that if one establishes an EEZ the contiguous zone will not be open sea.

One will note that the term *"exercise the control necessary"* is limited to a functional power which is far narrower than sovereignty. The control is qualified by the doctrine of necessity. If one were to read Article 33, one would note that this functional power is given with respect to four categories of laws, either to prevent or to punish their infringement. It is important to note the infringement of these laws must occur within the territorial sea or the territory of the State. What Article 33(1) of the 1982 Convention stipulates is that the act must occur within the territory, possibly if one infringes the law and attempts to escape, or within the territorial sea. One is not entitled to exercise control if the infringement occurs in the contiguous zone, which can be used to pursue persons who have violated or intend to violate the laws and regulations of the State within its territory or territorial sea. As has been noted, the contiguous zone is there to protect the State from infringement of four categories of law, whilst the EEZ is there to give the State the sovereign right to explore, manage, and exploit living and non-living resources, therefore the two have very different scopes.

Note a difference between Article 33(1)(a) and (b), referring to the prevention and punishment of the infringement, respectively. Once there is a very interesting doctrinal controversy as to the nature of enforcement that can be exercised, in practice most States will exercise

enforcement jurisdiction. Some would argue that to prevent infringement may not require legislative or prescriptive enforcement but ensuring that the vessel does not enter into the territorial sea or internal waters, for example. Remember that, at least currently, outside the Maltese territorial sea there is freedom of navigation and therefore that must be borne in mind. However, perhaps a different control is authorised with respect to Article 33(1)(b), to punish the infringement of laws committed within the territorial sea. Unlike the first scenario where the suspect vessel would have committed the crime within the territory or territorial sea and has escaped with the Coastal State being entitled to exercise the control necessary to punish that infringement up to twenty-four nautical miles.

Article 111 of the 1982 Convention deals with the regime of hot pursuit, which enables a ship to be followed to the high seas, and, under Article 111(1), the pursuit must begin when the pursuit vessel is either in the internal waters, territorial sea, or the contiguous zone of the Coastal State. If one is in hot pursuit of a vessel which is already in the contiguous zone it can be pursued up to the high seas or the territorial sea of another State. This right of hot pursuit is also found under Cap. 226 which gives the power to conduct hot pursuit of a suspect vessel even when it has arrived in the contiguous zone and into the high seas, so long as it *"has not been interrupted"*, pursuant to Article 8(2). The Maltese legislator makes an important proviso under this scenario with respect to the contiguous zone, stating: *"Provided that where the suspect vessel is within the contiguous zone when it is ordered to stop by a maritime enforcement officer on board the relevant vessel, the pursuit may only be undertaken if the suspect vessel is suspected of having committed any relevant offence".* The law goes on to say in sub-Article (3) that *"Where the suspect vessel is within the contiguous zone, hot pursuit may only be undertaken if the commission of a relevant offence is reasonably suspected".* Furthermore, hot pursuit may be by ship or by aircraft, as envisaged under Article 4(6) of the Laws of Malta.

"Exercising the control necessary" is an important term as it allows the State to exercise control within the law but regulates the level of control according to the relevant circumstances of the case. Therefore, shooting at a vessel which refuses to stop may or may not be necessary according to the circumstances of the case. Take, for example, the case of a suspect vessel whose captain was ordered to stop by enforcement officers for the vessel to be searched on the basis of a reasonable suspicion. A boarding party on a zodiac dinghy was sent to inspect the suspect vessel, leaving the warship to do so, and boarded the suspect vessel. As they did so, the captain decided to escape with them on board. Naturally, this irritated the captain of the warship who reacted by firing at the captain's cabin to halt the vessel's escape. Upon his return, the captain of the warship was summoned to a commission of inquiry and was charged with the use of inappropriate unnecessary force. The commission decided that the doctrine of necessity required the warship captain to use alternative measures before escalating to the level used. It was pointed out that severe warnings should have been issued, that if these did not work the captain should have shot in front of the vessel, and finally, if that did not work, then the captain should have fired at the vessel, aiming at a location that did not risk human life or the safety of the vessel itself. Therefore, the doctrine of necessity ensures that the control exercised is a reasonable one, a criterion which requires one to take into account all the relevant circumstances and to ensure the maximum effort to protect human life and the safety of the vessel.

A reading of Article 4 of Cap. 226 will note that a discrepancy, perhaps a reasonable one, between Article 33(1) UNCLOS and Article 4 of the Maltese law, as in the latter the Maltese drafters have inserted that when they refer to the laws subject to protection, next to sanitary,

the word pollution. Under Maltese law, one can exercise the control necessary with regard to sanitation, including pollution. This is an interesting inclusion which essentially turns the Maltese contiguous zone into a pollution control measure. In many respects, it was perhaps innovative and creative at the time when it was drafted. However, with the introduction of the Exclusive Economic Zone, international law under Article 56(1)(b) grants jurisdiction with respect to the protection of the environment in the EEZ. The issue, however, is that a considerable number of States go beyond the Convention where they claim to exercise the necessary control with respect to security laws, going beyond the Convention.

A difference between the 1958 and 1982 Convention versions is the question of delimitation. The first point to make is that to exercise the powers granted under the contiguous zone must declare a contiguous zone. If a State fails to do so, one cannot exercise the controls necessary. The second is that unlike the 1958 Convention, there is no delimitation formula when one finds overlapping contiguous zones. The 1958 Convention provided for the delimitation of overlapping zones which, curiously, was left out in 1982. This is a complex situation where one would have expected a greater need for the delimitation formula when the contiguous zone was increased from twelve to twenty-four nautical miles. Nevertheless, it was left out of Article 33.

Article 303 creates a legal fiction designed to protect the archaeological and historic objects which lie on the seabed. Under Article 303(2), in order to control traffic in such objects, the Coastal State may, in applying Article 33 on the contiguous zone, presume that their removal from the seabed in the zone of twenty-four nautical miles without the approval of the Coastal State would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Article. In other words, although the protection of archaeological objects does not fall under Article 33, Article 303 creates a legal fiction whereby, in the event that there is an unauthorised lifting of an archaeological or historic object without permission, it is considered as though that object was lifted in the territory or territorial sea of the Coastal State even though it was beyond its sovereignty. Article 303 creates an archaeological zone through a legal fiction which utilises the contiguous zones. *Vide* Article 43 of Cap. 445 of the Laws of Malta. The point remains that if one does not declare a contiguous zone, then one cannot protect one's underwater archaeological heritage. *Vide* the *M/V "Louisa" Case* (*Saint Vincent and The Grenadines v. Kingdom of Spain*, List of cases: No. 18).

In brief, the contiguous zone's functions are twofold: first, to allow the coastal state to enforce laws in those four areas; and second, to create a legal fiction whereby archaeological and historic objects are protected if they are found up to twenty-four nautical miles.

The Continental Shelf

The continental shelf Regime is a regime whereby the Coastal State has sovereign rights to explore and exploit the continental shelf resources on an exclusive basis. The waters above it, unless one has declared an EEZ, remain part of the high seas, with the limitation that some justifiable interference is allowed in order to explore and exploit the seabed and subsoil. Under international law, Article 76 of the 1982 Convention applies two criteria in establishing the outer limit of the continental shelf. These criteria were reviewed and changed from the corresponding criteria in Article 1 of the original Convention. One criterion in this Article establishes the outer limit of the continental shelf on the basis of the geophysical limits which may extend up to 350 miles. However, the second criterion, which is more relevant to Malta and the Mediterranean is the so-called distance principle, that is, although the continental shelf begins as a geological institution, Article 76, at least up 200 miles, detaches the geological

continental shelf from the legal one. In other words, the basis of legal title to the continental shelf rights is distance from the coast. Whatever the geological structure of the seabed and subsoil is, up to 200 miles the Convention under Article 76 recognises the legal continental shelf.

Clearly, in enclosed and semi-enclosed seas where there is no distance of more than 400 miles, we find overlapping claims which must be delimited on the basis of an agreement. Therefore, from the Maltese perspective, we find the distance principle which we apply, and which is clearly a claim known as the so-called trapezium claim, based on the median line as perceived by Malta, with two medications: first, a de facto agreement between Malta and Italy dating back to the 1960s where through an exchange of non-verbal it was agreed that the coast facing Sicily would be delimited on the basis of the median line. To the south, there is a relatively small but significant boundary between Malta and Libya which both States incorporated in a bilateral agreement, thereby implementing the 1985 ICJ decision on the delimitation between Malta and Libya. To the west and to the east, the Maltese claims are subject to overlapping claims, but Article 2 of Cap. 169 defines the continental shelf as *"that area permitted by international law, the boundary of which is either through agreement or, in the absence thereof, the median line".* It was not possible to come to an agreement at UNCLOS III and the Convention requires States only to reach by agreement an equitable solution. In fact, the Article in the Convention refers one to the application of the sources of international law in the event of a dispute.

Under Article 76 of the 1982 Convention, we have established the two legal limits. Article 77, in turn, states that within these limits one is entitled to exercise the sovereign right to explore and exploit the shelf and its resources. The first point to be made is that where one refers to the resources of the shelf under this Article of the Convention, one means all non-living resources with one exception: under Article 77, followed by Maltese law, the continental shelf regime also covers a living resource known as the sedentary species, a type of fish in constant touch with the seabed as they move.

The Convention does not give sovereignty of a State over the shelf, such that it would be wrong to mean that Malta's sovereignty extends to its continental shelf. The term used is a rather specific one developed by the International Law Commission when drafting the first Convention on the continental shelf in the 1950s. The State does not have sovereignty, but sovereign rights for specific purposes. Some confuse the two, but it has long been established in jurisprudence that the Coastal State enjoys sovereign rights exclusively for exploring and exploiting resources. The term sovereign rights was chosen specifically to avoid States claiming sovereignty over suprajacent waters, and also because these rights are exclusive to the exercise by the Coastal State and cannot be exercised by any other State even if not exercised by the Coastal State, unless they obtain the consent thereof. This consent translates into great revenues for States either through sub-contract, lease, or in the case of Malta, production sharing contracts whereby the exclusive rights of the Coastal State grant them title to obtain revenues in the granting of concessions to major oil companies. The doctrine of exclusivity has been translated into a huge economic benefit which continues to be enjoyed as more and more new discoveries are made, particularly off Western Africa. Countries that were once poor have suddenly found themselves with huge revenues on the basis of the exclusive title granted under Article 1977 of the 1958 Convention, which approach is also found in the Continental Shelf Act of Malta where permission from the government is required for any exploration or exploitation.

The Juridical Nature of the Continental Shelf Institution

The history of the modern shelf doctrine dates back to the 1945 Truman Proclamation where the President of the United States Harry S. Truman issued a proclamation declaring that the US has since time immemorial exercised control over the continental shelf which was the natural prolongation of the US mainland. In order to avoid interference with navigation, the United States, after declaring control over these resources, held that this was without prejudice to the legal status of the suprajacent waters which would remain high seas. Therefore, the US was in effect stating that the freedom of navigation over the continental shelf continue to be enjoyed.

Since the Truman Proclamation the doctrine has developed and by 1969 the International Court of Justice in the *North Sea Continental Shelf* cases disagreed with Lord Asquit in the Abu Dhabi arbitration award given a few years before, and the Court asserted that the continental shelf had now become part of customary international law. Since then, the doctrine has been consolidated and to a certain extent the current continental shelf regime has been developed.

The continental shelf rights do not depend on effective or notional occupation. The doctrine supports the view that continental shelf rights exist inherently in the rights of the State, such that those rights belong to the States even if it has not asserted them or declared so. that said, it is also true to say that because of the economic potential the vast majority of States do regulate the continental shelf and, in particular, regulate activities thereon. The continental shelf is therefore automatic and need not be declared. The rights of the continental shelf therefore exist *ab initio* and *ipso facto.*

Another point worth mentioning is that the continental shelf regime has been an early example of the cohabitation between the exercise of certain high seas freedom, such as the freedom of navigation, and the need to allow activities which interfere with these freedoms if the sovereign rights granted are to make sense. The establishment of an oil rig, for example, could interfere with the freedom of navigation. In some parts of the world, such as the Gulf of Mexico, there are over a thousand oil rigs around which ships must navigate. In fact, the right to establish these artificial islands is a right exclusively granted to the Coastal State under Article 60(1) of the 1982 Convention. However, this right has an important reservation in that these islands, in spite of the continental shelf regime, cannot be set up where they cause interference with lanes uses for international navigation. It would appear that at least in one case the sovereign exclusive right granted by the continental shelf would be limited in favour of freedom of international navigation.

The Exclusive Economic Zone Regime

This regime, which began in State practice and was consolidated in Part V of the Convention, is essentially an institution which allows the Coastal State to nationalise all resources and economic activities up to, under Article 57, a limit of 200 nautical miles drawn from the baselines which are used to measure the territorial sea. If a State has claimed a 10-mile territorial sea, that State measures the 200 miles from the baselines, but the EEZ begins at the end of the 10-mile territorial sea. Geographically it is 200 miles, but legally it is 280, as in the territorial sea the State has complete sovereignty over resources, therefore the need for the EEZ lies beyond the territorial sea. A Coastal State's territorial sea is therefore deducted from the EEZ.

Under Article 55 of the Convention, we are told that the EEZ is a specific legal regime, a zone *sui generis*, neither an extended territorial sea nor part of the high seas. Prof. Attard contends that it is a specific set of rules creating an independent regime and, to a certain extent, this view

was supported when the Convention was adopted in 1982, as under Article 86 defining the application of the high seas regime it is made clear that the EEZ is excluded from the high seas; an exclusion does not complete in the light of Article 58. What one finds beyond the territorial sea up until 200 nautical miles is the specific legal regime of the EEZ, neither a zone of sovereignty nor the high seas. It is a new zone designed to allow Coastal States to nationalise all economic resources and activities.

The Rights of the Coastal State in the EEZ

There is a convenient non-exhaustive list of rights found under Article 56 of Part V of the Convention:

> Article 56
> Rights, jurisdiction, and duties of the coastal State in the exclusive economic zone
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Clearly, in the case of States like Malta one must delimit one's claim in certain areas.

It has been pointed out that under Article 56(1)(a) sovereign rights are granted under the EEZ regime. Up to 200 miles, these are the same resources covered by the continental shelf regime. Therefore, under Article 56(3) it is laid down that in applying the rules relating to the seabed and subsoil of the EEZ, one applies the continental shelf rules. This represents a drafting attempt to harmonise the overlap between the two regimes. To a certain extent this is also the position of Malta under the EEZ Act. Furthermore, the Act applies the Fisheries Conservation

Act to fisheries in the EEZ. There is, however, a fundamental difference between the two regimes. It has been noted that the continental shelf regime exists *ab initio* and *ipso facto*, with the rights being inherent in the Coastal State and no State can exercise those rights even if the former State has not declared a continental shelf or has exercised continental shelf rights. A different approach is taken with respect to the EEZ in international law. As the doctrine has developed, the EEZ has to be declared if the State is to enjoy the rights that have been referred to, primarily those enjoyed in Article 56. Unless a State declares an exclusive economic zone, then it is not possible to exercise those rights. Until recently, that was the position of Malta, which did not declare an EEZ, and therefore the waters beyond the territorial sea of were part of the high seas, and the rights for environmental protection were not applicable. Therefore, a State must declare an EEZ if it wishes to enjoy the rights provided under the EEZ regime.

One must bear in mind that if a State has declared an EEZ, then, as has been noted, the legal status of the contiguous zone is now part of thereof, as it is up to 24 miles. These zones have two completely different purposes, the former being an enforcement zone the latter being designed for economic exploitation. If the State has not declared an EEZ, then the waters of the contiguous zone remain part of the high seas. The Maltese EEZ Act indicates an adoption of the law but, properly because of delimitation issue, it is up to the Minister to establish designated zones known as the EEZ. In practice, one may have a continental shelf without an EEZ, but not the reverse. In the event that a State has not declared an EEZ, then the waters remain part of the high seas. When a State declares an EEZ, under Article 86, the EEZ is excluded from the application of the high seas' regime in Part VII. However, Article 86 also states that this is without prejudice to Article 58 of Part V on the EEZ. If one were to consider Article 58, one would note that it protects the freedom of navigation, overflight, and the laying of submarine cables (all high sea freedoms under Article 87) in the EEZ. In fact, the Convention also includes the proviso that not only are these freedoms protected, but they are protected together with other related lawful uses. Article 58, in fact, refers to the freedoms of navigation and communication as those freedoms specified in Article 87. Although Article 56 appears to withdraw the EEZ from the high seas, this is without prejudice to Article 58 which reintroduces the high sea freedoms in the EEZ. Under Article 58(2), in fact, most provisions in the high sea regime are reintroduced in the EEZ, provisions relating to, for example, the peaceful uses of the sea, exclusive flag State jurisdiction, etc.

Under Article 73 of the Convention, special enforcement powers are given to the Coastal State with respect to the protection of fisheries in the EEZ. The *Virginia G* Case involved a tanker supplying diesel to a fishing vessel in the EEZ of a State. bunkering, as it is known, is a recognised high sea freedom, and therefore, on a *prima facie* basis, foreign bunkering in the EEZ is allowed under Article 58(1). The problem in this case, however, was that because it was bunkering fishing vessels, did it still remain a freedom of navigation? Or did it fall under the fishering rules of Article 73. The Hamburg tribunal decided that unauthorised bunkering to fishing vessels could be a violation of the Coastal State EEZ rights and therefore could result in arrest. These two Articles try to balance on the one hand the EEZ rights and on the other the rights of the international community. This is achieved by adopting the so-called due regard rule. Therefore, under Article 56(2) the Coastal State is protected as States must give due regard to the Coastal State's EEZ rights. Under Article 58(1), States exercising the freedoms of communication and navigation are required to pay due regard to the Coastal State EEZ rights. In short, the obligation to give due regard is the fulcrum for the basis of the coexistence between sovereign rights and the freedoms within the EEZ, hence the characterisation of the EEZ as a specific legal regime.

In re the nature of sovereign rights in the EEZ, with respect to sovereign rights over seabed and subsoil, these rights are no doubt exclusive and can only be exercised with the consent of the Coastal State. With respect to the living resources of the EEZ, the rights are not as exclusive as they are in the case of the continental shelf, because of the biological nature of the resource. There are two extremes with respect to fish, one can either fish exhaustively such that the species is threatened, i.e., dwindling stocks, whilst on the other hand if one does not catch, then it could well be that one has lost a resource. The Convention tries to achieve a balance by establishing what is known as the Total Allowable Catch (TAC) test. There is a method whereby scientists estimate the TAC of a species, beyond which it would be threatened. This is particularly relevant to Malta, because there is a multi-million-euro business with respect to tuna, and Maltese licenses are sub-contracted, generating large revenues from the Japanese. What TAC tries to achieve is to establish the surplus catch. If it establishes that each year one can catch 100 gross tons of cod and the State has a domestic capacity of 80, then the 20 is known as the surplus catch, which is allocated to other States including landlocked States.

Luca Camilleri

Selected Topics – Important Provisions

I. International Civil Air Law

Convention on International Civil Aviation (Chicago Convention) 1944

Article I – Sovereignty
The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2 – Territory
For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, or mandate of such State.

Article 3 – Civil and state aircraft
(a) This Convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft.
(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.
(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.
(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Article 5 – Right of non-scheduled flight
Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations at it may consider desirable.

Article 6 – Scheduled air services
No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 8 – Pilotless aircraft
No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such

aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

Article 37 – Adoption of international standards and procedures
Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways, and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircraft;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information; (h) Log books;
(h) Aeronautical maps and charts;
(i) Customs and immigration procedures;
(j) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

Article 17 – Nationality of aircraft
Aircraft have the nationality of the State in which they are registered.

Article 18 – Dual registration
An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

Article 96 – Definitions
For the purpose of this Convention the expression:

(a) "Air service"- means any scheduled air service performed by aircraft for the public transport of passengers, mail, or cargo.
(b) "International air service" means an air service which pas through the air space over the territory of more than one State.

Annex 2 and 7 – Rules of the Air; Aircraft Nationality and Registration Marks
Aircraft: Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.

II. International Outer Space Law

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) 1967

Article I
The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation.

Article II
Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III
States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

Article IV
States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.

Article V
States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly re- turned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the Moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.

Article VI
States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the pro- visions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

Article VII
Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

Article VIII
A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space

Article 2
If, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party, it shall immediately take all possible steps to rescue them and render them all necessary assistance. It shall inform the launching authority and also the Secretary-General of the United Nations of the steps it is taking and of their progress. If assistance by the launching authority would help to effect a prompt rescue or would contribute substantially to the effectiveness of search and rescue operations, the launching authority shall cooperate with the Contracting Party with a view to the effective conduct of search and rescue operations. Such operations shall be subject to the direction and control of the Contracting Party, which shall act in close and continuing consultation with the launching authority.

Convention on International Liability for Damage Caused by Space Objects

Article I - Definitions

For the purposes of this Convention:

(a) The term “damage” means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations;
(b) The term “launching” includes attempted launching;
(c) The term “launching State” means:
    (i) A State which launches or procures the launching of a space object;
    (ii) A State from whose territory or facility a space object is launched;
(d) The term “space object” includes component parts of a space object as well as its launch vehicle and parts thereof.

Article II

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.

Article III

In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.

Article IV

1. In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:

(a) If the damage has been caused to the third State on the surface of the Earth or to aircraft in flight, their liability to the third State shall be absolute;
(b) If the damage has been caused to a space object of the third State or to persons or property on board that space object elsewhere than on the surface of the Earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.

2. In all cases of joint and several liability referred to in paragraph 1 of this article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

Article V

1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.

2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire

compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

3. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching.

Convention on Registration of Objects Launched into Outer Space

Article II

1. When a space object is launched into Earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry.

2. Where there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this article, bearing in mind the provisions of article VIII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and without prejudice to appropriate agreements concluded or to be concluded among the launching States on jurisdiction and control over the space object and over any personnel thereof.

3. The contents of each registry and the conditions under which it is maintained shall be determined by the State of registry concerned.

Article III

1. The Secretary-General of the United Nations shall maintain a Register in which the information furnished in accordance with article IV shall be recorded.

2. There shall be full and open access to the information in this Register.

Article IV

1. Each State of registry shall furnish to the Secretary-General of the United Nations, as soon as practicable, the following information concerning each space object carried on its registry:

(a) Name of launching State or States;
(b) An appropriate designator of the space object or its registration number;
(c) Date and territory or location of launch;
(d) Basic orbital parameters, including:
    (i) Nodal period;
    (ii) Inclination;
    (iii) Apogee;
    (iv) Perigee;
(e) General function of the space object.

2. Each State of registry may, from time to time, provide the Secretary- General of the United Nations with additional information concerning a space object carried on its registry.

3. Each State of registry shall notify the Secretary-General of the United Nations, to the greatest extent feasible and as soon as practicable, of space objects concerning which it has previously transmitted information, and which have been but no longer are in Earth orbit.

Article V

Whenever a space object launched into Earth orbit or beyond is marked with the designator or registration number referred to in article IV, paragraph 1 (b), or both, the State of registry shall notify the Secretary-General of this fact when sub- mitting the information regarding the space object in accordance with article IV. In such case, the Secretary-General of the United Nations shall record this notification in the Register.

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (The Moon Agreement)

Article 3

1. The Moon shall be used by all States Parties exclusively for peaceful purposes.

2. Any threat or use of force or any other hostile act or threat of hostile act on the Moon is prohibited. It is likewise prohibited to use the Moon in order to commit any such act or to engage in any such threat in relation to the Earth, the Moon, spacecraft, the personnel of spacecraft or man- made space objects.

3. States Parties shall not place in orbit around or other trajectory to or around the Moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the Moon.

4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the Moon shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and use of the Moon shall also not be prohibited.

Article 4

1. The exploration and use of the Moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations.

2. States Parties shall be guided by the principle of cooperation and mutual assistance in all their activities concerning the exploration and use of the Moon. International cooperation in pursuance of this Agreement should be as wide as possible and may take place on a multilateral basis, on a bilateral basis or through international intergovernmental organizations.

Article 11

1. The Moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article.

2. The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

7. The main purposes of the international regime to be established shall include:
(d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those

countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

II. International Dispute Settlement

Article 1(1)
The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 2
The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 33
1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Hague Conventions of 1899 and 1907

Article 15
International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of a respect for law.

Article 18
Recourse to arbitration implies an engagement to submit loyally (and in good faith) to the award.

Articles 16 and 20
Arbitration is not intended as a first resort.

Statute of The International Court of Justice

Article 2
The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 9
At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 36
1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

Article 59
The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60
The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 65
1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

Article 94 (United Nations Charter)
1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations, or decide upon measures to be taken to give effect to the judgment.

Article 96 (United Nations Charter)
1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

III. Maritime Migrant Smuggling

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (Smuggling Protocol)

Article 2 – Statement of purpose
The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3(a)
"Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

Article 5 – Criminal liability of migrants
Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Article 6 – Criminalization
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
   (a) The smuggling of migrants;
   (b) When committed for the purpose of enabling the smuggling of migrants:
      (i) Producing a fraudulent travel or identity document;
      (ii) Procuring, providing or possessing such a document;
   (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

Article 7 – Cooperation
States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

Article 8 – Measures against the smuggling of migrants by sea
1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from

the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;
(b) To search the vessel; and
(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Article 9 – Safeguard clauses

3. Any measure taken, adopted, or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)

Article 3(a)

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation,

forced labour or services, slavery, or practices similar to slavery, servitude, or the removal of organs.

United Nations Convention on the Law of the Sea (UNCLOS)

Article 2 – Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil
1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 87 – Freedom of the high seas
1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 88 – Reservation of the high seas for peaceful purposes
The high seas shall be reserved for peaceful purposes.

Article 89 – Invalidity of claims of sovereignty over the high seas
No State may validly purport to subject any part of the high seas to its sovereignty.

Article 90 – Right of navigation
Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Article 91 – Nationality of ships
1. 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. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 92 – Status of ships
1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship 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.

Article 94 – Duties of the flag State
1. Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.

Article 98 – Duty to render assistance
1. 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 the passengers:
(a) to render assistance to any person found at sea in danger of being lost;
(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Article 110 – Right of visit
1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
(a) the ship is engaged in piracy;
(b) the ship is engaged in the slave trade;
(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
(d) the ship is without nationality; or
(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination onboard the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

United Nations Convention Against Transnational Organized Crime (UNCATOC)

Article 2 – Use of terms
For the purposes of this Convention:
(a) "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Article 3 – Scope of application
1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

2. For the purpose of paragraph 1 of this article, an offence is trans- national in nature if:

(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State.

Criminal Code (Cap. 9 of the Laws of Malta)

Article 337A – Traffic in persons to enter or leave Malta illegally.
(1) Any person who with the intent to make any gain whatsoever aids, assists, counsels or procures any other person to enter or to attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across, Malta in contravention of the laws thereof or who, in Malta or outside Malta, conspires to that effect with any other person shall, without prejudice to any other punishment under this Code or under any other law, be liable to the punishment of imprisonment from six months to five years or to a fine (multa) of twenty-three thousand and two hundred and ninety- three euro and seventy-three cents (23,293.73) or to both such fine and imprisonment …

Merchant Shipping Act (Cap. 234 of the Laws of Malta)

Article 305 – Obligation to assist vessels in distress.
(1) The master of a Maltese ship, on receiving at sea a signal of distress or information from any source that a vessel or aircraft is in distress, shall proceed with all speed to the assistance of the persons in distress (informing them if possible that he is doing so), unless he is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to do so …

Article 306 - Duty to render assistance to persons in danger at sea.
(1) The master or person in charge of a Maltese vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person who is found at sea in danger of being lost, even if such person be a citizen of a State at war with Malta; and if he fails to do so he shall for each offence be liable to imprisonment not exceeding two years or to a fine (multa) not exceeding one thousand units or to both such imprisonment and fine.

Safety of Life at Sea (SOLAS) Convention

Chapter V, Regulation 7 – Search and rescue services
1. Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.

Chapter V, Regulation 33 – Distress messages: Obligations and procedures
1. The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.

International Convention on Maritime Search and Rescue (SAR) 1979

Chapter 2, Article 2.10
Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

Chapter 3, Article 3.1.9
… And co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage...The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety.....In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

IMO Facilitation Committee's, 'Principles relating to administrative procedures for disembarking rescued persons at sea,' FAL.3/Circ.194

… If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the person rescued can have timely access to post rescue support.

The Guidelines on the Treatment of Persons Rescued at Sea
Place of Safety

… A location where rescue operations are considered to terminate. It is also a place where the survivor's' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can bet met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

Shipmasters should:
Seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized.

States must consider:
The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.

A place of safety is a place where basic physical needs and human rights and refugee rights are met.

IV. The Law of the Sea (Part I)

United Nations Convention on the Law of the Sea (UNCLOS)

Article 3 – Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 17 – Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18 – Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
   (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
   (b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 19 – Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (b) any exercise or practice with weapons of any kind;
   (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
   (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
   (e) the launching, landing or taking on board of any aircraft;
   (f) the launching, landing or taking on board of any military device;
   (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
   (h) any act of wilful and serious pollution contrary to this Convention;
   (i) any fishing activities;
   (j) the carrying out of research or survey activities;
   (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
   (l) any other activity not having a direct bearing on passage.

Article 20 – Submarines and other underwater vehicles

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Article 21 – Laws and regulations of the coastal State relating to innocent passage
1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(a) the safety of navigation and the regulation of maritime traffic;
(b) the protection of navigational aids and facilities and other facilities or installations;
(c) the protection of cables and pipelines;
(d) the conservation of the living resources of the sea;
(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;
(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Article 60 (7) - Artificial islands, installations and structures in the exclusive economic zone
Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

Article 86 – Application of the provisions of this Part
The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 87 – Freedom of the high seas
1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Territorial Waters and Contiguous Zone Act (Cap. 226 of the Laws of Malta)

Article 2 – Interpretations
"maritime enforcement officer" means any member of the Malta Police Force, of the Armed Forces of Malta, any Customs Officer and any other officer vested with general law enforcement authority.

Article 3 - Extent of territorial waters.
(1) Save as hereinafter provided, the breadth of the territorial waters of Malta shall be twelve nautical miles measured from baselines determined using the method of straight baselines joining appropriate points on the low-water line, defined by the coordinates in the Schedule.

Article 5 – Action with respect to vessel within Maltese waters
(1) Subject to the provisions of subarticle (2), any maritime enforcement officer on board a relevant vessel or craft may, within the internal or territorial waters of Malta, take appropriate action with respect to any vessel, other than a foreign military vessel or a ship owned by a foreign state used only for non-commercial service, whether flying the Maltese or any other flag or not flying any flag, reasonably suspected of having on board any person reasonably suspected of being about to commit or of having committed any offence against any of the laws of Malta.

(2) Subject to the provisions of sub-article (3), where the suspected offence has been committed on board the foreign vessel during its passage through the territorial waters of Malta, the power referred to in subarticle (1) shall not be exercised unless:

(a) the consequences of the offence extend to Malta; or
(b) the offence is such as to disturb the peace of Malta or the good order of the territorial waters; or
(c) the assistance of the Maltese authorities has been requested by the master of the vessel or by a diplomatic agent or consular officer of the flag State of the vessel; or
(d) appropriate action is necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

(3) The provisions of subarticle (2) shall not affect the right of any maritime enforcement officer on board any relevant vessel or craft to take any steps authorised by Maltese law for the purpose of an arrest or investigation on board a foreign vessel passing through the territorial waters of Malta after leaving Maltese internal waters.

Article 7 – Powers to regulate the passage of ships through territorial waters.
7. (1) The Prime Minister may make regulations to control and regulate the passage of ships through the territorial waters of Malta, and, without prejudice to the generality of the foregoing, may by such regulations make provision with respect to all or any one or more of the following matters:

(a) the safety of navigation and the regulation of marine traffic, including the designation or establishment of sea lanes and traffic separation schemes to be used or observed for the passage of ships;
(b) the protection of navigational aids and facilities and other facilities or installations;
(c) the protection of cables and pipelines;
(d) the conservation of the living resources of the sea;
(e) the prevention of infringement of any law or regulation relating to fisheries;
(f) the preservation of the environment and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;

(h) the prevention of infringement of any customs, fiscal, immigration or sanitary laws or regulations;
(i) the arrest, detention and seizure of ships to ensure compliance with any law, rule, regulation or order and such other power as may be necessary for securing such compliance;
(j) the punishments, whether by way of fine (multa or ammenda) or of imprisonment, to be applied in respect of any contravention or non-observance of any regulation made under this article.

(2) In the application of any regulation made under subarticle (1) to warships or to nuclear powered ships or to ships carrying nuclear or other inherently dangerous or noxious substances, their passage through territorial waters may, by any such regulation, be made subject to the prior consent of, or prior notification to, such authority as may be specified therein.

V. The Law of the Sea (Part II)

Convention on the Territorial Sea and the Contiguous Zone (1958)

Article 24

1.In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2.The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3.Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

United Nations Convention on the Law of the Sea (UNCLOS)

Article 33 – Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 55 – Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56 – Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    (i) the establishment and use of artificial islands, installations and structures;
    (ii) marine scientific research;
    (iii) the protection and preservation of the marine environment;
(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article 57 – Breadth of the exclusive economic zone
The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58 – Rights and duties of other States in the exclusive economic zone
1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Article 60 – Artificial islands, installations and structures in the exclusive economic zone
1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
(a) artificial islands;
(b) installations and structures for the purposes provided for in article 56 and other economic purposes;
(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

Article 73 – Enforcement of laws and regulations of the coastal State
1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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 this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Article 76 – Definition of the continental shelf
1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Article 77 – Rights of the coastal State over the continental shelf
1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable 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.

Article 86 – Application of the provisions of this Part
The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 111 – Right of hot pursuit
1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:
   (a) the provisions of paragraphs 1 to 4 shall apply mutatis mutandis;
   (b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and
escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Article 303 – Archaeological and historical objects found at sea
1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Territorial Waters and Contiguous Zone Act (Cap. 226 of the Laws of Malta)

Article 4 – Contiguous Zone
4. (1) Without prejudice to the provisions of article 3(2), in the zone of the open sea contiguous to the territorial waters of Malta as defined in article 3(1) (such zone being in this Act referred to as "the contiguous zone") the State shall have such jurisdictions and powers as are recognised in respect of such zone by international law and in particular may exercise therein the control necessary -

(a) to prevent any contravention of any law relating to customs, fiscal matters, immigration and sanitation, including pollution, and
(b) to punish offences against any such law committed within Malta or in the territorial waters of Malta as defined by article 3(1) or (2), as the case may require.

(2) The contiguous zone shall extend to twenty-four nautical miles from the baselines from which the breadth of the territorial waters is measured.

Cultural Heritage Act (Cap. 445 of the Laws of Malta)

Article 61 (1) - Discovery of cultural property.
(1) Any person who, accidentally or otherwise, by any means discovers any object, site or building, or feature in a building or property or any other cultural property whether on land or sea to which this Act applies, shall immediately inform the Superintendent, keep the cultural property found in situ and shall not for a period of six working days, which may on reasonable ground be extended for a further period of six working days, after informing the Superintendent proceed with any work on the site where the object of cultural property is discovered.

Continental Shelf Act (Cap. 535 of the Laws of Malta)

Article 2 – Interpretation
"continental shelf" means the seabed and subsoil of the submarine areas that extend beyond the territorial waters of Malta to a limit established in accordance with international law, measured from the baselines from which the breadth of the territorial waters is measured; so however that where in relation to States of which the coast is opposite that of Malta it is necessary to determine the boundaries of the respective continental shelves, the boundary of the continental shelf shall be that determined by agreement between Malta and such other State or States or, in the absence of agreement, the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and such other State or States is measured:

Provided that until the agreement mentioned in the preceding paragraph comes into force, any licences issued under this Act or any regulations made thereunder for the exploration and exploitation of natural resources of the continental shelf of Malta shall only apply to the area lying on the Maltese side of the median line between the coast of Malta and coast belonging to the opposite State or States:

Provided further that nothing shall preclude the Government of Malta from entering into any cooperative arrangements, such as joint development agreements, revenue sharing agreements and international unitisation agreements, with neighbouring States for the purpose of exploring and exploiting the natural resources on the continental shelf:

Provided further that the Government of Malta may extend the continental shelf boundary beyond the median line in accordance with international law.

INL3000: Principles of Public International Law
Dr. Chris Soler

11th November 2022
International Criminal Law
Some might say that this is a new branch of the law, because some associate it only with the ICC statute only - but arguably, this is a mistake. This is because ICL (international criminal law), to a large extent, is decentralised. There is no one centralised authority which is tasked to apply and enforce it. ICL does not start and stop at the ICC statute, meaning that is much more broader and complex.

As a general rule, criminal law is enforced territoriality. It is based intrinsically upon principles from territorial jurisdictions. A territory within which a crime is committed in the forum convenience. This means that most probably the accused, the witness, the evidence, the sconce of the crime are there, and hence, there is a more reasonable prospect of a conviction if one can prove the case beyond reasonable doubt at that place.

Territorial jurisdiction is a rule that should be applied as a procedural notion, and also from an international point of view. States prosecute persons who have allegedly committed a crime within the boundaries of that state. This seems like an obligation, but it is also a right.

Essentially, the right is state sovereignty. One of the hallmarks of sovereignty is the power and ability of the state to ensure respect to its criminal laws. It does so by pursuing what one would call the three allied obligations i.e. nearly independent:
1. Prevention
2. Prosecution
3. Punishment

If one adopts a theory by means of which one consider deterrence as a main objective of punishment, as many jurists and judges do, one will realise that crimes are prevented when they are prosecuted and when there is punishment. The latter can be a goal in itself - but it can be a means to an end. It may prevent other prospective crimes from being committed.

ICL's main weakness is its enforcement. This is because ICL is based on the system of subsidiarity by means of which states are expected to perform their duties i.e. a duty of care towards its citizens. This duty includes the duty to prosecute when crimes are committed. While we deal with ICL, although it is a combination of various fields of law, it is a branch of law in its own right, way back from the Nuremberg Trials to date.

One will be dealing of the International Law components of Criminal Law, International Law, and other related branches of the law duly intermingled and abide accordingly depending on the scope of application of the relevant legal question being dealt with. Depending on the applicable Treaty, certain rights and obligations emanate from them directly.

Similarly, International Human Rights Law, although it developed by a life of its own, is very much related. For example, the Genocide Convention of 1948 was described as one of the most important Human Rights Instruments of members within groups. It was one of

the most inflectional milestones for the protection of human rights and human dignity. It still has its flaws, especially relation to enforcement, but as far as principles are concerned, it is quite groundbreaking. Genocide was so politicised prior to the Convention, that to a large extent, states used to try and decriminalise by making it very much political. With the Convention, genocide was criminalised - not that it needed to be as per Customary International Law.

When one looks at a more recent development, being the ICC Statute, one will notice that it has been described even as a Human Rights instrument, to the extent that some argued that the ICC Statute is very similar to an International Constitution, possibly more than the UN Charter. One has to keep in mind that there is no counter-part for a domestic Constitution. However, the ICC encompasses very similar principles i.e. Article 25 of the ICC. This was a groundbreaking development, for the individuals becoming a subject of International Law.

These progressive developments should be based on the development of Human Rights itself. It is essential two sides of the same coin.

Criminal Law and ICL, including the ICC, has developed further Human Rights law protection and has been a source of inspiration for the development of HR itself. Reference can be made to pre-trials rights which are expressly stipulated. In many regional mechanisms, for example Article 6 of the ECHR, there is no express protection. This article speaks of a criminal charge which follows various processes which lead to that charge i.e. reasonable suspicion, interrogation, the right to understand, the right to legal representation, the right to remain silent, and things of the like nature, however are not expressly stipulated, unlike in the ICC Statute in which they are expressly referred to.

Another example is when one refers to the prosecution as the accused's best friend. In many countries the prosecutor has the moral obligation to bring forward evidence both in favour and against the accused. The ICC makes this a legal evidence. This shows how the ICC has complimented further HR Law.

Although ICL is not intrinsically linked to war per-se, and it can be said that it developed as a result of the two World Wars. A war brings with it total lawlessness: no laws and not much one can do. There was a first trial to adopt a draft - however, this was never adopted. After WWII, the London Charter effectively gave rights and powers to Tribunals known as the International Military Tribunals to prosecute those responsible for the crimes committed. From a conceptual point of view this was important because for the first time an International Tribunal had power over individuals who were subject to the laws of a particular state.

At the time, International Criminal Lawyers argued how one could obtain powers to prosecute their citizens. One of the main pleas was the lack of legitimacy of the tribunal itself. There was opposition from a conceptual point of view which was shown through the defence. For the first time, the International Community, excluding political perspectives, had an international military authority with the valid legal jurisdiction being able to conduct a trial. The Nuremberg Trials are also known for the Judge Made Law i.e. Nuremberg Principles. These were a few principles which are still applicable today and which, to a large extent, if placed together can be summarised to be Individual Criminal Responsibility.

As a major principle, one is looking at basic principle of International Law which is now taken for granted: **a state can punish something which is not a crime under another, but is still held as an International accepted Crime.** A related principle is that **a crime punished domestically** i.e fraud or forgery **can sometimes not be a Code under International Law.**

One of the most important principles is that **there is no exemption if the act committed does not constitute a crime locally.** Most importantly, one has to keep in mind that wars are generated many a time by a chain of command which leads to the very top. The principle still holds that everyone is liable for offences, no matter to the status they hold in society i.e. the Rule of Law. Everyone is equally subject to the law as per the principle of Equality before the Law. Moreover, there is no defence of superior organs.

One of the main principles was **the lack of possibility to lead superior organs as a defence.** This is, to a large extent, what is crystallised in the ICC today. This is reflected is the modes and methods as to how one can be considered as responsible for a crime.

The need for ICL stems from the principles of IL itself, and from the fact that there needs to be an external intrusion to the domestic affairs of the state - which is an exception to the rule of state sovereignty. In order to protect the fundamental human tights of the oppressed citizens, the international community had to create a corpus juris which has to prevail over domestic laws which are not applied i.e. Gaddafhi and Libya. This is when the domestic courts are **unwilling** to prosecute.

One of the most important principles which emerged form the Nuremberg Trails is the **right to a fair trails**, which kept developing to date. When one deals with crimes, one cannot limit the idea to the statute only. The statute is one source of ICL. It is a multilateral convention, which is built up on consent of states which have bound themselves to follow the Treaty itself as per the principle of *pacta rum servanta*.

Reference can also be made to the Geneva Convention of 1949.

There was also, after Nuremberg, a period within which nothing happened as evidently see through the Cold War. Thing much happened within the International Arena, and international stagnation. There were only a few initiatives of the UN in approximately forty years.

Things started to move through reaction of the Balkan Wars and Genocide in Rwanda. During this period, things were televised and everything was duly documented.

The fact that what developed where created by the UN says a lot. The horrors of these wars led to the creation of the Tribunals. Rwanda was unable to prosecute the people who started the genocide. There was no law system, documents were destroyed - millions of people perished. The state was in a situation of total collapse. This is a classical case of **inability.** This is where help was needed in the form of an ICTR.

In the Balkan cases, there is a different scenario, which led to a fragmented Yugoslavia. Rape was used as a weapon of war i.e. Bosnia Herzegovina. With their belief, especially Bosnian Muslims, a girl/women who was raped would generally leave the place where she was living out of fear of actions against her. When the rape lead to impregnation, it still led to a greater Serbia because the husband would have been Serbian.

The State is an abstract entity, and can never be in prison. However, the Nuremberg Principles ensuing from the trials have developed in such a way that those calling the shots within that States, can be punished. The areas of the law can coexist and run in parallel, but criminal law is punitive while the law on state responsibility is reparation i.e. repair the damage done. ICL heavily relies on **individual criminal responsibility**, whereas the ICJ can determine **state aggravated responsibility.**

There are two different branches of law which can coexist.

A State has an obligation, even with the Genocide Convention, not only to prosecute crimes committed, but to use all the legal means possible, including legislation, but not only, to prevent such crimes. The State can do a lot to prevent crimes.

Our Criminal Code now, also, punishes the main core crimes i.e. war crimes, crimes against humanity, and those of the like nature from Article 55A to 55I. If genocide is committed in Malta, and the country is unable or unwilling to prosecute, the International community has given an entitlement to other states to intervene. An example can be through universal jurisdiction. The moment there is a judgement by a state against Mr. X, that triggers an IAW or an EAW for the implementation of that same judgement. When one has a multi jurisdiction scenario, one might need to settle to a neutral state.

Inability is quite simple to detect as per the substantive collapse of the system. Unwillingness also seems easy to detect prima facie. The complication arises when there is unwillingness which is hidden. There can be a state which gives an impression of the willingness to prosecute. The main culprits can be prosecuted, and after a few years they are set free because of amnesty. Similarly, there were instances in which someone who was sentenced to life imprisonment is granted early parole within six months.

The stop this abuse (ne bis in idem), the ICC devised a system of finding a way to determine whether the prosecution was bona fide. If it is proved that this was not the case, the ne bis in idem rule would not apply. One would be subject to prosecution before the ICC for the same facts brought before the domestic courts.

The ICC State contributed to IR because it crystallised customary international law basic principles. It made explicit was seemed to be general uniform practise which was unwritten for many decades. In doing so, it consolidated the principle of individual criminal responsibility and dispelled pleas and defences which were previously tendered at Nuremberg such as nullum crimen sine lege.

The Statute comes with the rules of procedure and evidence, which is ICL crystallised in a document. Why was it so difficult to get there? Dr. Soler attended to most meetings and said that there are so many legal experts from different systems, meaning that it was not easy to merge ideas of criminal procedure into one.

The ICC wanted to avoid any allegations of breach of nullum crimen sine lege so much that for each and every crime there is a corresponding list of elements. So, if genocide is committed by killing, there is a list of elements which is required. This is a great guiding principle for the Court. When crimes are not prosecuted, ICL demands on State to exercise universal jurisdiction.

Reference can be made to the International, Impartial and Independent Mechanism - Syria (IIIM) which was established in December 2016 by the General Assembly to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011.

18th November 2022
The principles enunciated in the statutes and rules of procedure were applicable under customary international law. IL goes beyond the ICC Statute - reference was made to teh constitutionalism of International Law.

N.B. One has to also note that ***Grotius*** *has been called the "father of international law."*

In the Ukraine versus Russia disputes, one can notice and realise that there are divergent and opposing views.

Some countries may have an interest to broaden their jurisdictional reach. For example, Spain and Belgium extended their enforcement of universal jurisdiction. They contributed a lot in the enforcement of international criminal law. Universal jurisdiction is a bit controversial. It has been recently given a different dimension; before it could have been a ground of jurisdiction in the high seas where no one had direct jurisdictional claims, but today, largely because of the Adolf Eichmann Trial. Eichmann seemed to claim that even if he had not committed those crimes and given those orders, the crimes have been committed anyway.

Violence was the rule not the exception. If a soldier did not perpetrate violence, in this case vis-a-vis the Nazi Regime, these will in any way be persecuted by other persons within the military regime. There is a heavy group element. Criminal Law is a local platform. ICR is an international platform. However this should not be misleading.

One can have a very local crime i.e. genocide as per Art. 54 of the Maltese Criminal Law, but it is a crime under IL. The term *international* does not necessarily mean that there are many states involved, or that there are many jurisdictions involved. There can be a crime carried against an ethnic group in Malta, and hence, could be committed territorially, by one group and against another.

Insofar as genocide is concerned, one can refer to the termination of a group. This is pretty much similar to what journalists call *ethnic cleansing.* Some jurists refer to other instances as genocide. For example, the attack of the twin towers is not to be considered as genocide.

Fortunately, in the international community there is a consensus vis-a-vis the actus reus and its definition. There is a definition coined in 1948. It was one of the first human rights instruments that contributed to genocide as a crime under international law. The Convention is short i.e. less than twenty articles, but it is extremely important.

The fact that genocide is a crime under IL is important. Criminal Law is relative, and will tell you what constitutes a crime in relation to its relevant punishment. Here, we have more than a relative mechanism; we have a preventive mechanism because the of the wording of the Convention with regard to the Treaties.

The Convention on the Prevention and Punishment of the Crime of Genocide, or the Genocide Convention, is an international treaty that criminalises genocide and obligates state parties to pursue the enforcement of its prohibition. There are various ways through which a state can decrease genocide i.e. facilitating arrests warrants, collecting evidence form migrants who flee their countries, amongst others.

Crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, such as murder, deportation, torture and rape. The ICC prosecutes the perpetrators even if the crimes were not committed in times of war.

Example: The Revolutionary Armed Forces of Colombia—People's Army is a Marxist–Leninist guerrilla group involved in the continuing Colombian conflict starting in 1964. The FARC–EP was formed during the Cold War period as a peasant force promoting a political line of agrarianism and anti-imperialism. On 27 June 2017, FARC ceased to be an armed group, disarming itself and handing over its weapons to the United Nations. One month later, FARC announced its reformation as a legal political party, in accordance with the terms of the peace deal.

The actus reus of Genocide can be one of five, thus, being an exhaustive list:

a. Killing members of a group

b. Causing serious/GBH on members of a group

c. Deliberately inflicting on the group, conditions of life intended to bring about its physical destruction i.e. very inhuman conditions, separating sexes, systematic exclusion of persons

d. Imposing measures intended to prevent birth i.e. sterilisation, systems whereby one would ensure that women/girls would be in the physical impossibility of having children

e. Forcibly transferring children against their will, in an area controlled by the perpetrator

These are alternative, but exhaustive.

One now has to deal with the mens rea: the intent to kill or to place the life on another in manifest jeopardy (mens rea required for wilful homicide). The law demands an ulterior mens rea: the **dolus specialis.** There needs to be the intention to destroy the group in whole or in part. For genocide to subsist, the group need not necessarily perish i.e. the destruction of the targeted group need not be proved.

This intent to destroy would distinguish wilful homicide from genocide, but the crime , in case of a Maltese killing another, would not subsist anyway. Because in order for the latter to subsist, the victim needs to be part of an ethnic, national, or racial group.

One needs to know that the law punishes inchoate crimes in order to be preventive as per Article 3. Inchoate crimes are **crimes where liability attached even though the crime may not have been completed**. They generally involve at least taking a substantial step towards committing a crime, preparing to commit a crime or seeking to commit a crime.

Article 3 punishes Genocide, Conspiracy to commit genocide, Direct and public incitement to commit genocide, Attempt to commit genocide, and Complicity in genocide.

The Maltese Restorative Justice Act refers to Victim Offender Mediation, and also contemplates situations of eligibility for parole. ICL is a completely different platform, because in ICL one finds it hard to reconcile the importance of rehabilitation.

If one there is one characteristic in the law is that where is a law, there is a law: a law without a remedy is a dead letter. A person attacked in his own country by the very people who should be protecting him would need help: an external corpus juris. This was the need to go beyond the boundaries of the territories and the contour of the state.

One cannot hide behind immunities to influence crimes, especially if this same person is in a position to protect his people: a person becomes an enemy of all mankind.

The Genocide Convention excludes the offence as being a political offence. The offence is committed in a rather politicised context. Many a time, this is committed between one group and another. The political offence exception is an exception to the extradition of an individual.

Article 9 is currently being invoked by Ukraine, arguing that Ukraine did not commit suicide. This article holds the following: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”.

Crimes against humanity are totally different from genocide. They do not require a dolus specialis. Moreover, there is no multilateral convention prohibiting it. They are characterised by a contextual element: an organisational policy which has state allied features and can render the state unable to prosecute would fall under the definition. If the criminal organisation is not robust and solid enough, it cannot fault any control over land, it cannot endanger the power of the state, but it is a mere simple organisation of a few people who cause public disturbance but not such as to trigger the attention of the international community, and not such to endanger stability and security in the region.

In such case, the international harm principle is not triggered. The organisation would be guilty of crimes, just not crimes against humanity. Possibly it would be guilty of transnational organised crimes or domestic crimes.

Another difference is that with genocide one has an exhaustive list, while an umbrella provision is provided for crimes against humanity i.e. other inhumane acts. Crimes against humanity are attacks on the dignity of human beings: they divest human beings of their basic dignity.

David Luban classified crimes against humanity with three words: politics gone cancerous.

Missed Lecture - 2nd December 2022

9th December 2022
One of the major issues on this sphere of law relates to its enforcement. Reference was also made to the substantive crimes, limiting consideration to the core-crimes, as opposed to other domestic crimes. Finally, procedure is to be made reference to.

Jurisdictional issues deal with pretty much everything. It can be seen as a procedural matter which brings about substantive issues.

The Right to a Fair Trial
The ICC, in a way, is quite weak in its jurisdiction reach. It can never assume universal jurisdiction, unlike other Courts who can use such universal jurisdictional grounds. The ICC has the luxury of also being placed in a situation where its decision, to a large extent, goes unchecked. This is because of what is called **kompetenz-kompetenz.** This means that it is the arbiter of its own jurisdiction; it is the ICC which has to determine whether it has jurisdiction or not. Some might argue that the ICC is weak, it can bark but cannot bite. Others would say that this is not so: referring to its ultimate power to decide its own jurisdiction.

The statute gives it a certain flexibility. When you have this flexibility and leeway, Courts have a tendency to adopt what is called a theological approach. The is a judicial law making approach. In domestic structure, we are used to system where the state has its own organs. There is a system and a written/unwritten constitute i.e. a pre-ordained system. There is no counterpart in international law. International Courts, in order to enhance the development of international law, sometimes have to indulge into innovative ways of thinking, but always within the purview of the constitutive instrument which gives them authority *ab initio*.

International Criminal Law had to embrace a system which is supranational i.e *tmur lil hinn minn dak li hu lokali*. It has been devised and designed to cater for a deep lacunae in the global system. It does not start and finish at the ICC. There are other structures and judicial frameworks which the international community has helped to create when no other structure can assume jurisdiction.

Some form of prosecution has to be undertaken. Sometimes the ICC does not have jurisdiction, or when for political reasons the ICC should not investigate a case, or where there is the willingness of a state or a system to help out.

Reference can be made to hybrid courts which allow for supplementation and complimentary jurisdictions. These are called hybrid because in some form or another they rely on other judicial systems i.e. the one for Lebanon was chaired by an Italian Professor.

Another important feature of hybridity could be the applicable law. Hybridity comes with some advantages. Territorial jurisdiction is the general rule because the locus delicti is the most suitable place for the prosecution. Though hybridity, one gains external help i.e. funding, witness protection programmes, security mechanisms, methods of tagging, construction of buildings etc. Hybridity shows that the local state is willing to pursue the course of justice which lead to a determination of guilt or innocence.

Hybridity was the rule up to a few years ago. Some talks about this are still ongoing. However, there is now the move to certain specialised judicial panels for the purpose of enforcing ICL. Generally, these panels are the construct of the willingness of many states, sometimes within the auspices of an ad hoc convention.

If there is custodial jurisdiction, unless there is extradition, one would have to prosecute. The International community is so willing to prosecute, when it cannot do so directly, because no tribunal was formed amongst others reasons, it has found ways and means how to collect and preserve evidence in relation to those crimes.

Admissibility Test - the state action assessment + the genuineness assessment

Inability could be objectively established. This is bees the line is between being able and not being able - no more, no less. Unwillingness is difficult to determine.

Amnesty Laws - an Amnesty law is any legislative, constitutional or executive arrangement that retroactively exempts a select group of people, usually military leaders and government leaders, from criminal liability for the crimes that they committed.

If amnesty is given from prosecution on condition that one reveals were, for instance, some people are buried, this has to fully go through. There is a condition which is put in place. Amnesty allows for the right to the truth, and which may sometimes lead to therapeutic mechanisms. However, this is not blanket amnesty.

Human Rights and Criminal Law is two sides of the same coin. The latter is punitive in nature.

Preamble to the Statute
The Preamble explains the object and spirit of the law. The gist of the state's objective is found in the preamble. The statute is not the making of the UN, it is a multilateral treaty. It a convention which relies on the consent of the contracting parties. These are the states which decided to send a message to the international community.

The State is so sure that it will meet out justice and that it has ways to prevent core crimes from its territory, that it is ready to relinquish that which gives it the jurisdiction to try alleged criminals.

Absolute power corrupts absolutely.

International Criminal Law is the most civilised response to the most uncivilised behaviour. One does not stop a tat by incrementing violence. If a state is misbehaving, wherein its territory crimes are committed, the option is state referral.

The enforcement of ICL starts from the States' contribution. The complimentary regime is deeply reflected and mirrored in the admissibility test. In fact, the admissibility test starts with a general rule: the presumption is that the ICC does not have jurisdiction.

Introduction to Air and Space Law

Municipal Law and International Law

There is no one definition of the law, but there are two main schools of thought which try to establish what the law is: **Natural Law Theory** and **Theory of Positivism.**

The former considers this statement: ***unjust law cannot be law, it is not law.*** The latter holds: ***unjust law is still law*****.** Public International Law was born from a Natural Law perspective, but eventually evolved into a more positivist study, as did law in general.

Municipal Law: the law within one State is found within a hierarchy and thus, establishes a horizontal system. There are states, which among themselves, provide **i**nternational law mostly in the form of treaties and customary international law.

Enforcement of Public International Law

This is a deficient of IL because there is no real executive. The closest thing to this is the Security Council of the UN which is composed of States which leads to the realisation that States legislate, while also enforcing legislation. Under Municipal Law, there is a division of powers whereas under the PIL system, it is the States who legislate and execute, while also being the primary subject. Therefore, there is no effective division of power.

The Evolution of PIL

Reference can firstly be made to Roman Law. The Jus Gentium is the Law of Nations rather than the Law among/between Nations. It was the Law of Nations because it regulated the relationships between Roman Citizens and what the Romans considered foreigners. While Jus Gentium is not PIL in the modern sense since it was the law common to all people rather to all nations, it did include the first elements of International Application of Law.

It provided the basis, although outdated, on which, in the Middle Ages, certain scholars of the law built their understanding of modern International Law. Reference can be made to three scholars:

i. The School of Salamanca

Two important figures are **Suarez** and **De Vittoria.** As a historical context, Europe had just discovered the Americas, while being strongly religious. Thus, the initial idea was that the law of nations did not apply to the Americas. In fact, it was Suarez & De Vittoria who introduced the law of nations to the newly discovered Americas.

ii. Alberico Gentili

He held that the International Community included all the States of the World, not merely the Christian States. The was a big statement. In his conception of the Jus Gentium, he departed from the Roman Law understanding and held that the Jus Gentium did not include individuals - it concerned states only. He proposed that only states where the subjects of the Jus Gentium and examined this Law of Nations as an order between and among Public Sovereign States. He also found that this law was based on natural law and was governed by the principles and rules of Roman Law.

iii. Hugo Grotius

The Pope divided the globe into two: Spaniards and Portuguese. The rising maritime powers at the time, in particular the Dutch, did not like the aforementioned division and thus, Grotius was commissioned by the Dutch State to argue that this division was fundamentally wrong. He first work related to maritime matters in his **Mare Librium** in which he maintained that "***high seas are free/common to all".*** High seas do not fall under the Sovereignty of a State. The sea, like air, was subject to the common use of mankind.

Grotius saw the Law of Nations as an Autonomous Code, and this is an evolution towards positives. He effectively provided this modern understanding of PIL: **a body of laws for the benefit of all rather than the benefit of some.**

The **Treaty of Westphalia** was a form of International Law signed between several European States in other to bring the thirty-year-war to an end. This marked the beginning of PIL and established certain important principles which still are recognised and adhered to today. The most important principle enshrined in this treaty is ***the recognition of the independent sovereignty of the states of Europe*** at the time. This treaty confirmed that within its own territory, each state is sovereign.

Sources of Public International Law

The most common sources within a State is **Parliamentary Legislation** and **Judicial Legislation.** On the International plane, there is no equivalent to such domestic sources. It is made up of **hard law** and **soft law.** The former refers to instruments which contain legally binding obligations and that delegate authority for interpreting the law ('shall'). The latter refers to instruments which are non-binding, and these are normally used in contemporary international relations. These instruments express preferences rather than obligations.

In Public International Law, the recognised sources are typically split into primary and secondary sources. The former are considered formal and are those from which legal rules derive their legal validity. The latter are considered to be material and are those from which the matter, rather than he validity, is derived.

The sources are reflected in **Article 38 of the Statute of the ICJ.** One says reflected because it does not create the sources per-se. When this Article was drafted, the drafters of the statute did not really come up with these novel concepts, but they wanted to represent those sources which they found at that time but which were already accepted by the International Community as sources.

Article 38.

1. ***The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:***
   - ***international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;***
   - ***international custom, as evidence of a general practice accepted as law;***
   - ***the general principles of law recognised by civilised nations;***

- ***subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.***

2. ***This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.***

The main Sources:
i. International Treaties
ii. International Custom (Customary International Law)
iii. The General principles of Law
iv. Judicial Decisions and Teachings

International Treaties

These contain agreements between states, which agreements are rules. These are the major instruments used by states to embody these international obligations. **The Vienna Convention on the Law of Treaties**, in **Article 2(1)** provides a definition of Treaties: "***means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designatio***n".

Treaties are contracts between states. They are law because the states accepts severally obligations established with the Treaty, thus, regarded as being hard law. For example: "A State *shall not* pollute".

Articles 31 and 32 provide means by which Treaties are to be interpreted:

Article 31: General Rule of Interpretation

1. ***A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.***

2. ***The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:***
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. ***There shall be taken into account, together with the context:***
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.

4. ***A special meaning shall be given to a term if it is established that the parties so intended.***

Article 32: Supplementary Means of Interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

Customary International Law
The International Law Commission gives a definition: "***Those rules of International Law that derive from and reflect a general practice accepted as law***". This source gas an objective element and a subjective element.

The former is state practice, while the latter is the *opinio juris* which essentially is the belief of a state that it is, or it is not, doing something because it is obliged to do or not do it.

Subjects of Public International Law
Brownlie's book provides as follows: ***An entity possessing international rights and obligations and having the capacity to maintain its rights by bringing international claims and to be responsible for its breach of obligations by being subjected to such claims.***

The primary subject is the **State** since they have the International Rights and Obligations, and they have the necessary capacity to enforce their rights and to have the rights of others enforced against them. There are also certain International Organisations and Individuals, Companies, and People as Subjects of PIL.

StateHood
A State so called has to satisfy certain criteria as enshrined in **Article1 of the Montevideo Convention on Rights and Duties of State.** These criteria are commonly accepted as the criteria for the formulation of statehood:
a. Defined Territory: an area which falls under the control of a stable population.
b. Permanent Population: an amount of people which permanently reside in the territory.
c. Government: stable political community supporting a legal order.
d. The Capacity to enter into relations with other States: this is the decisive criterion of StateHood.

The subject of Public International Law enjoy two fundamental characteristics: **they are sovereign and they are equal.**

Sovereignty is the cornerstone on which Public IL is built. This concept was developed in the Middle Ages by **Hobbes** and **Bodin.** It is an essentially intangible concept, but within a

State, sovereignty expresses the supremacy of the Government. Outside a State, sovereignty expresses the supremacy of the State itself.

It is important to note that Equality is the characteristic of each state which means that each state is equal, no matter their size. State Responsibility links to the fact that in International Law there are no real sanctions meaning that there is no fear of actual punishment.

There, however, exists the articles for Responsibility of States for International Wrongful Acts by the International Law Commission. They are formally soft law, so they are not a Treaty but a document which was never developed into the former. Most of the articles on State Responsibility are considered to reflect Customary IL. This applies regardless of whether states have signed a treaty or not.

International Organisations as Subjects of Public International Law

The United Nations has an important goal i.e. world peace, as enshrined in its charter. The UN Charter can be described as a Constitution. This is evident in **Article 103 of the UN Charter.** It is typically held that ***in the event of a conflict between the obligations under the UN Charter and those under any other agreement, the Charter trumps.***

The only difference is that there is not one effectively global constitution. The primacy of the UN Charter applies only to other agreements, and while it has features similar to what is found in a domestic Constitution, it is not such.

The United Nations Agencies

1. International Civil Aviation Organisation
2. International Telecommunications Union
3. Committee on the Peaceful Use of Outer Space

Public International Air Law

The regulation of aviation is quite old and has to be placed in a historical context. **Prof Mendez De Leon** in "Introduction to Air Law" defines it as being a ***body of rules governing the use of air space and its benefits for aviation, the travelling public, undertaking and the states of the world.***

This was first mentioned in 1784 where, in France, a police directive was issued aimed directly and excessively at the balloons of the Montgolfier Brother: flights were not to take place without prior authorisation.

The first aviation agreement regulating international traffic was the German-Austrian Agreement on crossing National Borders on both sides with military ballots. The first International Multilateral Contractual Agreement relating to Air Tragic was the Hague Declaration which prohibited launching or projectiles and explosives from balloons and other methods of a similar nature. The latter only remained in force up until 1904.

The Sources of Air Law:

1. Treaty Law encompasses all international treaties in which multilateral conventions are the primary source of air law.
2. The implementing measures are found in international agreements and conventions.
3. Bilateral instruments, such as national law, contracts between states etc...
4. International Custom, in practical, constitutes an important source of international law applicable in the absence of an agreement or complementing it. But in the view of the development of treaty laws, the application of International Custom is not much in use in the domain of aviation as time goes by. Therefore, it can be held that as such Customary international law is not a source of air law, since the pertinent rules have been codified in treaties, therefore in that sense they have been bypassed.
5. Litigation between national and international law, or it between private and public law is applicable to air law.

The Chicago Convention - Convention on International Civil Aviation of 1944

This is also referred to as the **Constitution of International Air Law.** The predecessor of this is the Paris Convention of 1919 and has 193 Member States including all States of the UN. Both Conventions are based on the foundation of sovereignty. One has to keep in mind that an aircraft might be carrying a flag of a particular country but is flying over the territory and landing in the territory of another State.

It is to be noted that there is no Act with transposes the Chicago Convention into Maltese Law. Since Malta is a Dual State, when it ratifies a Treaty, a Treaty will be applicable in terms of Malta and other States, but is not automatically applied within Malta as a State. It would have to be legislated through an Act of Parliament. There are sill some legislations which transpose various provisions of the Chicago Convention into Maltese Law i.e. Air Navigation Order S.L. 499.09.

The Convention was established to promote cooperation and ***create and preserve friendship and understanding among the nations and peoples of the world.*** This landmark agreement established the core principles permitting international transport by air and led to the creation of the specialised agency which has overseen it ever since (***International Civil Aviation Organisation).***

The Convention has three fundamental principles:

1. **Cooperation:** states cooperating in order to ensure that aviation is a safe mode of transportation and in terms of finance, whereby states cooperate to achieve financial success.
2. **Non-Discrimination:** this relates to the nationality of the aircraft.
3. **Uniformity:** there is a system of uniform rules which apply to everyone, such as the uniformity of air navigation and air traffic rules. The need of uniformity cannot be underestimated due to the international character of civil aviation.

There are also sets of standards and recommended practices termed as being the **SARP**s. These are annexes to the Chicago Convention.

Article 37 of the Chicago Convention provides the legal basis for the SARPs to be drafted and published:

Each contracting State undertakes to collaborate international formity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organisation shall adopt and amend from time to time, as may be necessary, international. standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking
(b) Characteristics of airports and landing areas
(c) Rules of the air and air traffic control practise
(d) Licensing of Operating and Mechanical Personnel
(e) Airworthiness of Air Crafts
(f) Registration and Identification of Aircraft
(g) Collection and Exchange of Meteorological Information
(h) Log Books
(i) Aeronautical Maps and Charts
(j) Customs and Immigration Procedures
(k) Aircraft in distress and investigation of accidents; and each other matter concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

Article 54(L): ***adopt in accordance with the Provisions of Chapter VI of this Convention, International Standards and Recommended practises; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken.***

Definitions of Standard and Recommended Practises are not found under the Chicago Convention itself, meaning one would have to refer to the annexes.

Standards: these are specifications, the uniform application of which is recognised as necessary for the safety or regularity of international air navigation.

Recommended Practises: specification, the uniform application of which is recognised as desirable in the interest of safety, regularity, or efficiency of international air navigation.

SARPs do not enjoy Treaty Status. Thus, it follows that these must be implemented in National Law. SARPs are not Treaties, thus, in a way it is irrelevant whether a State is dualist and monist. It is argued that a State would have to implement this in National Law in order for it to have at least national applicability.

There is also a difference between the standards and recommendations themselves. While the former is necessary (*must)*, the latter is desirable (*should)*. Therefore, even the SARPs create a distinction between the binding nature. The Chicago Convention ensures sovereignty as with regard to airspace, but the freedom is restricted as per the SARPs.

International Civil Aviation

This is an extremely important notion, seeing that the Chicago Convention regulates solely aviation which is international air services and civil aviation. There are two important elements to be satisfied in this regard:

1. International
2. Civil

International Air Service is defined under **Article 96(b) of the Chicago Convention** as ***any air service which passes through the air space over the territory of more than one State.***

However, one must note that although Civil Aviation is not expressly defined under the Convention, reference can be made to **Article 96(a):** ***Air Service means any scheduled air service performed by aircraft for the public transport of passengers, mails, or cargo.***

The aforementioned also refers to all activities or operations which are not state activities i.e. civilian going on holiday. This is established as per **Article 3 of the Convention.**

The term 'Aircraft' was defined in the Paris Convention as ***all machines which can derive support in the atmosphere from reactions of the air.*** In the Chicago Convention, an aircraft is not specifically defined, however, one can look at the many annexes: ***any machine that can derive support from the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.***

i.e. a hovercraft and a rocket cannot be classified as aircrafts.

Civil v State Aircraft

As per **Article 3 of the CC,** the Convention only applies to Civil Aircrafts. Additionally, aircrafts which are used in military, customs, and police services are NOT Civil Aircrafts. No State Aircraft of a contracting State shall fly over the territory of another State or land without authorisation by special agreement.

Royalty, Ambassadors, and Diplomatic Aircrafts are considered to be State Aircraft. These enjoy the privilege of not needing to pass through airport checks and scans, and are considered as being an extension of the State.

Unmanned Aircraft Systems

These comes in a variety of shapes and sizes and are termed as being drones, remotely piloted aircraft systems, unmanned aerial vehicles, model aircraft, and radio controlled aircraft. These can be described as being ***a system, whose components include the unmanned aircraft and all equipment, network, and personnel necessary to control the unmanned aircraft.*** Till now, these are not formally regulated and for them to be subject to the Chicago Convention they'd have to satisfy the requirements necessary.

The Notion of Sovereignty under the Convention

Article 1:

The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.

The airspace of every state is, in law, closed for each and every aircraft registered in another state. This means that for an aircraft to enter into the territory of another, it must require permission. Permissions are granted through Articles 5 and 6.

Nicaragua Case - it was held that the basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2(1), of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory.

Article 2:

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

1. Horizontal Sovereignty

This comprises the State's land mass and the territorial waters adjacent thereto. Needless to say, this does not compromise the high seas because no one has national jurisdiction on the high seas.

2. Vertical Sovereignty

Air Law is considered to be a matter of private property law, meaning that he who owns the lands, owns it up to heaven.

In terms of the Maltese Constitution, the State of Malta have sovereignty over the airspace, above the land and extending to twelve nautical miles measured from the baseline.

Scheduled and Non-Scheduled Airspace

Article 5 deals with non-scheduled air services. These services require no special permission i.e. if one wants to go on holiday to France and a private jet is booked, such flight need not be regulated by the Bilateral Air Services Agreement. This Article is equivalent to the Right of Innocent Passage under UNCLOS which deals solely with ships.

Article 6 deals with scheduled air services as the result of the Bilateral Air Services Agreements. In this regard, permission is required by the taste via such agreement. Scheduled Services are all the Commercial Flys. International Trade Agreements need to be entered into between governmental authorities of States and in such agreements, performance of scheduled air services are regulated, such as traffic rights, capacity, and frequency between the respective territories.

Scheduled Air Services possess the following:

i. Passes through Air Space over the Territory of more than one State

ii. Performed by AirCraft for the transport of passengers, mail, or cargo, fro remuneration in such a manner that each flight is open to use by the public

iii. It is operated as to serve traffic between the same two or more points, either according to a published timetable of with flights so regular and frequent that they constitute a recognisable systematic series.

The Nine Freedoms of the Air

1. OverFly

The Right or privilege, in respect of scheduled international air services, granted by one state to another state to fly across its territory without landing.

2. Technical Stop

The Right in respect of scheduled international air services, granted by one state to another, to land in its territory for non-traffic purposes. This means, the right to stop for a technical stop.

3. Set Down Traffic

The Rights in respect of of scheduled international air services, granted by one state to another, to put down, in the territory of the first state, traffic destined for the home state of the carrier.

4. Pick Up Traffic

The right or privilege, in respect of scheduled international air services, granted by one state to another, to take on, in the territory of the first state, traffic destined for the home state of the carrier.

5. Carry Traffic to/from Third State

The Right in terms of scheduled international air services, granted by one state to another, to put down and to take on, in the territory of the First State traffic coming from or destined to a third party i.e. *start from Malta, go to Italy, set down passengers and pick up others to go to another State*.

6. Carry Traffic via Home State

The Right in respect of scheduled international air services, of transporting, via the home state of the carrier, traffic moving between two other states.

7. Operate fromSecond State to/from Third State

This relates to the low-cost carrier models. The Right in respected of scheduled international air services, granted b one state to another, of transporting traffic between the territory of the granting state and any third state with no requirement to include on such operation any point in the territory of the recipient state i.e. *while RyanAir is Irish, it operates extensively by performing flights Malta-Italy.*

8. Carry Traffic between two points in a Foreign State

The Right in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting state on a service which originated or terminated in the home country of the foreign carrier or outside the territory of the granting state i.e. *RyanAir leaves from Ireland, goes to Paris to pick up passenger, with the final destination being Marseille. There is a connection, but the direct competition is within the local market.*

9. Operate only in a Foreign State

The Right of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State.

Article 9(a) of the CC gives States the Right to restrict or even prohibit overflight over certain areas of their territories given there are *reasons of military necessary* or *reasons of public safety.*

Qatar v UAE (2017) - in 2017, Bahrain, Saudi Arabia, and Egypt imposed a blockade on Qatar, meaning Qatar aircrafts were prohibited to fly over their territory. Many alleged that this was a breach of the CC and the IASTA Agreement. The sanctions were imposed because of Qatar's alleged support for groups that the plaintiff nations view as terrorist organisations which goes against diplomatic relations in the region. Qatar rejected such allegations, arguing that the air blockade goes against the 1944 Convention on Civil Aviation. The ICJ ruled that the matter had an effect on Civil Aviation which ultimately effects the CC and thus, left the matter to be decided by the ICAO.

Pakistan Case (2019) - Pakistan closed its airspace to all foreign aircraft because of political and military tensions with India. When there is a threat to one's sovereignty or perception of danger, States can take proportionate measures in restoring such sovereignty.

Malaysian Airline MH17 Case - in 2014, the airline was shot down over the territory of Ukraine at the time of the Ukraine-Russian War. As a result, Ukraine, prior to the shooting, had closed down its airspace up to a certain level. Therefore, MH17 was flying above such level, seeing that it was 'safe' to do so. In light of this tragedy, further SARPs were adopted i.e. timely closure and restriction of airspace, provide information to third parties in the event of armed conflict. Notwithstanding, States were reluctant to adopt such recommendations.

Bilateral Air Services Agreements

There are methods by which permission is awarded under **Article 6.** There are two types of Air Services Agreements which regulated various aspects of air scheduled rights such as rates, capacity, and frequency between two States.

1. **Bermuda 1**

This is the most important since the CC, and was concluded in 1946 between Great Britain and the US. This agreement was described as being liberal and provided a compromise between the absolute freedom of traffic sought by the US and the strict economic organisation and allocation of scheduled air traffic requested by GB.

2. **Bermuda 2**

The former agreement did not work anymore when overcapacity, declining traffic development, and so on led to an extensive use of formally authorised notions that ended up damaging both parties and which could only be brought back into balance with considerable difficulty. Thus, the Bermuda 1 Agreement was terminated in 1975, ending up with a more restrictive practise. In 1977, GB and US signed a new agreement

3. **Open Skies**

These Agreements have vastly expanded international passenger and cargo flights to and from the US, promoting increased travel and trade, enhancing productivity, and spurring high-quality job opportunities and economic growth. Open Skies agreements do this by eliminating government interference in the commercial decisions of air carriers about routes, capacity, and pricing, freeing carriers to provide more affordable, convenient, and efficient air service for consumers.

AirSpace v OuterSpace

It can be held that there is no tactile boundary between airspace and outerspace. **Article 1 of the Chicago Convention** provides that states have complete and exclusive sovereignty over airspace above territory. Sovereignty thus extends to over land, over waters and over airspace.

In OuterSpace, no one can claim sovereignty.

There is no provision delineating the act boundary between the two, between the regime of the *res communis* and the sovereignty of States over National Territory. However, there are two schools on Vertical Sovereignty:

1. Spatialist Approach

This approach claims that the boundary between airspace and outerspace should be defined. Moreover, space law is only applicable according to its place i.e outerspace and what is in outerspace. The main proponent of this approach is Russia.

2. Functionalist Approach

This argues that the boundary between airspace and outerspace should not be defined, as it is unnecessary or impossible to achieve. Space law applies according to the purpose, being space activities, rather than the place where they take place. This approach is not enshrined in any State.

International Law does not define where outer-space begins. Vertical delimitation depends, therefore, on national law. From a scientific point of view, the is the *Karman Line Theory* which holds that everything beyond 100km above sea-level is considered as 'outer-space'. From a legal point of view, there is no international legal boundary or rule that distinguishes airspace from outer-space and there is also no International Agreement regarding the matter.

Space Law

At its broadest, space law compromises all the law that may govern or apply to outer space and activities in and relating to outer space.

Space Law can be divided into soft-law and hard-law. It originated from two main events: the cold war and the creation of the UN. wWhen Russia launched Spuntik, the US and Russia and several other states discussed the **United Nations,** which was created after World War II, with its primary objective being world peace. There was a fear of a nuclear war and there was this international organisation which sought to ensure world peace: this created Space Law.

The UN Committee on the Peaceful Use of Outer Space (COPUOS) had presented a report to the UNGA containing a number of considerations regarding the problems that could arise in the conduct of space activities. COPUOS also set out to regulate activities conducted in outer space so as to prevent and avoid the development of haphazard practises dictated by national interests. COPUOS proceeded to formulate two principles of utmost importance:

1. **Outer Space and Celestial Bodies, unlike newly discovered continents and seas on earth, are not subject to national appropriation and are free for exploration and use by all States.**
2. **International Law, including the Charter of the UN, applies to Outer Space and Celestial Bodies.**

There are today five Multilateral Treaties on OuterSpace:

i. OuterSpace Treaty

ii. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of the Objects Launched into Space

This has been ratified by 98 States, and elaborates mainly on Articles 5 and 8 of the Outer Space Treaty. This is an earth-oriented instruments, and the obligations it imposes relate to the case when an astronaut either lands on the High Seas or the Territory of a State.

As per **Article 2,** States are required to do all that is required on their behalf to help astronauts in distress.

Article 3 tackles the duty to render assistance when the astronaut lands on the high seas or in a place which is not under the jurisdiction of any State.

Article 5 is basically the gist of the agreement since it deals with the recovery of a space object. The reason behind such agreement was the ***safety of astronauts in the vent of distress by landing and the up keeping of states' technology when they land upon Earth.*** However, the notification need no be immediate, and it only extends to space objects which returned to Earth.

iii. Convention on International Liability for Damages Caused by Space Objects

This is the second most important following the Outer Space Treaty and has been ratified by 96 States. It elaborates upon Article 7 of the Outer Space Treaty. The Convention creates a two tier system in terms of liability: ***absolute liability*** and ***fault-based liability.***

Damage is defined under **Article 1(a)** as ***loss of life, personal injury or other impairment of health, or loss of or damage to property of States or of persons, natural or juridicial, or property of international intergovernmental organisations.***

Additionally, one also finds definitions to the terms '*launching*' and '*launching state*'.

One can also briefly refer to damages, and as per **Article 12,** the damages under Article 1 can be described as ***damages restitutium in integrum.*** This might refer to direct and indirect

damages, the latter also extending to moral damages. Punitive damages are not compensable under the Liability Convention.

Article 2 speaks of Absolute Liability which is spoken of vis-a-vis ***damage caused by its space object on the surface of the earth or to the aircraft flight.***

Article 3 speaks of Fault-Based Liability which concerns damages caused by a space object to another or to persons or property on board. Here, the damage must be caused by the fault of the launching state.

Article 4 speaks of Joint and Several Liability toward a Third State. If damage is caused by one state to another, one speaks of Articles 2 and 3. If such damage also results in damage towards a third state, whether on earth, in the air space, or in space, there is joint and several liability by the first two States.

Note:
- *Damage on the Surface of the Earth: Art. 2 and Art. 4 (Absolute)*
- *Damage in AirSpace: Art. 2, Art. 4 (Absolute), and possibly Art. 3*
- *Damage in OuterSpace: Art. 3 and Art. 4 (Fault-Based)*

Article 6 deals with Exoneration from Absolute Liability which shall be granted if fault is proven. This is only up to the extent that if the state has not acted in conformity with International law, even if it was not at fault, absolute liability subsists.

Article 7 speaks about instances where there would be no liability for damage. Bin Cheng holds that Paragraph (b) is an application of the principle *Volenti non fit injuria*, whilst paragraph (a) is an application of a basic principle of international law which, in normal circumstances, refrains from dealing with relations between a State and its nationals i.e. *if an Italian is injured in another country by an Italian Space Object, Italy is not liable for damages caused.*

iv. Convention on Registration of Objects Launched into OuterSpace

This has been ratified by 69 Sates and elaborates on Article 8 of the Outer Space Treaty. This Convention makes it a duty for States to register their space objects, both in a national registry as well as in a UN registry created specifically for that purpose (dual-registration).

Article 2 deals with Registration of a Space Object. The registering a space object in the UN, there are some criteria which need to be satisfied. One of which being that if one ratifies this Convention, then one is accepting responsibility and consequential liability. However, there are some states such as Netherlands do not register state objects under this Convention but register them under Resolution 1961.

v. Agreement Governing the Activities of States on the Moon and other Celestial Bodies

This Agreement is only ratified by 18 States. **Article 1** holds that such Agreement applies to the Moon and other Celestial Bodies, while **Article 3** deals with the notion of using of Peaceful Purposes. **Article 4** makes the moon a province of all mankind, alongside it being Common Heritage as per **Article 11**.

The Outer Space Treaty

This is the first of the *Corpus Juris Spatialis,* and the most important with respect to what is legal and illegal in carrying out space activities.

Article 1: Province of all Mankind

All countries, in one way or another, shall benefit from the exploration and use of Outer Space. Every State has a legal right to the fruits of their exploration and use of outer space.

Article 2: Sovereignty

One cannot claim sovereignty in outer space. The only sovereignty one can own is over one's own space objects. The question of whether mining of resources in outer space is legal also comes around. Many legal scholars explain that, although it is clear that States cannot claim sovereignty in outer space and therefore cannot 'appropriate' a celestial body, this doesn't automatically mean that States, or their citizens (natural and legal), cannot mine the resources of such bodies.

One might also argue that on the High Seas one cannot claim sovereignty, but it is still possible to extract fish or the deep seabed resources. In addition, the Moon Agreement allows fro the mining of Space Resources.

Article 3: States can explore and use Outer Space in accordance with IL

Article 4: Peaceful Purposes in Accordance with Art. 3 of the Moon Agreement

The moon and other celestial bodies shall be used by all State Parties to the Treaty exclusively for peaceful purposes. It is accepted that peaceful means non-aggressive.

Article 5: Astronauts in accordance with the Astronauts Agreement

In carrying out activities in Space, the astronauts of one State Party shall render all possible assistance to the astronauts of other State Parties.

Initially, this was considered to confer upon astronauts a diplomatic status. It seems that it is no longer accepted as a scope. At best, astronauts should be given immediate help and assistance in distress. This duty extends to all astronauts whatever their nationality.

Article 6 & **7:** Responsibility and Liability

Article 6 requires National Space Law since it is through such law that States give authorisation and carry out supervisions. State Parties to the Treaty shall bear international responsibility for National Activities in outer space. Any damage to another State Party is attributed to whom caused such damage.

In other words, these articles state that all acts carried out in outer space, whether performed by a governmental or a non-governmental agency are deemed to be activities which directly involve state responsibility. However, this article does not also cover the personal activities of nationals who carry out such acts when they are not within the territorial or quasi-territorial jurisdiction of the State.

Article 6 also speaks of International Organisations, and their responsibility becomes jointly and severally with the parties to the Treaty.

There are three types of Liability:
1. A State that launches
2. A State that procures for launching i.e. *financing a launch*
3. A State from whose territory or facility an object is launched

Article 8: Registration
A Space Object in Space can never become an object belonging to no one, meaning it will always remain under the jurisdiction of the State which registers it. All Parties to the contract maintain a registry of objects launched into space and assumes that all objects are indeed registered. This Article also introduces a quasi-territorial jurisdiction seeing as it applies also to personnel.

To date, Malta has signed:
i. The Agreement on the Rescue and Return of Astronauts
ii. The Liability Convention
iii. The Outer Space Treaty

Soft Law Post-Corpus Juris Spatialis
1. UNGA Resolution on the Concept of Launching State (2004)
2. UNGA Resolution on the Practise of States in Registering Space Objects (2007)
3. UNGA Resolution on the Adoption of National Legislation (2013)

Semester 2: International Law

Disputes and ways in which such disputes can be tackled.
One should be looking at the different procedures which will help states settle their disputes peacefully. The procedural rules will not change.

Dispute v Conflict
By way of introduction, one will have noted that the topic of the lectures are 'International Dispute Settlement'. The media uses some terms interchangeably, but a dispute is a more specified issue and is characterised by a claim and a counter-claim. There is a specific disagreement and tied down with specificity. A situation of conflict, is much more wide ranging. A conflict is a condition of hostility which can be made of a number of different disputes and historical problems. The importance of this distinction is that while a dispute can be solved, the conflict might not necessarily be solved because the latter might have more surrounding issues. The feelings of hostility will supersede the solution of one or two particular disputes making it up.

One is also looking at General International Legal disputes i.e. disputes between states or between states and a non-state entity e.g. a company. It is the peaceful settlement of disputes that shall be focused upon because we are looking at this as a corollary to the prohibition of the threats or use or force.

This branch of International Law has two main types of procedures:
1. The Legal (formal)
2. The Non-Legal (political)

The former is made up of arbitration and adjudication. These always give rise to a binding solution. The latter is the diplomatic or political branch. These lead to a non-binding solution meaning that states are not bound to take up the solution reached.

As one will note, starting from the non-binding and going up the ladder, one will notice that from the first non-binding procedure, to the last one covered, the extent of formality increases. The extent to which third parties are involved also increases. One will move from the very basic and flexible to the rigid procedure before the ICJ.

The law begins to play a more important role the further up you go, where the Court is charged to find a solution based on International Law.

The General Framework
This is impude in the UN Charter, stated in Article 1(1) that States seek to settle their disputes peacefully. An aim of the UN is to preserve international peace and security, and to that end promotes the peacefully settlement of disputes.

Article 2 goes on to oblige States to settle their disputes by peaceful means and through which security and peace is secured. Article 2(4) is the famous provision against the use of force i.e. negative obligation. All Members shall refrain from the use of force against other Member. This is a jus cogens obligation.

Article 33
The one Article which will be referred to vis-a-vis each procedure is **Article 33 of Chapter 6**, which deals with the **Specific Settlement of Disputes**. This Article guides states to settle their disputes peacefully.

This Article codifies procedures which were in existence prior to the codification of the UN Charter. One should note that there is no hierarchy. Article 33 has been described as a tool box, with different procedures necessary to different scenarios of disputes. The Parties are at liberty to make use of any procedure to resolve a dispute. Article 33 is also non-exhaustive, so it merely provides examples. The main duty which underlines this article is cooperation. The non-formal procedure will not be successful without cooperation, and would be more difficult to make use of legal procedures. Thus, cooperation serves as the basis.

States have to work proactively together. Reference can be made to the **Nicaragua Case.** The duty to cooperate with a view to reaching a settlement is also inherent in the CIL obligation to settle disputes peacefully. The obligation to cooperate is necessary to work together to reach an agreement.

The Political Forms of Dispute Settlements

As you will see, the level of third party increases even though these are all flexible procedures. The one common result or feature in this is that they lead to a non-binding solution. What one means with this term is exactly that the states are not bound to accept it. If they accept it, it would make sense to enter into a binding agreement.

1. Negotiation

This was mentioned first in Article 33 and not because of any priority, but because it is the simplest form of dispute settlement procedure. It is also the most utilised form because it is so easy to set up.

What this legally means, is that there will be discussions with the relevant parties vis-a-vis their diverging opinions. Only the States involved in the dispute are involved in negations. The crucial element in this procedure is that there is no third-party involvement. It is up to the States to deal with the disputes as they wish.

This has been universally acknowledged as being the main method, its fundamental nature cannot be disputed. Reference can be made to the **North Sea Continental Shelf Case.**

A question often brought up in texts is what is the relationship between negotiation and other forms of dispute settlements. For example, a question comes up if a case is brought forward before the Court while there are negotiation proceedings (N.B. this is also applicable to mediation).

The general position is that negotiation does not preclude resort to other dispute settlement procedure. Negotiations need not be exhausted for other procedures to apply. Reference can be made to the **Aegean Sea Continental Shelf Case.** Greece referred the matter to the ICJ, while Turkey wanted negotiation proceedings. It was held that the fact that negotiations are being actively pursued during the present proceedings, is not, legally, any obstacle to the exercise by the Courts of its judicial function.

In principle there is nothing wrong with these two proceedings carried out at the same time. The idea for this is that respondent states cannot rely on pending negotiations to block adjudication. An arrangement set out in the aforementioned case does not allow the state to stop the settlement of the dispute by preventing access to court. It gives the states the widest fora to deal with the dispute, but this has to be moderated by the principle of good faith. However, a Court can decline jurisdiction if it thinks that a successfully procedure is happening elsewhere. This would be an instances of bad faith attributed to the State bringing a claim before the Court. This is determined through various factors.

Reference can be made to **Judge Moore** and an explanation given in the **Palestine Consessionis Case.** He held that negotiation is the legal and orderly administrative process by which Governments, in the exercise of unquestionable powers conduct their relations with another and discuss to settle their disputes.

The forms can vary:
i. Bilateral or Multilateral
ii. Diplomatic Channels
iii. Collectively i.e. UN
iv. Mixed/Joint Commission - in this case, a commission would deal with disputes as they arise to diffuse such dispute.

The Nature of the Obligation to enter into Negotiation
Realistically, there is not obligation to enter into negotiation as a first step. This step ladder approach is not adopted, as held in a multitude of case law. There is no general rule found that the exhaustion of negation is a precondition for a matter to be referred to the Courts. This was also subject of discussion in the 2018 Case of **Bolivia v Chile.**

The fact that negotiation is not a necessary first step, it is still a very useful tool for states to use as such. Thus, it is the most utilised form of dispute settlement but not because it is necessary.

A Treaty obligation may be created by which States would have to go to negotiation. States can determine what time of procedure they want first in a particular Convention.

The principle of Good Faith
A state has to act in good faith when settling its disputes. The **Nuclear Test Cases** held that one of the basic principles governing the creation and performance of legal obligations, whatever the source, is the principle of good faith.

There is no one definition of Good Faith. One, however, can look at the **Lac Lanoux Arbitration.** Any of these four instances would amount to bad faith:
i. Unjustified Breaking off of Discussions (usually the Court would not take jurisdiction)
ii. Abnormal Delays
iii. Disregard of Agreed Procedures
iv. Systematic Refusals to take into consideration adverse proposal or interests

There is no obligation to agree, the only obligation there is, is to negotiate in good faith. While the aim is an agreement, there is no obligation to force agreement on the State. This was explained in the **South West Africa Case.** It was stated that it is not so much the form of negotiations that matters as the attitude and views of the parties on the substantive issue of the question involved.

This was also maintained in the **North Sea Continental Shelf Case.**

Advantages:
i. Saves expenses and trouble of international litigation
ii. Brought into operation at short notice
iii. A number of disputes are reflections of differences over accommodating or adjusting the interest and aspirations of the parties to changing circumstances rather that strict issues of laws.

The climate for negotiations:
i. The compromise must be reasonable - he benefits gained have to outweigh the disadvantages for both parties involved.

The Limitations:

i. The absence of a third party is sometimes an advantage, but also a disadvantage because it usually acts as moderator. There would be no guarantee of an impartial laying out of facts. It is not particularly fair on the weaker state. Fair terms might not exactly be guaranteed.
ii. The putting forward of exaggerated claims which might aggravate a dispute cannot always be prevented.
iii. Nor can fair and just terms be ensured since one of the parties might be in a weaker position.
iv. Negotiation is plainly impossible if the parties to a dispute refuse to have any dealing with each other.

2. Mediation

Sometimes, the degree of animosity between the parties would be so great that negotiation without third party involvement would be impossible. The Hague Convention is relevant, especially Article 4, which refers to mediation and a mediator. The mediator would have a reconciliatory role, sorting the differences between the States.

Collier and Lowe said that mediation is participation of a third state or states, a disinterested individual or an organ of the UN with the disputing States. It is another attempt for reconciliation.

Reference can also made to 'Good Offices' which is different to a mediator who takes active steps to make proposals for reconciliation. The former is exercising by someone who would be helping in trying to start or continue negotiations which have busted out or discontinued because the parties just decided to give up. A person exercising good offices does not take steps to solve the disputes initially, but can become one progressively. If he actually encourages, and then takes an active role, he becomes a mediator. If one looks at the Hague Convention Articles 2-4, there is no difference made between the two aforementioned roles. Moreover, Good Offices are not even mentioned in Article 33. This is therefore mainly an academic distinction.

In the case of mediation, one would need he willingness and acceptance of a mediator. This has to be done through an invitation by all parties to the dispute. In mediation, the mediator has to have the confidence of both parties because if not his proposals would not even be considered, let alone accepted.

The main features till now:

i. The purpose to reconcile the opposing claims
ii. Advance proposals

The task of the mediator is at an end once the means proposed for reconciliation are not accepted. The results have exclusively the character of advise and never have binding force.

One needs consent at every step of the way. Once this is the case, the mediator will hear the positions of the parties. He will examine how much each side is prepared to give up/offer. If they accept, then they move to the post-mediation stage, in which they will adopt the advise and make it binding. The idea of cooperation is even more important here, and even consent.

Advantages over Negotiation:

- Third Party involvement (refer to limitations of Negotiation vis-a-vis Third Parties).
- Should a face-saving compromise be needed, it may be practically easier.

Mediation generally tends to occur:

i. Parties do not wan to communicate with each other directly

ii. Disputes have been protracted
iii. Individual efforts have reached stalemate
iv. Parties refuse to shift grounds on their position (i.e. this possibility of settlement is still very hard in this scenario)

The Limitations:
- The parties would need to make the necessary concessions
- The stumbling block to find a mediator suitable, willing, and acceptable, in the beginning of the process.

3. Inquiry

The purpose of this procedure is to facilitate the solution of disputes arising predominantly from a difference of opinion of facts by elucidating those facts. There is normally no investigation or application of rules of law.

The Hague Convention came up with this idea of a Commission of Inquiry, the will look at clarify and examine the dispute, and may very well solve it. If the issue is a factual one, inquiry may settle it completely. If it is legal, it might still help in terms of facts.

A UN definition of fact finding is any activity designed to obtain detailed information and knowledge of the relevant facts of any dispute or situation. There are two main meaning of inquiry:
i. Broad
ii. Institutional - there is a Commission set up which is impartial and charged with looking into the fact of the dispute and through that, the dispute, if factual, may well be settled. This is because what was happening is that States were adopting impartial national Commission of inquiries i.e **the Red Crusader Inquiry.**

Certain of these procedures have evolved because inquiry in its traditional form leads to a non-binding results. But there is no prohibition for States to not give it a binding nature. States might ask a Commission to come up with a binding report, and this is not prohibited.

Note: In one of the Annexes of the Law of the Sea, Article 5 recognises an inquiry procedure which is conclusive to the parties, unless agreed otherwise by the parties. So there is a binding result, unless otherwise agreed. The aim is always to avoid the use of force.

Rarely used:
i. Sometimes unnecessary to set up an inquiry because a situation which appears to involve quite different versions of the facts proves amenable to negotiations.
ii. Sometimes clarifying the facts would not solve the dispute at hand.
iii. If conciliation is applied, the conciliator would still carry out an inquiry.

The Conditions:
i. Dispute to be one of facts
ii. The parties need to accept that their version of events might proved to be wring

4. Conciliation

This is the last informal method. The definition is pretty interesting because it combines characteristics of mediation and inquiry. It encourages the contending parties to come to a settlement and there is an impartial elucidation of the facts of the basis of the dispute.

It involves a quasi-judicial role, much more than in fact-finding. In conciliation, it goes beyond fact-finding because one moves on to suggest solutions. **Brownlie** held that the third party must elucidate the facts, hear the parties, and make proposal.

With this nature, there is a slightly more formal procedure, but it is still a diplomatic procedure. This is common in Treaties, which always have a dispute settlement clause.

Versatility:
i. Legal
ii. Political
iii. Technical
iv. Human Rights
v. Trade Disputes

Conciliation is mentioned in all Treaties dealing with the aforementioned.

Again, there are two main types:
a. Traditional - an optional third party procedure.
b. New Procedure (Vienna Convention and the Law of the Sea) - the idea is to make the resort to this process compulsory. This does not exist in customary international law. The former Convention deals with this in Article 66. With the latter Convention, reference should be made to Article 284.

The result is always non-binding, which have the character of recommendation. The conciliator's suggestions can be accepted or rejected. There is usually a specified period of time in which to indicate whether they have or have not agreed to the proposals. This is not to allow the dispute to escalate. The next step would be in the hands of the parties, who accept, reject, or ask the conciliator to take a more extensive role to allow and help for implementation of the solution.

The Formal Legal Forms of Dispute Settlements

Arbitration and Judicial settlement form of the branch which affords a binding decision. These are to be contrasted to the political methods, in which States have control over the procedure. In the perception of States, when one looks at arbitration, it is more flexible that judicial settlement. Thus, there is still the retention of party autonomy, although not as informal as the in the political form.

There are some similarities between the two forms of dispute settlements. The most evident is the establishment of a binding decision. Moreover, unless the parties stipulate otherwise, the decision is based on rules of International Law.

As with differences, in Arbitration there is greater party autonomy, greater importance given to the power of the parties to determine the procedure. The agreement giving rise to arbitration will lay down the rules which the tribunal will decide the case. The party can decide upon the procedural and substantive rules to be used by a tribunal. Arbitrators are selected by the party, not a feature of ICJ jurisdiction. Usually, in arbitration, the tribunal is set up to deal with a particular dispute or a particular class of disputes.

Moreover, in arbitration, the proceedings are private and the award is usually unpublished. Finally, arbitration is expensive when compared to a method including the ICJ. The ICJ expenses are borne by the UN.

1. Arbitration

In Arbitration, there is the determination of a dispute of a different between States (or between a State and a non-state entity), through a legal decision of one or more arbitrators, and an umpire, or of a tribunal other than the ICJ or other permanent tribunal. It is up to the parties to decide how the issue is to de decided upon.

The so-called mixed-arbitration is an enormous advantage of this form of dispute settlement. This is not possible before the ICJ. The International Law Commission provides another definition: ***procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.***

Notwithstanding, the State cannot be dragged to any form of dispute settlement, meaning that in any case they would need to consent.

Arbitration is also a feature in the Hague Convention. Article 15 holds that ***International Arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of a respect for law.***

Article 18 goes on to say that ***resource to arbitration implies an engagement to submit loyally to the award.***

Arbitration under the Hague Convention regime was intended as a last resort after all attempts of diplomacy have failed. This is no longer the case as per Article 16 and 20, and today, the States can immediately opt for Arbitration. The Hague Convention Regime set up the Permanent Board of Arbitration, which started as the prime forum of Inter-State Arbitration. However, it then fell into relative disuse and now no longer exists.

<u>Ad Hoc InterState Arbitration</u>

In this case, there would be no standing tribunal to which states have recourse. If a dispute arises, they might agree to establish a tribunal. Recourse may be made to an arbitral agreement after the occurrence of a dispute. There would be no Treaty which direct the States to a particular dispute settlement procedure. Thus, it is up to the States to agree on the aforementioned. This type of arbitration is very useful for territorial issues and interpretation of Treaties.

There might be an applicable Convention, and the Convention would say that a dispute arising under it would be dealt with through arbitration. The States can still determine how the dispute is to be decided, but they cannot decide whether or not to be bound by it.

An important feature or Arbitration is the concept of <u>Mixed Arbitration.</u> It is one of the only fora which allows proceedings between State and Non-States on an International Level. This is mentioned and allowed under: the European Energy Charter, Law of the Sea Convention, ICSID Convention, Iran-US Claim Tribunal, and the European Court of Human Rights.

<u>The Main Features of the Process</u>

The arbitrators are firstly chosen by the parties ('judges of their own choice'), or through a mechanism chosen by the parties. The later is useful to serve as a safeguard. There are mechanisms which also provide for scenarios in which the States cannot compromise with regard to the Arbitrators (this is a default mechanism to make sure that at the end of the day, arbitrator are appointed). Arbitrators can be solo, form a Tribunal, or even a Commission.

The Commission is made up of an equal number of national arbitrators appointed by the parties, and the neutral who is generally an expert in the field, to whom cases are referred if the national members cannot agree.

The consent to arbitration must always exist. Even though the award is binding, consent is essentially, as shown in two different ways:

i. If the dispute arises, there could be a pre-existing Convention which gives one a general undertaking to resort to arbitration. In this case, State consent would exist before the dispute has arisen.
ii. If there is no Convention, consent is to be given after the dispute occurs through the agreement by the parties. This agreement is so much more detailed than a simple dispute settlement clause which exists prior to the moment in which a dispute arises.

Kompetenz-Kompetenz

This happens if there is a challenge to the jurisdiction of the tribunal, in which the arbitral tribunal is given to the power ti decide such challenge to its competence. The arbitral clause is severable from the entire agreement. It is considered to be a separate agreement so that it will remain valid if the whole agreement is alleged to be invalid.

Generally, International Law is applicable, but parties can decided on whatever principles what they wish. In the **Trails Melter Arbitration** it was decided that International Law was to be made used in conjunction with other American Laws.

The rules of procedure are also decided by the parties. The parties can either go through each rule, or make reference to a model set of rules which provides a default position in cases where they won't agree.

Effect of Awards

This award is binding, and there is no possibility of appeal. It has the same effect of judgements when *res judicata*. Article 81 of the Hague Convention states that ***arbitration is meant to be final.***

However, there is the doctrine of nullity which says that an award is binding if certain conditions are satisfied:

i. Tribunal property constituted
ii. Tribunal has not acted ultra vires
iii. Tribunal provided an adequate award with relevant reasons

If the tribunal has not followed the rules of the parties, and contrary to the aforementioned, the award is nullified. The Tribunal cannot move outside the instructions of the party. The same holds if the award is tainted by fraud.

The general rule is that an award should not be disturbed, unless there is a manifest error in fact or law, an irregularity in the appointment of the arbitrator, and if there is one essential procedural error. This happened in the **Maritime Delimitation between Guinea-Bissau and Senegal Case of 1992.** The duty to give reasons of utmost importance, as determined by the ICJ who had the power to determine if an award was null and void.

2. Judicial Settlement

This involves the reference of a dispute to a permanent tribunal. It was created by its Statute in 1945. Its Statute forms part of the UN Charter which is almost identical to the PCIJ Statute. The latter is its predecessor which existed under the watch of the League of Nations. The difference between the two is that the Court is the principle judicial organ of the UN under the current Statute.

The general composition is made up of 15 judges (no two may be nationals of the same state) chosen by the UNGA and UNSC. Article 2 maintains that the Court shall consist of a body of independent judges, who are elected regardless of nationality, of high moral character, and usually possess the qualification required in their countries.

The aim is that the International community has confidence in judges who determine their cases. It cannot mainly be European to have full confidence, and thus, the importance of representation of the main forms of civilisation and of the principle legal systems of the world.

One can bring an Ad Hoc judge to give a national perspective when there is no judge of the nationality of the parties.

Consent must be given in order for the Court to be able to hear a case. One might think that by becoming a party to the Statute, one would give consent, but this is not the case. One can be a party to the Statute, but there is no automatic jurisdiction given to the ICJ. For the case to be heard, specific consent must be given.

There are two main branches of jurisdiction:
1. The Contentious: this gives a binding decision. It is only States that can take part, mixed-disputes are excluded. **Only States can go before the ICJ.**
2. The Advisory: as the name implies, this branch offers legal guidance, and not directly directed towards dispute settlements.

The State must have consented to the jurisdiction of the Court. The claimant would obviously consent, but unless the defendant specifies consent, the ICJ would lack jurisdiction. The different methods of granting consent are established under Article 36 of the Statute.

As in Arbitration, consent can be given before or after the dispute has arisen. Before a dispute has a arisen, there can be a Treaty of Convention which provides for jurisdiction. The Party agreeing to the Treaty would agree to all clauses. Sometimes, declarations may be made by States saying that any disputes are referred to the ICJ: this would give jurisdiction by that State to the ICJ.

Instances of consent after happen when the States specifically agree to send their dispute to the ICJ. *Frorum Proprogatum* is also spoken of in instances of consent given after the dispute has arisen. The defendant must always indicate that he has consented.

<u>Heads of Jurisdiction under Contentious</u>

i. All Cases the Parties refer to the Court

After dispute arises, the parties right an agreement and send their dispute to be decided by the ICJ. Here, consent is given after the dispute arises.

ii. Matters specifically provided in the UN Charter

This is mentioned by Article 36(1). Initially, the idea was that certain types of disputes should be compulsorily decided by the ICJ. However, this list was never provided in the UN Charter. There is only one instance which provides that the Security Council should try to remember that legal disputes, as a rule, should go to the ICJ for dispute settlement. This is only a recommendation and in fact was brought in the Court's attention in the **Corfu Channel Case.** Seven judges said that this is recommended and not mandatary. Possibly, this head is redundant.

iii. Forum Prorogatum

iv. Treaties or Conventions in Force

This is like a dispute settlement clause, wherein a Treaty clause will refer any disputes, as to the interception or application of the Treaty to the ICJ. If States are bound to the Treaty, they are also bound by the clause.

Treaties can be specifically for the settlement of disputes or can be about any matter which include a dispute settlement clause. In both case, the fact is the same: States parties to the Convention which includes the aforementioned consent to ICJ Jurisdiction.

v. Transferred Jurisdiction (Art. 37)

Consent of Jurisdiction under the PCIJ is to be transferred and understood as consent to the jurisdiction of the ICJ. This is to allow for continuity, and that acceptances to its jurisdiction were important. It was considered necessary to preserve the earlier provisions which conferred jurisdiction to the permanent court.

There are two conditions:

a. The Treaty still in force
b. The Parties to the Treaty also Parties to ICJ Statute

vi. Optional Clause (Art. 36(2))

This denotes a States' acceptance of judicial settlement on certain terms and conditions, and when both parties have made declarations which cover the dispute the Courts' jurisdiction over the case is established. Some argue that thus declaration grants compulsory jurisdiction to the ICJ but this is misleading because the declaration between both States need to match in terms of issues over which the ICJ has jurisdiction. For consent, both declaration have to match.

States can choose, by communication, to give the Court compulsory jurisdiction on what is listed under (a)-(d) of Article 36(2). The State can grant jurisdiction regarding any matter on international law, but the State can still make reservations. The Declarations are rarely open-ended (unconditional). Declaration can still be unconditional. It can also be made for a specified time, and on condition of reciprocity, however these reservations are uncommon.

The typical Declarations:

A. Domestic Jurisdictions

Some States reserve disputes which are in the domestic jurisdiction of the State. This is superfluous because the ICJ does not look into the domestic jurisdiction of States as IL has no application.

B. Automatic and Peremptory Reservations

C. Limitations of Jurisdiction to certain Categories of Cases

For example, Canada gave jurisdiction to the ICJ excluding issues dealing with its Coast.

D. Time-Limitations

Reference can be made to the term *hereafter arising*. In the **Interhandel Case,** the US provided a declaration regarding disputes hereafter arising. The dispute arose in 1948, and so the Court did have jurisdiction.

Sometimes, a reservation says *situation or facts arising after the specific date*. This is quite a draconian limitation, since it is difficult to establish when facts arose.

The initial idea of this clause declaration was to create a compulsory jurisdiction by consent of States. This was not to be, as one can evidently see from statistic. Not many have been given on the basis of matching declarations. The most common way still remains through the specific agreement.

The Court can never determine a hypothetical case. The dispute has to remain until the very end of the proceedings before the Court. If parties reach a settlement before, the Court would have nothing to decide. The dispute would have been settled. Courts are not there to make legal pronouncements *in abstracto*.

Moreover, if a case has become moot, there is, again, nothing for the Court to decide (**Nuclear Tests Case of 1974).**

The Effects of Judgements

The effect is only binding and without appeal on the parties. There is no doctrine of precedence under the ICJ system. This does not mean that there is no judicial consistency. It is not bound to previous judgements, but these are highly respected and referred to.

Enforcement

The Charter of the UN obliges MS to comply. A lot of the ICJ judgements would not need to be enforced since most of them are declaratory. The ones that need to be enforced run into the problems faced on IL because of the way the Security Council is structured.

In terms of the Advisory Branch, the ICJ may be asked to give an advisory opinion as per Article 65(1). This is non-binding, which cannot be asked for by the States because one would enter the realm of contentious. The purpose of this opinion is to give authoritative guidance, which is so important and given a lot of weighting. However, this opinion does not settle disputes between the States. Sometimes, the guidance is so important that it can settle a dispute between States in an indirect manner.

Principles of International Law
Maritime Migrant Smuggling

Migrant Smuggling

In all areas of the world, migrant smuggling and maritime migration and intrinsically linked. Most people travelling by sea, and who find themselves in distress are essentially smuggled migrants. Over 90% who travel via oceans are actually smuggled migrants. The IOM Migrant Smuggling Data and Research of 2016 said that in numerous parts of the world, migrant smugglers have become an integral part of the irregular migration journey.

There are many rules of law dealing with the actual fighting of the crime. Migrant smuggling is a crime, an organised crime, subject to a multilayer Convention, and it is a threat to maritime security. There are a number of different sources which provide statistics as to the arrivals in Europe, along the dead and missing. However, these statistics are unreliable. For every dead body recovered on the shores of a State, there are at least two others that remain uncovered. There is no exact number of people lost at sea.

Migrant Smuggling is a Threat against Maritime Security. Maritime Security is ***the protection of a State's land and maritime territory infrastructure, economy, environment, and socially from certain harmful acts occurring at sea*** *(Routledge).* It is also a ***stable order of the oceans subject to the rule of law at sea.*** The latter is important because it is evident that law is applicable on sea, and whatever happens at sea is also regulated.

The beginning of these threats are to be linked to the Report of the Secretary General of the UN on Oceans and the Law of the Sea of 2008. Certain threats were highlighted: piracy and armed robbery against ships, terrorist acts involving shipping, offshore installations, and other maritime interests, illicit trafficking in arms and weapons of mass destruction, illicit trafficking in narcotic drugs and substances, **smuggling and trafficking of persons by sea,** illegal and unregulated fishing, and intentional and unlawful damage to the marine environment. All these acts have an intentional approach.

Migrant Smuggling as a Threat to States

This is the case where individuals are assisted in their attempt to enter a State's territory vis the sea in a covert manner, in a violation of a State's laws and evasion detection by a State's border control official. These individuals are assisted, and this is not an altruistic form of assistance.

One would by trying to enter in a hidden manner, undetected, because a State's sovereignty vis-a-vis borders would be breached. States have the right to control who enters its territory. The lack of identification of the individuals would serve as a threat i.e. theoretically, a terrorist would be able to enter a country in this manner, even though practically this would not be plausible. Additionally, migrants increase the burden on the State in terms of economics. Another big issue during COVID-19 was the quarantine and health risks. Finally, there is an infringement of State sovereignty. This would be a blatant violation of sovereignty because the concept of borders would be declared null.

This is considered as the fastest-growing transnational crime, and is a big issue vis-a-vis Human Rights. The motivations for smugglers are many: enormous amounts of money, risk to smugglers is less than in other spheres of smuggling, and there is a growing demand to move without increase in opportunity. Another problem is that money which is gained from this crime is used for other illegal issues i.e. drugs. People who smuggle the migrants are rarely proved to be acting as such, and the problem is even more pressing given that the migrants are consenting to what would be happen, they would be paying. This becomes a business in itself.

Smuggling of Migrants: a Definition

One has to note that this is undocumented, but assisted. One would be attempting to enter a country without a proper authority of documentation. The **CATOC Protocol of the Smuggling of Migrants of 2002** was dealt with as a facet of organised crime:

i. Trafficking of Fire Arms
ii. Smuggling of Migrants
iii. Trafficking of Individuals

Two of the Three Annexes of the CATOC deal with human suffering. The fact that migrant smuggling is appended to the Convention on Organised Crimes, it is seen to be considered as such.

Smuggling and Trafficking could look identical, and while there are similar points between the two, they are not the same. In trafficking, the crime is the fraudulent exploitation.

Smuggling Protocol

Article 3(a) holds that there would the the ***procurement, in order to obtain, directly and indirectly, a finical or other material benefit, of the illegal entry f a person into a State Party of which the Mersin is not a national or permanent resident.*** The offence is committed when the border is crossed and the profit is made.

Trafficking Protocol

Article 3(a) says that trafficking ***shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.***

This offence is not necessarily the crossing of borders, although there might be a cross-border element. There is consent which is fraudulently obtained. This offence focuses on the improper form of recruitment, even though the element of obtaining profit is still necessary. Trafficking can happen within the same country, unlike smuggling.

The Distinction

In Smuggling, the migrants would consent, unlike in trafficking were one may give consent but this would be vitiated and obtained by fraud. Moreover, the completion of the offence is different: one relates to the crossing of the border, while the other relates to the exploitative relationship. In case of the latter, one looks at the treatment of individuals post-movement, whether within or outside the country. While smuggling must involve a cross-border element, this is not necessary in trafficking (*although this can still be the case)*.

When one deals with trafficking from an enforcement point of view, attention has to be given to post-arrival conduct, not like what happens in smuggling. In smuggling, one would not need to prove the element of exploitation.

In practice, the distinction is sometimes a blurred one. This is essentially because of the overlapping elements. There is a continuum between voluntary and non-voluntary forms of undocumented migration.

Trafficking is often referred to as modern day slavery. There also might be instances in which a smuggler become a trafficker, and vice-versa.

The link between the two offences is extremely strong. The migrants smuggled would normally be also trafficked. Nearly all persons recused in the Med have been exposed to an alarming level of violence and exploitation, kidnap for ransom, forced labour, sexual violence and prostitution, and being kept detained and in captivity.

In Migrant Smuggling, there is the Human Factor. Any actions relating to the aforementioned happening at sea relate to the rights of the individual. This counts for during the journey and post-disembarkation. The human element comes down to two branches of law:

i. Human Rights

There are countless references to Human Rights violation in these offences. They are forced to suffer deplorable treatment in life-threatening conditions. Even before departure, smugglers very commonly use violence to force migrants into unseaworthy boats. Once on board, the overcrowding and poor hygiene creates appalling conditions, which favour the spread of disease. There is also a lack of adequate food and water supplies.

ii. Refugee Law

The Roles of the States

The State can rescue persons distress at sea (*this is an obligation at International Law: both Treaty Law and Customary Law)*, arrest migrant smugglers, combat smuggling in its generality as per the terms of the Protocol, increase protection on National Borders because sovereignty is not a bad thing and should be protected, and safeguard of Human Rights considerations in all level of the journey (*pre, during, post)*.

To do this, the element of cooperation is important because States cannot act alone. The need of a cooperated approach cannot be underestimated as per **A/63/63, paragraph 16.** The challenge is essentially the balance that should be achieved: one needs to fight smuggling, but within the parameters of International Law.

The Importance of Cooperation is laid down under many documents such as the **UNCA Doc. A/54/429 of 1999, Section VI relative to Crimes at Sea.**

The Law of the Sea

The Law od the Sea Convention, which came into force in 1994, divides the ocean into various zones, and the States have different powers in each zone. The further away from the shore, the less the powers of a State are. **Internal Waters** are related to the Land and State. There are also the **Territorial Sea,** the **Contiguous Zone,** and the **High Seas.**

Article 2: the Sovereignty of the Coastal State

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

The High Seas

Article 97 of UNCLOS says that High Seas are open to all States relating to the Freedoms of the High Sea. Reference should be made to Article 91 and 92 of UNCLOS.

The former states that: ***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. There must exist a genuine link between the State and the ship. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.***

The latter states: ***Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. A ship 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.***

The Basic Principles of Maritime Enforcement

In the High Seas, there is Flag State exclusivity, with some exceptions such as piracy. Flag State jurisdiction is the general rule when vessels are sailing the high seas, nevertheless exceptions to this general rule exist within the law so as to cater to situations where flag State jurisdiction may no longer seem feasible.

The Migrant Smuggling Protocol of 2000
This creates a framework for cooperation for the repression of the crime while ensuring the protection of victims and respect for their inherent rights. There is a dual enforcement: the maritime dimension and the Human Rights factor.

Missed Lecture 2 - 09/03/2023

16/03/2023
Chapter II of the Smuggling Protocol
Smuggling of Migrants by Sea

It makes sense to have a Chapter dealing with this truth because of the maritime environment, its nature, and the underlying risk to human life., which requires an approach to its suppression. Chapter II of this Protocol opens by imposing a general obligation on **State Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants be sea in accordance with the International Law of the Sea**. This is a positive obligation placed on State Parties as per Article 7 which is a manifestation of cooperation envisaged under the Protocol.

In Accordance with the International Law of the Sea
This phrase implies that the rules found in Chapter II works within the well-established general framework of the law of the sea.

The 1982 UN Convention of the Law of the Sea
This is otherwise known as **UNCLOS,** which serves as the main International instrument. The main rules of the law of the sea are found in this instrument, but not only. There are other relevant Law of the Sea Treaties. It is important to note that this Convention is also typically termed as being the Constitution for the Oceans. This Treaty was the culmination of Malta's diplomatic initiatives in 1967 at the UN General Assembly, when it proposed that the UN should review the existing law of the sea, and create a new maritime legal order for the oceans.

This Convention is the product of the Third UN Convention on the Law of the Sea which was the largest, longest, and most expensive conference in the history of diplomacy. The 1982 Convention is the product of such conference, the product of a ten year negotiation process. This conference involved the participation of over 150 States, which for almost a decade met twice a year, to formulate rules regulating humankind's activities over the oceans.

UNCLOS came into force in 1994, and currently has 168 signatories to it. In light of this general support, it is also reasonable to argue that most of its provisions reflect Customary International Law. This means that they are binding on States which are not parties to the Convention i.e. Turkey.

If one had to read the Preamble to the UNCLOS, there is an identification of its aims and its goals. **The main aim is to protect international peace and security, and preserving public order on the ocean**.

The Convention has 320 Articles, and 9 Annexes, governing the whole spectrum of ocean affairs and space i.e. commercial activities, settlement of disputes, rendering of assistance, marine scientific research etc.

The Convention provides States with jurisdictional powers and important economic rights in respective maritime zones adjacent to their coasts. There are different zones as provided for by the Convention, with different rights according to the area. The Convention attempts to strike a balance.

The different maritime zones are, up to a twelve nautical miles, the coastal state exercises jurisdiction and control. The further away one gets from the coast, the jurisdictional powers and capacities will decrease until one gets to areas of ocean space which are beyond the control of any state, and are referred to as the High Seas.

Despite the broad ambit of the Convention, there are no provisions addressing irregular maritime migration or the smuggling of migrants by sea. There are various theories and possible reasons why smuggling of persons provisions were not included in the Convention. The problem had largely been solved by the time of the adoption of the Convention, so consequently, the issue was not considered as major and thus, not inserted in the future Convention.

Irregular Migration by Sea, at that time, was not considered to be a major international problem as is today. Because the Convention took such a long time to be negotiated, drafted, and adopted, the drafters inserted a very burdensome amendment procedure, which has never been used. In fact, UNCLOS provides general obligations and these are supplemented by more specific rules and regulations found in other Treaties.

However, as one can see, the jurisdiction principles which apply in the different maritime zones given the interception of smuggling vessels. There are certain UNCLOS rules which provide States with mechanisms to prevent and suppress smuggling of persons by sea. The application of these rules depends in which maritime zone the incident occurs.

The vast majority of smuggling of persons happens on the High Seas. Just because the High seas are areas beyond the jurisdiction and control of any one State, this does not mean that there is no law and order on the High Seas. In fact, quite the contrary because the High Seas regulated by Part VII of the Convention which provides the legal regime regulating these areas.

The Rules regulating the High Seas - Part VII

In theory, one should not have vessels engaging in illegal activities on the High Seas i.e. transport of vulnerable individuals. No State can exercise sovereignty over any part of the High Seas: they are not subject to appropriation by any State and are open to all States.

The High Seas are reserved for peaceful purposes and no State can exercise sovereignty over any part of the High Seas. They are open to all States whether coastal or land-locked where they enjoy the exercise of certain freedoms, such as the freedom of navigation. In order to enjoy this right, vessels must fly the flag of a State. A ship which sails under the flags of more than one State, using them according to convenience, may not claim any of the nationalities of any of the States in question and is assimilated to a ship without nationality i.e. Stateless.

Registration is a rather big business in this regard. Malta has the largest registration business in Europe, and smith largest in the world. Once a ship is registered with a State, all events which occur on board the ship are regulated by the law of the flag state vis-a-vis all areas of law.

A vessel which is Stateless (no Flag) would not be subject to the protection of a Flag State, and other States could potentially interfere with the vessel's navigation.

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in International Treaties or in UNCLOS, shall be subject to its **exclusive jurisdiction on the High Seas** as per ***Article 92(1) of UNCLOS.***

International Law of the Sea developed the principle of **Exclusive State Jurisdiction on the High Sea.** Once a vessel is registered, it is subject to a very important rule: the rule of exclusive flag state jurisdiction. This is on the High Seas, only a Flag State can exercise jurisdiction over the registered vessel, irrelevant of the area of the sea in which the vessel is at.

This rule was established centuries ago, and continues to be valid and applicable. States jealously protect this principle. It enables the maintenance of the legal order on the oceans, because given the absence of a supranational authority, International Law is maintained through States enforcement and accountability.

With this Right of Exclusivity comes also certain duties for the Flag State. Under UNCLOS, Every State (flag state) shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag. The reality is that, in practise, not all Flag States will exercise the same level of jurisdiction and control over their flagged ships.

Such Flag States, often referred to as **Flags of Convenience**, or open Registries, will allow ships with no connection with the state to register under its Flag. The attraction for Ship owners is that it will allow to evade certain taxation or crewing standards. These Flags of

Convenience have a reputation for having little interest in the affairs of their ships, they provide minimal surveillance, and enforcement of certain international requirements is often weak, and this is a problem. It is a problem mainly because on the High Seas, the primary remedy for a State to act against a Foreign Flag Vessel on the High Seas which does not meet International Standards is to report it to the Flag State.

If one has a Flag State which does not intervene, there might be problems of vessels being used for illegal activities including the smuggling of persons.

The ability of other States to interfere with the activities of another State vessel on the High Seas, even if with a flag of convenience, is very limited. There are some exceptions to the Doctrine of Exclusivity:

1. <u>The Right of Visit (Art. 110)</u>

The supremacy of Flag State jurisdiction on the High Seas means that it is ordinarily not possible for a State to interfere with the navigation of a foreign flagged-vessel; without authorisation from the Flag State. There are some exceptions.

The Right of Visit empowers State warships to board suspect vessels on the High Seas without Flag State authorisation in certain circumstances. There must be reasonable grounds of suspicions: the vessel is engaged in piracy, slave trade, unauthorised broadcasting, the vessel is stateless, the vessel does not want to show its flag.

When exercising this Right, the warship may proceed to verify the shop's right to fly a flag, examine the vessel's documents, and if suspicion remains it may proceed to a further examination on board. The Right of Visit under UNCLOS allows warships of non-flat States to **board and search vessels, but does not permit unilateral enforcement action such as arrest or seizure.**

The extent to which this right is possible, weakness the ability to suppress the present threat.

<u>Mairtime Interdiction</u>

This is the principle tool used by State Law enforcement officials, agencies, and the like, to prevent and suppress crimes at sea. It involves measures applied by States, either to prevent, interrupt, and stop, the movement of vessels. Smuggling Vessels spend a considerable amount of time on the High Seas, thus the advantage of maritime interdiction is that it allows the State to investigate a suspect vessel before it reaches its destination. Maritime Interdiction has a two step process which has been described as follows: ***first, the boarding, inspection and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures, including any combination of arresting the vessel, arresting person aboard or seizing cargo.***

Maritime Interdiction is contemplated in the Smuggling Protocol, Article 8. Whilst the smuggling of migrants is not considered a specific group for which the Right of Visit may be exercised under UNCLOS, Article 110 contemplates that this Right may derived as conferred by Treaty, reflected through Article 8. This deals with Interdiction of Smuggling

Vessels on the High Seas. In fact, the drafters of the Protocol did not find it necessary to include a procedure for investigating, conducting, arrest, of smuggling vessels which fall within the jurisdiction of States, because principals relating to the matter are catered for through State Authority.

There is much more complicated issues on the High Seas. Article 8 provides for two scenarios:

a. A Flagged Suspect Vessel

A State Party must have *reasonable suspicion* that a flagged vessel is engaged in smuggling of migrants. If it wishes to act, the interdicting State must first contact the flag State, and request confirmation of Registry. Once confirmed, the interdicting State Party may request authorisation from the flag State to board and search the vessel. If the vessel is engaged in the migrant smuggling, it is to **take appropriate measures with respect to the vessel and persons and cargo on board, as authorised by the Flag State.**

This is akin to the Right of Visit, but goes a step further because it allows for enforcement. Unfortunately, the protocol do not elaborate on what are *appropriate measures*.

Article 8 is designed to facilitate cooperation in obtaining the required consent needed for boarding another State's vessel, and this facilitates the followed procedure. However, the Flag State has a number of Obligations and Duties under this Protocol.

It has an obligation to respond expeditiously to requests from other States and should designate an authority to receive and respond to requests. In theory, the Flag State can refuse the authorisation to board, but there are considerations to keep in mind; the first being, the obligation to cooperate under Article 7 of the Smuggling Protocol, as well as the overall objective of the same Protocol.

Furthermore, according to the *Pacta Sun Servanda* principle, all States should cooperate at the issue at hand.

b. A Stateless Suspect Vessel

A State Party must have reasonable suspicion that a vessel is engaged in smuggling of migrants and that the vessel is without nationality or may be assimilated to a vessel without nationality; the state party may board and search the vessel. If evidence confirming the suspicion is found, the State party shall take appropriate measures in accordance with relevant domestic and international law.

This last step reinforces the view that if a vessel is stateless, the interdicting state can exercise enforcement.

Conclusions on Article 8

UNCLOS rules must be adhered to in order for interdictions under Article 8 to be lawfully carried out on the High Seas. Interdictions under such Article must be undertaken in accordance with UNCLOS rules.

Article 8 does not provide State Parties with any pre-existing enforcement powers. The main objective of this Article is to facilitate cooperation for streamlining the procedure to seek consent from or give consent to other State parties interdicting smuggling vessels on the High Seas. The maritime provisions complement the Law of the Sea rules in UNCLOS, so that any lacunae in the latter on smuggling of persons by sea is addressed in a way which strengthens rather than challenges Flag State exclusivity.

The Relationship between International law of Smuggling Migrants and other Branches of International Law

The Migrant Smuggling protocol cannot operate within a legal vacuum. The crime of migrant smuggling is multilayered, and because one is dealing with individuals, there are various branches which seeks to protect the rights of individuals. **According to Article 31(3)(c) of the Vienna Convention**, States shall taken into account an relevant rules of IL applicable in relation between the parties.

1. Law of the Sea

Law of the Sea rules found in UNCLOS and CIL govern maritime interdiction of smuggling vessels. Smuggling Interdiction operations may coincide with rescue operations. The duty to render assistance and rescue is regaled by UBCLOS and other law of the sea Treaties i.e. SOLAS and SARCon.

2. Human Rights Law

Interdiction under Article 8 of the Protocol are subject to safeguards under Article 9. These reflect applicable International HR standards. Reference can be made to Article 16 of the Protection and Assistance Measures.

3. Refugee Law

Some smuggled migrants may be entitled to additional protection by virtue of being asylum-seeker. Article 33(1) of the Convention relating to the States of the refugees and its 1967 protocol provides the principle on **prohibition of expulsion or return.** The practical implications requires that asylum-claims, and things of the like nature, should be entitled to appropriate status determination procedure. States which have interdicted migrants and immediately return them back to a place of persecution, without a proper review of such claim, would be in breach of this principle.

Reflections on Effectiveness of the Protocol

The Protocol is to be applauded because it offers a comprehensive and cooperative approach, aimed at preventing and suppressing smuggling, whilst protecting the rights of smuggled migrants. However, there are concerns regarding the implementation and enforcement of the rules of the protocol.

Climate Change and the Ocean

The challenges that IL has in regulating armed-conflicts, the geopolitical situations between the West and the East, and the atrocities have persisted for a number of years. The longer one lives, the easier it is to realise that that the planet is in a state of turmoil. International Law has to be dynamic enough to adapt to the challenges, one of these being the issue of climate change.

There are three major challenges, which are all interrelated:

1. Climate Change
2. The Degradation of the Ocean
3. Biodiversity Loss

The problems are not the same, but they are interrelated. Because of the damage to the ocean through many activities, mainly because we alerted the climate, the ocean is becoming more acidic. The melting of the ice is making it less saline is certain parts, and thus, the poles which are usually very salty are no longer that much.

International Law has to address what is causing harm to humanity. These issues are first to be looked upon separately. By 1992, there was the UNFCCC. In 1997, the Kyoto Protocol can into existence, followed by the Paris Agreement. This was an example of how IL was influenced by science. Prior to this, the law was never influenced by science since it was influence by morals, public perceptions, the sharing of ideas and cooperation, and things of the like nature. As soon as scientific reports started identifying what kind of challenges are facing the planet, a relationship between science and the law developed. The law had to find a remedy to stop the source of the damage to prevent the degradation.

The reports come from an International Organisation which is a subject of International Law. The validity of the science is even more important politically. As with all aspects of law, the law identifies the cause of the harm so as to remedy it and prevent it all together.

If one understands how difficult that it, one has to keep in mind that one would be talking about energy generation, electricity, transport, and also transport of goods and services. These all form a part of our daily life, including the manufacturing of goods. Even the extraction of mineral is in itself very energy intensive i.e. industrialisation. It is not so easy to eliminate fossil fuels in a complete manner. If by 2050 fossil fuels are not fazed out, survival is at stake.

The first step was to stabilise greenhouse gas emissions. In 1997, the Kyoto Protocol tries to reduce emission by industrialised states i.e. the West. Things were not going well, and science was showing that everything which was being done was insignificant. By 1997, the biggest emitters were not the big States, but China, India, and South Africa. These States had no obligation to reduce, and this led to Canada withdrawing from the Kyoto Protocol, and the US never signed.

The 2015 Paris Agreement made more sense. It wanted to achieve carbon neutrality by 2050. However, there is a difference between what is said and what happens in practise. You have the biggest emitters saying that 2050 is not the date by which they will become carbon neutral. There is a lot of political turmoil in relation to the matter. This does not mean that States are not taking action i.e. EU States are at the forefront to achieving neutrality till 2050.

The Sources of IL of the Law

These are much older when spoken of in relation to Climate law. Freedom of the high seas started in the 1600s. It was acknowledged that coastal states needed to have some control over the belt of sea surrounding the territorial states. As technology improved, activities at sea also did.

IL had to keep up with development to provide a balance of rights and duties, and to balance rights between the coastal states which were claiming rights in its resources. The ocean is a source of life, and its protection is of utmost importance. The sources of IL relating to the Ocean are mainly embodied under UNCLOS. This has been supplemented by a number of agreements known as implementation agreements. There would also be unwritten rules i.e. customary international law.

Treaties can codify custom, and they may also generate in themselves customary international law.

UNCLOS is not the only Treaty regulating the ocean. There are treaties regulating life at sea, prevention of pollution, shipping, and dumping at sea. There are also regional agreements. At sea, the coastal sea has extended its jurisdiction over time. Beyond state jurisdiction, there are the High Seas.

The different maritime jurisdictional zones are:

1. **Territorial Sea**: A belt of coastal waters extending 12 nautical miles from the baseline of a coastal state. The state has full sovereignty over the territorial sea, including the airspace above and the seabed below.

2. **Contiguous Zone**: A belt of coastal waters extending 24 nautical miles from the baseline of a coastal state. The state has limited control over this zone, including the power to enforce customs, immigration, and sanitation laws.

3. **Exclusive Economic Zone (EEZ)**: A zone extending 200 nautical miles from the baseline of a coastal state. The state has exclusive rights to explore and exploit natural resources in the zone, including fish stocks and oil reserves.

4. **Continental Shelf**: The seabed and subsoil of the submarine areas that extend beyond the territorial sea to the outer edge of the continental margin, or 200 nautical miles from the baseline of the coastal state, whichever is greater. Coastal states have sovereign rights to explore and exploit the natural resources on their continental shelf.

5. **High Seas**: The waters beyond the EEZ and continental shelf, which are not subject to the jurisdiction of any state.

States have the right to control what happens in those zones which are under their jurisdiction. There are also the Sea Beds which can be drawn up to 200 nautical miles from the baselines. There are also the deep sea beds and above them, the High Seas.

Human Nature being what it is, even where coastal states have jurisdiction, the ultimate motive is to exploit it exclusively.

On the High Seas, there is the Flag State Jurisdiction. If a vessel with a Maltese Flag is sailing on the High Seas and it is polluting, none of the other vessels in its vicinity have jurisdiction to directly act. Notwithstanding, they have the right to report what is happening. One has to keep in mind the balance of coastal states having rights over maritime jurisdiction, while keeping in mind that at the end of the day, the freedom of the High Seas is important to all States.

The Applicable Legal Sources
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The ocean is in a very and state. It has a lost a lot of its potential to regulate the climate, because it has lost its current and became much more acidic. Because of fossil fuel burning, the oceans are absorbing a lot of heat so much so that global warming was discovered later than necessary because the oceans were absorbing such heat.

Filling the Gaps
A new Treaty might not have a kind of legal States, especially when States might not ratify it. The best way forward might be to try and tweak UNCLOS, or supplement it. A multilayer approach is an essential tool to address the contemporary needs of claimed change and ocean governance holistically and simultaneously. The holistic approach is best served via the evolution of an International regime that looks into the socio-economic and environmental requirements that ensures sustainable.

The beginning of IL was focused on IL issues. However, today this has extended to cater for the needs of society vis-a-vis the environment and sustainability.

Regulating Sea Level Rise under IL: A Case Study
The law has established base lines from which the maritime jurisdictional zones are measured. They have been taken, based on Article 5 of UNCLOS, and are established at the outermost points of the coast. These would form the imaginary baselines. If these submerge, the baselines are no longer in existence. If the sea floods the coasts, the marked points are no longer valid and land is lost.

To be considered a State, there has to be territory. If there is total denudation, the criterion of territory is lost and the State would no longer exist: statehood is lost.

In a way, one would have a threat to territorial integrity, not because of State invasion but because of the ocean as a result of sea level rise due to anthropogenic activities. Under UNCLOS, it is very clear that land territory without residence and human activity is a rock, and therefore not a State.

These are all science predictions: things will happen eventually. The Critical Infrastructure might stop functioning because the major operational buildings will not function because of sea level rise. There are very tragic implications to this issue at hand.

If IL wants to ensure fairness, one should prepare in tweaking a norm to say that if there is a change in the coastal area because of sea level rise, the previous baselines should hold. The nationals of States that can be denunciated should retain their nationality. The maritime zones should remain theirs.

If there would be a legal framework to prevent the consequences of sea level rise, that is something which would prevent possible conflicts, loss of life, refugees, economic collapse, and things of the life nature.

In IL we always argue that a force majeur might not make the law applicable as it is. Existing IL already provides for circumstances on non-application of the law. But this is more than force majeur: this is a constant degradation. Scientifically, sea level rise will happen gradually. This is definite and more stable than relying of force majeur as an example of waiving legal norms.

The most affected states, the small island states are making the claim that they should not be legally prejudiced because at the time of UNCLOS there was no idea and no understanding that sea level rise would occur.
There are various other legal norms which can be applied:

1. The Non-Harm Principle
2. The Obligation to Control Fossil Fuels
3. The Importance of Protecting Future Generations
4. The Recognition of StateHood

There are also maybe technological solutions and natural solutions.

Law of the Sea

Malta is the largest shipping registry in Europe, and is one of the biggest in the world.

Zones:
1. **Territorial Sea**: Twelve Nautical Miles
2. **Contiguous Zone**: Twenty-Four Nautical Miles
3. **Exclusive Fishing Zone**: Twenty-Five Nautical Miles from the outer part of the territorial sea
4. **The High Seas**
5. **Exclusive Economic Zone**: two hundred nautical miles from base line

The distances after mentioned are all measured from the baseline. Waters that are on the landwards sign of the base line are the internal waters which would includes ports and bays. While both the internal waters and the territorial state form the state's sovereignty, the sovereignty in the territorial sea is limited by the right of all ships to enjoy innocent passage.

The Right of Innocence Passage: this is the right for foreign vessels to transverse a foreign territorial sea for purposes of innocent passage in a free and continuous manner.

The Maltese Base Lines
Follow the coast in the North, hitting Gozo at the North point and goes down including Filfla as a base point. Malta has increased its internal waters by a considerable number of square nautical miles, seeing that the base line continues to follow the shore.

The Continental Shelf
This is the prorogation of landmass that slides into the ocean. The historical development of this doctrine is important to analyse. A problem initially arose when the territorial sea was of two nautical miles. After the Great World Wars, American Scientists showed that there existed carbon, particularly oil, in the continental shelf. However, the location extended beyond three nautical miles, meaning they were essentially found in the High Seas. The US President at that time was keen to safeguard such resources from exploitation and developed the **Trumann Proclamation on the Continental Shelf** wherein it was held that the continental shelf was a natural proclamation of the US Landmass, and thus, the US had exclusive control over these resources up to a water depth of 200metres. This doctrine meant that beyond the **three nautical mile limit, the coastal state would have exclusive control over oil and gas, with the water still being in the high seas.**

While other States followed the aforementioned and established Continental Shelf Claims in some of its overseas territories, other States were particularly interest in excluding foreign fishing from their rich fishing grounds i.e. in Latin America.

Consequently, Chile faced a treat to their whaling industry. During the Wars, Europeans stopped fishing outside the waters and this led to development of the industry in Chile. When the fishing industry reappeared, Chile's industry was threatened, and thus, the Chilean

Government had to declare a 200nm maritime zone of sovereignty wherein all foreign fishing was excluded. This was in contradiction to what Trumann had established, seeing that they were not only claiming seabeds and resources, but also the waters.

The International Law Commission was asked to proposed a Law of the Sea Convention. The first conference was held in Geneva where reference was made to four Conventions:

a. **Territorial Sea and Contiguous Zone Convention**
b. **Continental Shelf Convention**
c. **High Seas Convention**
d. **Fisheries Conservation Convention**

Substantial codification of customary law took place. For instances, the preamble to the High Seas Convention where the doctrine of the freedom of the High Seas is embodied says that ***the parties were codifying customary international law.***

The Continental Shelf Convention established rules for the exploration and exploitation of the Legal Continental Shelf. It can be said that this Convention was based on the Trumann proclamation:

i. It adopted the 200nm criterion as the outer limits of the continental shelf with the additional **exploitability criterion** which was made for the extension of the continental shelf limits if the technology developed enabling exploitation beyond 200nm.
ii. A term was devised which suggests that the Convention supported the American position of not claiming sovereignty.
iii. The sovereign right to explore the shelf and its resources,

The failure in establishing a maximum limit to the territorial sea led to the second Geneva Convention to achieve **general support for the outer limit of the territorial sea.** A maximum limit was not agreed upon, and this led to great instability.

The Discovery of Manganese Nodules: this resources would provide millions of revenues, but they were on the ocean floor subject to freedom of access of the High Seas. Any State could exploit these nodules, but in 1967, the Maltese Permanent Representative put forward a proposal for the Continental Shelf to become **Common Heritage of All Mankind.** In its generality, such proposal received great support. The Latin American Countries, however, asked for a revision of the whole spectrum of the law, allowing time to master support for the 200nm maritime zone idea. Malta accepted the Latin American Proposal, and in fact, the Seabed Commission was set up with the aim of identifying the issues for the Third UN Convention.

The 1982 Convention adopted the **constitution of the oceans.** This was a **comprehensive framework regulating all ocean States, to reflect the interdependency of maritime problems requiring a comprehensive solution as that proposed in the Convention**.

The Convention Structure:
- Limits of National Jurisdiction
- Access to the Seas Navigation
- Protection of the Marine Environment
- Exploitation
- Scientific Research
- SeaBed Mining

The Convention also set up international videos to carry out certain obligations:
- Internal Seabed Authority
- International Law of the Sea Tribunal
- Limits of the Continental Shelf Commission

The Convention is deigned to **facilitate International communication, promote peaceful uses, the equitable and efficient use of sources, and promote conservation of fishers and the environment. The achievement of these goals will contribute to the bettering of humanity as a while. Resources beyond the continual shelf are the common heritage of mankind.**

The Convention came into force in 1992, and up till today, it is the basis for all International Maritime Law.

Regime of Internal Waters

Sovereignty of Malta extends beyond its territory up to twelve natural miles from the base line, including air space and the seabed and subsoil of the Territorial Sea.

Internal Waters are to be those **parts which are not high seas, relevant zones, or territorial sea, and are classed as appertaining ti the land territory of the Coastal State. They can be determined by drawing baselines alongs the coasts.**

Art. 5 UNCLOS: ***except where otherwise provided, the normal baseline for measuring the breadth of the territorial sea is the Low-water line along the coast as marked on large-scale charts officially recognised by the state.***

Art. 7 deals with straight baselines. ***In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.***

Art. 8 deals with the Internal Waters. Waters on the landward side of the baseline of the territorial sea form part of the Internal Waters of a State. However, Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Malta v Libya (1985) - Filfla was not taken into account when measuring the Libyan Coastline, but Malta claims it asa base point. In 2014, Chapter 226 of the Laws of Malta included a list of coordinates joined by straight baselines from which the breadth of the territorial waters is measured. According to thus, the outer limit of the internal waters is the inner limit of the territorial sea. The baselines are the dividing lines between the two.

The Right of Innocent Passage does not extend to Internal Waters, with the exception where the straight baselines enclose as internal waters what had been territorial waters.

State Sovereignty

Given that Internal Waters form part of the State's sovereignty, the Convention does not state how these are to be regulated. This was noted in the **Louisa Case** in which it was held that the International Law of the Sea Tribunal had no jurisdiction to the dispute since Louisa was arrested in Spanish Internal Waters. Investigation showed that according the Spanish Authorities, Louisa was not searching for oil and gas but for sunken gold. The plaintiff argued that this was contrary to the Convention, but the Tribunal held that there was no jurisdiction.

The Flag State

A Coastal State may exercise jurisdiction over foreign ships within its internal waters to enforce its law, although judicial authorities of the flag state may also act if any crimes occur on board the ship. In **R v Anderson**, the UK CoA declared that an American National who committed manslaughter on board a British Vessel in French Internal Waters was subject to the jurisdiction of the British Courts, event though he was within the sovereignty of the French Justice System.

A merchant ship in a foreign port/internal waters is **automatically subject to domestic jurisdiction,** although if purely disciplinarian issues related to the ship's crew are involved, which do not concern the maintenance of peace within the territory of the coastal state, then such matters would by courtesy be left to the authorities of the flag state to regulate.

If the foreign vessel involved is a warship, the authorisation of the captain or flag state is necessary before the Coastal State may exercise jurisdiction over the ship and its crew.

Ports

These are important tools in the economic development of a State, which have recently become the gateway fro maritime security. Although ports are within the domain of the state, they are gathering an international character that makes international law more relevant.

Under IL, **States are entitled to close off any of their ports**. Generally, this is done to protect the interest of a State. Such power is supported by customary IL.

Nicaragua v US: the ICJ held that **States have the right to decide on entry into the ports which applies to merchant ships and warships**. Internal Waters are subject to State

sovereignty. With regard to Merchant Ships, States usually tend to facilitate their entry with the common interest to facilitate internal trade. With regards to this, there are two developments:

1. The **Bilateral Treaties of Commerce and Navigation** allow entry to party vessels on a reciprocal basis.
2. The **Multilateral Convention** which also provides for reciprocal entries for the signatories into the Ports.

Additionally, it is for the Coastal State to decide or grant authorisation for a vessel to leave the port.

There are some obstacles that may be encountered by an emerging vessel:

1. The Vessel may be subject to a Court Order (civil or criminal), and thus, the Court would order for its arrest. The vessel is always subject to the States sovereignty upon entry.
2. The exception to consent being given is when ship requires entry due to force majeure or humanitarian reasons. In such cases, the ship is allowed entry and is expected to leave immediately after the danger is removed.

Port State Control

This had a dramatic effect on maintaining safe shipping and international labour standards. It started via the Memorandum of Paris on Port State Control where Port States agreed to submit vessels in their ports to an audit with regard to safety and environmental measures. If a ship failed the test, it would remain arrested under the offence or violation is rectified. This affected Flags of Convenience because of the inspection requirements. Major formerly flags of convenience have now become prestigious registries with International Standards as per the International Maritime Organisation i.e. Panama, Malta, Liberia.

Unfortunately, the IMO has no enforceability power meaning Treaty obligations have to be enforced by MS' Domestic Courts. Malta, under the Ratification of Treaties Act, it is held that Treaty Obligations which Malta undertakes cannot be enforced by Local Courts unless promulgated as Maltese LAw.

In the years before EU Membership. There was a process where IMP prescriptions were incorporated into domestic laws. These IMO rules came, at certain points, into Maltese Legislation via the EU i.e. transport of passengers by sea.

Two Approaches when State claims jurisdiction:

i. Constructive Approach

A state will exercise jurisdiction over a vessel, even though the offence does not particularly concern it.

ii. Jurisdictional Approach

If the vessel violates port or national legislation, then it will be subject to that state's control.

The common understanding is that once a state that an offence offends the peace order, then it should, and can intervene and assert its jurisdiction.

Warships

There are two exceptions to the principles of sovereignty of the Internal Waters which relate to government owned vessels, or more specifically warships and government owned vessels used for non-commercial purposes. Under IL, these both enjoy State Immunity which is a long-standing tradition, and one which provides for reciprocal respect. Entry into harbours is a more complex issue than normal cargo vessel because entry has to be agreed upon via diplomatic channels.

A Warship can be defined as follows:

i. Article 29 of the Convention

A ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

ii. Article 2 of Ch. 226

Any ship belonging to the armed forces of a foreign State and having such characteristics mutatis mutandis as correspond to those of a Maltese military vessel.

Maltese Law requires that for a foreign military vessel to be recognised as such, the State would have to apply the same characteristics it applies to Maltese military vessels.

There are some issues with regard to warships seeing immunity is granted even when these enter grade harbour. In fact, because of such ratifications, entry into Maltese Internal Waters, is subject to usually clearance obtained via diplomatic channels, unless there is a pre-existing agreement. Once diplomatic clearance has been obtained, it is presumed that the Port State will respect immunities of the warship upon its presence.

Moreover, if a warship is involved in a collision, it cannot be submitted to Courts' jurisdiction. One would expect the state of the warship to exercise due diligence, but there is always this underlying pressure that if one does not, then there is nothing one can do about it. Secondly, a warship cannot be violated.

The Esmeralda Case - flagship of the Chilean Navy sought permission to enter the Grand Harbour. Permission was granted and the cadets rushed to Paceville to enjoy its nightlife, consequently ending up injured because of a fight. The cadets were aware of the advantages of immunity, and thus, immediately embarked the warship. Given the Doctrine of Immunity, not much could have been done unless:

i. The captain handed over the suspects
ii. The Government of the Flag State allowed Police to enter the Vessel
iii. An Extradition Request was submitted

The Flagship left with the suspects on board. This young cadet married and decided to honeymoon in Miami. On the way out, an Immigration Officer realised that there was an International Arrest Warrant against such person.

ARA Libertad Case - the Argentina Training Vessel applied through diplomatic channels to enter into Ghana IW and was given permission. Once it docked, an American Businessman who bought defaulted Argentinian bonds went to the Ghana High Court to obtain a warrant of arrest against the Argentinian vessel, but Argentina pleaded immunity. Ghana did not appear for arbitration proceedings under the Law of the Sea Convention and Argentina came to the IL Sea Tribunal to order provisional measures against the Government of Ghana which would require the immediate release of the ship.

The judge of the High Court appeared to move towards a judicial sale. Court officials were greeted with armed personnel refusing entry into the vessel. The question was whether the Argentina request for provisional measures of protection were legitimate.

Ghana continued to resist the exit of the warship. However, a procedure under the Convention allowed Argentina to seek measures to protect interest until the tribunal is released. The problem faced by the Law of the Sea tribunal was that Ghana claimed the tribunal has no jurisdiction because the warship was in the internal waters of Ghana, which is true. Argentina argued that wherever the warship was to be found, it continued to enjoy sovereign immunity and thus, the Court's orders were contrary to international law.

It was decided that although the definition of warship under the Convention is placed with respect to the provisions dealing with the territorial sea, this definition starts with an interesting proviso which seems to sow that the definition is applicable throughout all the Convention. The Tribunal **decided that even though the warship was in Internal Waters, the definition which applied to the vessel fell within the jurisdiction of the tribunal, because with regard to warships, jurisdiction extended.**

Argentina maintained that Courts should not give qualifies provision measures. In **Netherlands v Russia,** where Russia arrested a green peace vessel, it was ordered to release it in exchange of a deposit. In **Switzerland v Nigeria**, a tanker was ordered to be released upon a payment.

Argentina claimed that reals should not be conditional, for if the tribunal imposed conditions upon the reals they would violate Warship Immunity. Ghana armed that it exercised due diligence while still respecting the High Court. The **Tribunal decided that the vessel enjoyed immunity, and thus, it was wrong to arrest a warship. Ghana was ordered to release the vessel without conditions.**

Padre Pio Case - the case of Switzerland v Nigeria, which involves the Padre Pio vessel, concerns a dispute between the two countries over the ownership and detention of an oil tanker that was arrested in Nigerian waters.

The Padre Pio vessel, which was registered in Switzerland, was detained by Nigerian authorities in 2018 on suspicion of involvement in illegal oil smuggling activities. The Nigerian government claimed that the vessel was carrying stolen oil and that its owners had violated Nigerian maritime laws.

Switzerland, however, contested Nigeria's actions, arguing that the vessel and its crew had not violated any laws and that Nigeria had no legal grounds to detain the ship. Switzerland claimed that Nigeria had violated the United Nations Convention on the Law of the Sea, which guarantees the right of innocent passage for ships in international waters.

The case was brought before the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany, which ruled in favour of Switzerland in December 2019. The tribunal ordered Nigeria to release the Padre Pio vessel and its crew, and to allow them to leave Nigerian waters.The ITLOS also stated that Nigeria had violated Switzerland's rights under the UN Convention on the Law of the Sea, and ordered the Nigerian government to pay compensation to the owners of the Padre Pio vessel.

In summary, the case of Switzerland v Nigeria involving the Padre Pio vessel was a dispute over the detention and ownership of an oil tanker, with Switzerland arguing that Nigeria had violated international law and the United Nations Convention on the Law of the Sea. The International Tribunal for the Law of the Sea ultimately ruled in favour of Switzerland, ordering Nigeria to release the vessel and its crew and pay compensation to the owners.

Government owned Vessels used for Non-Commercial Purposes

These would be entitled to immunities as long as they do not engage in commercial activities i.e. hospital-related vessels or presidential yachts. Moreover, they are immune from jurisdiction while allowed to enter the harbour.

Malta v Ukraine - Ukraine was given ports and Vessels which belonged to the former Soviet Union. One such vessel entreated the Maltese Harbour and engaged with debts it didi not pay. When sued, the Ukrainian Government could not be sued, and the vessel could not be arrested because they belonged to the State and were therefore immune. Mr. Justice Magri refused this argument and referred to the doctrine of IL which stated that once one is trading, immunity is no longer ensured. For immunity to subsist, the vessel cannot practise commercial activities.

Current Issues with Jurisdiction

1. Passenger Liner Vessels

Internal Waters represents a significant part of Maltese Territories and although ports are considered to form a part of these, the incidence of International Trade has attracted the application of International Rules that ports have to respect. A new area of interest is passenger liner vessels that carry thousand of people, that move from one jurisdiction to another.

2. Emissions

Unfortunately, passenger vessels are notorious for the emissions they produce and there has been an international drive which is now even being implemented in Malta, to ensure that the vessels hook onto the local grid when they are in the harbour, rather than continue to emit emission from their engine.

3. Humanitarian Crisis

A challenging observation is the humanitarian crisis of illegal trafficking of persons at sea. There is an obligation under **Article 98 of the Law of the Sea Convention** to render assistance to person in distress at sea, and states have to promulgate laws that require the master of the vessel to render assistance if ordered. This is a well-established principle and the principle which until the phenomenon of mass migration at sea was largely respected.

Oceans are also divided Ito search and rescue zones. They are functional zones where a State is responsible for the coordination of search and rescue. The Maltese search and rescue are particularly large. It extends from Greece to Tunisia. Coincidental with this is the flight identification region were Malta coordinates aviation.

Under IL, a Master had the **Duty to Render Assistance.** Indeed, any master of a Maltese vessel, whether he is in the centre of the Mediterranean or in the Indian ocean, under the Merchant Shipping Act must undertake a request to render assistance.

4. Doctrine of Persistent Objector

The first point to note is that the IMO has a unique system of adopting treaties. Amendments are adopted, followed by a one-year period which allows notification to the Sec Gen of the IMO if there is a disagreement. If there is no notification, a presumption of agreement is established and the amendments will enter into force.

A few days before the time was up, Malta objected to such amendments regarding the SAR Convention. The Maltese position was far more logical given the extent of the SAR zone. Malta had argued that if a vessel is ordered by the Maltese SAR to save people that are on the extreme eastern part of the SAR zone, it makes no sense for the master to sail to come to Malta when there is a Greek port a few miles away. The Maltese position is the obligation to remedy the distress and the distress is remedied if the master enters the nearest safety port. This is why Lampedusa faces so many challenges because it is usually the safest, nearest port.

Additionally, under IL Law, every person can seek asylum. One cannot push back migrants to ports where there is no adequate mechanism to protect their right of asylum. It is rather interesting than in the one case sending migrants to Greece was considered to be illegal because Greece didn't have adequate asylum procedure but sending them to Malta was not contrary to the Convention because there was adequate procedure to contemplate the right of asylum.

Territorial Sea Regime

The Territorial Sea Regime is applicable up to twelve nautical miles from the baseline. Article2 of the Convention states that ***the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea***.

Article 18 of the Convention of 1982: Passage means navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.

Passage shall be **continuous** and **expeditious**. the reason for this is that this is a right granted to limit the territorial sovereignty of a state and one needs to respect such limitation by taking the shortest possible route.

However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

There is no right of innocent passage accorded the aircraft flying in the airspace above the territorial sea. The airspace is sovereign airspace and there is no right of innocent passage to claim in this regard. The most controversial element in the discussion of the third UN Convention of the Law of the Sea with respect to the regime was what constitutes innocence.

The drafters had to balance, on the one hand, the desire by states to use the territorial sea as a means of navigation, particularly when such seas cover strategic straights, and the coastal states that were keen to protect themselves from the non-innocent passage. The danger here was that if you gave to much subjectivity to the coastal state, it would start to suspend the right of innocent passage in the expense of international navigation.

The formula, reflected in Article 19 of the 1982 convention is two fold:

1. **Article 19(1)**: the Convention establishes a general rule requiring passage to be innocent and respect the territorial integrity and sovereignty of the coastal state.
2. **Article 19(2)**: this is a counterbalance to the aforementioned. It essentially enlists an exhaustive number of activities which if a ship engages with, it does not retain its innocence.

Article 19(2)(a) is the General Obligation to respect the principles of the Charter and the territorial integrity of the state. As you go down the list, you will see that there are a number of activities that are not considered innocent. They range from spying and jamming, fishing, pollution, and any other activity that is not incidental to passage.

Article 19(2)(b): any exercise or practise with weapons of *any* kind
The practise of weapons may not be threatening, but still, it deprives the vessel of its right of innocent passage because there is potential of the activity being threatening.

Article 19(2)(c): any act aimed at collecting information to the prejudice of the defence or security of the coastal state
Spying, irrelevant of its nature, is prohibited.

Article 19(2)(d): any act of propaganda aimed at affecting the defence or security of the coastal state.
These aforementioned articles have to be read together since they mean that collecting of information is prohibited if its prejudices the defence or security of the coastal state. Furthermore, under Article 19(1)(d), even if there is no collection of information, if a vessel, exercising its right of innocent passage through the territorial sea of another state engages in acts of propaganda, which ultimately may affect the defence/security of the state, then its right of innocent passage is deprived of.

Article 19(2)(e): launching, landing, or taking on board of any aircraft
Article 19(2)(f): launching landing or taking on board of any military device
Article 19(2)(g): the landing or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Virgina G Equitorial v Panama - fuelling another ship is not directly relevant to the passage. One may argue that that could be covered under Article 19(2)(g), although strictly speaking bunkering (refuelling) is not unloading on the territory of the state but on another ship. Bunkering given to a normal vessel constitutes the freedom of navigation and therefore is allowed outside the territorial seas. However, bunkering to a fishing vessel would not constitute the freedom of navigation, but a fishing activity, because although it is providing it to another ship, it is providing it to enhance the fishing capacity of that vessel.

Article 19(2)(h): any act of wilful and serious pollution contrary to the Convention
Article 19(2)(i) any fishing activities
Article 19(2)(j): the carrying out of research or survey activities
A vessel cannot use the right of innocent passage to undertake research or survey activities of the seabed. Beyond the territorial sea marine scientific research is covered by a whole regime under Part 13. In the territorial sea no research is allowed.

Article 19(2)(k) any act aimed at interfering with any systems of communication or any other facilities/installations of the coastal state.
Article 12(b)(l): any other activity not having a direct bearing on passage
This category might give rise to some issues seeing it is non-exhaustive. This would indicate that passage would be allowed as long as it acts in conformity with Article 19 and not involved in any other act that is not necessary for the purposes of passage. Sometimes it is argued that the discretion of the coastal state is regained. The truth is that Article 19 imposes

an obligation that the activity will be seen only if or in the light of having a direct bearing on passage.

One has to note that only violations of Article 19 will render the passage non-innocent. Violating Article 21 of UNCLOS, which is similar to Article 7 of our Ch. 226 would only make the offender liable to prosecution.

Warships

It was extremely controversial in developing states who took the view that the presence of a warship press was not innocent. The maritime states took an opposite view and argued that the Convention did not discriminate against warships. In fact, if one reads the title of this section in the Convention, it refers to **Rules applicable to All Ships.**

Submarines

Moreover, under **Article 20** the Convention allows for the passage, the innocent passage, to be accorded to submarines. There are two conditions imposed:

1. It must surface
2. It must show the flag

In the light of this rule, perhaps, it is difficult to sustain the view that warships are not entitled the right of innocent passage. Nevertheless, there are some 30 States that depart from the UNCLOS model, and require either prior notification or authorisation from the coastal state.

This is strongly objected to by the maritime states and the US and the then Soviet Union, who issued a declaration on the uniform interpretation on the rules of innocent passage. This can about after US warships challenged a requirement by the then Soviet Union in its Black Sea military ports to require authorisation. There was conflict potential which required agreement on interpretation of the rules. The Soviet Union, now Russia, did a U-Turn and recognised the right of warships to exercise innocent passage.

The two major maritime powers issued a Declaration asserting that warships had the right of innocent passage, that the Convention rules reflect customary international law, that the list under **Article 19(2)** was exhaustive, and denied the right of notification or authorisation. This is arguably a proper reading of the Convention, but 30 States disagree with this.

This principle was affirmed by our Tribunal in **Ukraine v Russia** where the Russian State confiscated Ukrainian warships exercising the right of innocent passage in Crimea. The Tribunal argued that Ukrainian warships had the right of innocent passage.

Rights of Protection of the Coastal State

If the warship violates the right of innocent passage, time is granted before one can ask the vessel to leave. On the other hand, a coastal state (**Article 25**) is allowed to take measures that are necessary to prevent non-innocent passages in terms of ordinary vessels.

In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. The coastal state may, without **discrimination**, suspend **temporarily** in **specified** areas of its territorial sea the innocent passage of foreign ships if such suspension is **essential** for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

On the other hand, If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and **disregards any request for compliance** therewith which is made to it, **the coastal State may require it to leave the territorial sea immediately**.

Under Article 30, if a warship fails to comply with the laws and regulations of the coastal state, before action can be taken, it **must be asked to comply**. It is only if the warship doesn't comply that it then is open for the flag state to ask the warship to leave the territorial sea immediately.

<u>The meaning of Innocence</u>
This was one of the most sensitive discussion in the UN Conference at Geneva, and as evidently seem opinions differed. This was was reflected in the opinions held by two groups:

1. Limited Definition i.e. the presence of a warship was not innocent even if it was merely navigating in a non-threatening way.
2. The group of Maritime states argued for a definition of innocence that would protected them, but which would limit the discretion they had in interfering with the right. The controversy was that maritime striae feared that if coastal states had too much discretion in determining innocent, then it might unduly interfere with the right.

The Convention created a balance between the need to restrict the discretion of the Coastal States and the need to prohibit passage which was not innocent.
Passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in line with the Convention and other rules of IL.

<u>Corfu Channel Case</u> - this was decided by the ICJ and revolved around the passage of British warships that left Malta and sailed through the Corfu Channel. The British navy decided to exercise the right of innocent passage and whilst passing through Albania's territorial sea, it encountered mines which caused damage and loss of life. Another group of warships was sent to enter Albania's territorial sea to clean Albanian waters from the mines.

The matter was taken to ICJ to see whether the passage was innocent. The Court was told that naval officers were on deck, with the warships set up in a military-like formation. According to Albania, this was threatening since canons were also directed at the Albania

coast. However, the Court did not find this as reliable and decided that the passage was in fact innocent.

The second issue was whether the second expedition was in accordance with IL since the UK entered into the territorial sea without authority. Upon deciding that there was no infringement of the right of innocent passage in terms of the first issue, the Court took a different view and castigated the UK for taking law in its own hands and violating Albania's territorial sovereignty the second time round. **Therefore, the UK did not violate the rights of innocent passage, but it did violate the territorial sovereignty of Albania when it entered without permission.**

Entrance into the territorial sea can only be for innocent passage, or:
1. Humanitarian Considerations

The Somalia Incident - in the High Seas Regimes, the right to pursue pirates comes to an end when pirates enter the territorial sea of a state. The problem in combating Somalia piracy was that the pirates would escaped into the territorial sea of Somalia. In the interest of international commerce and navigation, the security council should authorise vessels to continue to purse Somali pirates in violation of the sovereignty of Somalia. Before the security council decided, the force combatting piracy were frustrated.

There are states who, like Malta, de facto, have given the PM the power to legislate with respect to requiring authorisation or notification. This power is given under Chapter 226 of the Laws of Malta, and has been there for a number of years. However, it has not been put into force. Thus, Malta does not require authorisation or notification. Dr. Attard believes that in some areas notification may not be unreasonable. The US has a programme where it will appose such moves.

There has developed an interesting *modus vivendi* vis-a-vis strong allies of the US, and followed by other States, which involves on an informal basis, the naval attache at the embassy calling upon the foreign ministry to inform them without prejudice of the passage of warships. This seems to calm down the waters and enables the US to retain its position without upsetting unduly its allies.

Under Chapter 226, the Maltese Government is allowed to legislate in a manner that is consistent with **Article 21** of the 1982 Convention on the Regulation of Innocent Passage with respect to protecting its laws. The coastal state may issue rules relating to fishing, environmental conditions, protection of customs, fiscal, immigration, and sanitary rules. Under this Chapter, the law envisages the establishment of what it defines as a **Maritime Enforcement Officer.** The definition elaborates on who can act as such and essentially, it includes the police, customs, armed forces, and any other officers vested with general law authority. The reason for this wide definition is that some years ago, when the armed forces took enforcement action in the territorial sea, there was an interesting case where the defence argued that the armed forces did not have the authority to arrest as this authority in the territory of Malta was that accorded to the Police.

At the time, the Government issued a legal notice which gave the armed forces the necessary power and a revision of the Territorial Sea and Contiguous Zone Act settled this question.

Under **Article 5** of this Chapter, these officers may take appropriate action with respect to any foreign vessel, except warships, reasonably suspected on having on board a person reasonably suspected to commit or having committed an offence against the law of the country. This is the exercise of criminal jurisdiction over ships exercising the right to innocent passage in the territorial sea.

Criminal Jurisdiction

Under **Article 27 of the 1982 Convention**, there are limits imposed on the exercise of criminal jurisdiction. These limits are reflected in Article 5(2) of Chapter 226. The powers of investigation cannot take place unless:

1. The consequence of the offence extends to Malta
2. The offence is of a nature that would disturb the peace of Malta or the good order or the territorial waters
3. This is a reflection of the principle of nationality. Enforcement may intervene if requested by the flag state, the consul, or a diplomatic agent of that state i.e. clearly also the master of the vessel can ask for intervention.
4. The enforcement officers have the power when there is suspicion of carrying of narcotics and psychotropic substance

Under Maltese Law, the territorial sea regime does not only apply to the water column, but also to the seabed and subsoil of the territorial sea. Malta has sovereignty over the seabed and subsoil allowing it to exploit any resources therein.

Civil Jurisdiction

Article 28 goes on to deal with Civil Jurisdiction. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Under Chapter 226, the outer limit of the Maltese Territorial Sea is consistent with Article 3 of the Convention, and is twelve nautical miles.

However, there was a combination of our colonial history and international law where it is said that territorial sea extends to 25 nautical miles for the purposes of the sovereign rights of Malta to explore, exploit, conserve, and manage the living resources. In the old

legislation, the reference was to extending sovereignty but this was inconsistent with international law which doesn't grant exclusive sovereignty to an exclusive fishing zone but merely sovereign rights.

Maltese Legislation on the matter was adopted through the Fishery Conservation Act which reflects the new notions which are also found in the 1982 Convention.

The High Seas

These commence, unless you declare an EEZ, at the outer limit of the territorial sea. The High Seas are open to all States. They are not subject to sovereignty and cannot be appropriated. They must be used for peaceful purposes, and within them, as per Article 87, States enjoy the freedoms of the High Seas.

Article 86: this announces which areas are not included under the High Seas Regime.

i. Territorial Sea
ii. Archipelago Waters
iii. Exclusive Economic Zone

In Malta, the High Seas Regime starts at the end of the Territorial Sea. As we shall see, the situation in Malta is about to change dramatically because the Government has, some months ago, promulgated the Malta Exclusive Economic Zone Act which gives the Government the power to establish EEZ. This power has not been yet fully implemented. Although there is a 24 nautical miles contiguous zone, and a 25 nautical mile fishing zone, the legal status of the waters of these zones is High Seas.

These rules apply to activities in the High Seas of Malta. Under Article 87 of the Convention, there is a non-exhaustive list of the so-called Freedoms of the High Seas. The two freedoms which we usually encounter are:

1. The Freedom of Communication
2. The Freedom of Navigation

Under Article 87, States enjoy the **Freedom of the Navigation** of their ships and the Freedom of overfly in the airspace above the High Seas of their planes.

There is the next freedom termed as being the **Freedom of Communication** which is becoming very important: freedom to lay submarine cables and pipelines. This freedom has become important, particularly because we are in the process of rewiring the globe. In the late 1800s, when telegraphy was invented, there was a rush to lay underwater telegraphic cables, and this advent actually change the geopolitics of the world i.e. in these days of colonial rules when communications with the motherland was relatively instant than taking months.

The first underwater cable was laid between UK and US and Canada i.e. landed in Newfoundland. It was an important event that the first voice transmitted was that of Queen Victoria. The vulnerability of these caters was later discovered. An international Treaty was

designed to protect cables, and is still in force and the only specific treaty dealing with the matter. It gives powers to inspect a ship suspected of causing problems to underwater cables, usually through the anchor of a ship, and was used by the US some years back when its forces boarded Soviet vessels suspected of causing damage.

Today, there is fiberoptic cables that transmit millions of data channels and underwater cables have proved to be successful that they became a major source of communication. Similarly, States have the freedom to underlay underwater pipelines. This is an important development because these are huge pipelines designed to transport, generally oil or gas, over huge distances. Prior to the Ukraine-Russia crisis, it was generally felt that underwater pipelines were more reliable as they bypassed sensitive political areas. However, recent development shown that these pipelines are also exposed as seen by the Russia-German pipeline being sabotaged causing havoc.

An example of a pipeline transfer Hungarian gas to Italy which passes Tunisia and touches the Maltese Continental Shelf to make it to Sicily.

There is the **Freedom to establish Artificial Islands, Structures, and Devices**. This is limited by Part VI of the Convention dealing with Continental Shelf regime.

There is a **Freedom of Scientific Research**, again limited by the distinction of applying scientific research i.e. economic, and fundamental research which is research undertaken for the sake of knowledge and the benefit of humankind.

It has been pointed out that this is not an exhaustive list. The reason for this is that given the new developments in maritime activities, the list develops as the technology develops. We are in the era of autonomous shipping, and we have to face consequences of legal regime based on human characteristics.

The more important freedom of navigation is relied upon when dealing with trade which is always been carried out.

These freedoms are not absolute and have to be exercised with due regard to the right of other States to enjoy their freedom.

Article 60(7) of the Convention: although the coastal state has the exclusive right to establish artificial islands on the continental shelf or in the EEZ, one cannot establish such island if these interfere with international recognised sea lanes. There is a protection of the freedom to navigate.

<u>Navigation</u>
The first point to make is that this right is given to the State. It is the State that has the right to sail ships. This applies whether the State is landlocked or coastal. In fact, there are states like Switzerland which has a maritime registry and have ships sailing the Swiss Flag exercising Freedom of Navigation.

A ship sails by virtue of its nationality and are given the nationality by States which entitles the ship to fly the flag of such State. If one is not registered with a State i.e. stateless vessel, one would run the risk of being arrested as such. This is not free from controversy, but Dr. Attard believes that a stateless vessel should not have the right to navigate because the right is given to a State and not a ship. The ships have this right upon registration with the State.

There is the condition that there must be a genuine link between the Vessel and the Registry. This feature or requirement is based on the **Nottabon Judgement** and requires a link between ownership of the vessel and the State. In the post-Korea crisis, American ship owners decided that it was too risky to be registered under the US flag as the vessel could be expropriated as happen in Korea if there is a war. American ship owners created the Panama and Liberia Registry where the genuine link between the vessel and the State was a company established in those territories, which company could be bearer-shares or owned by an American or Russian Citizen, and the ship would be owned by the Panama or Liberian Company. As long as dues were paid, you were allowed to fly flags of Panama or Liberia.

In the late 80s, Malta and Cyprus joined, which attracted considerable shipping because the political climate in Greece was a concern to ship owners. Generally, they were known as flags of convenience and this created problems which was threatening the security and safety of navigation.

One is not allowed to fly two flags, because one would be still considered stateless. From this emerges the fundamental principle which holds that on the High Seas, the ship is subject to the exclusive jurisdiction of the Flag State. Consequently, a vessel in the Indian Ocean can be subject to the jurisdiction of Malta if the flag state is Malta.

Ocean Governance on the High Seas is dependent on the control the flag state exerts on its ships. Thus, a very strict rule which has not yet been pierced despite the efforts of the US, the principle remains that to board a vessel, permission of the flag state is needed. There was the case in Malta where a Maltese registered timber carrier owned by Russians was subject to piracy in the Baltic Sea. The crew reported that they were attacked by pirates while travelling to Algeria. The Baltic is one of the most highly regulated seas. The crew took over the vessel and commenced sailing down to Africa. When the ship was around the Canary Islands, the London Times said that the vessel was carrying nuclear vessel for Iran. This allegation was that the nuclear parts were hidden. The Russian Government applied for permission to board, and the Maltese Government gave permission. The mood of the Russians was that the vessel would have still been taken over if no permission was given. The vessel was searched, and if there were any weapons, they must have been unloaded when taken over by the Russian Navy.

This is a very interesting case because it is not always easy to find who in the flag state can give consent.

It is not sufficient to set up a company and argue the existence of a genuine link. Effective control over the vessel has to be proved, directly or indirectly. Over the years, the cleaning up of the flags of convenience has been improving. This is because of the emergence of Port Ship Controls which would arrest ships which are not in compliance with standards and requirements of International Law. There is the Memorandum of Paris which ensures that there is a proper regulation of vessels where flag states fail in their duties. Indeed, registries like Malta, Cyprus, and Liberia cleared up their registries and requiring the recognition and compliance with international stands to avoid the risks of being arrested in ports, giving a bad name to the flag.

Malta is the largest ship registry in Europe, and one of the largest in the world, thus plays an important role in ensuring that flag state jurisdiction ensures the compliance of its vessels with international rules and standards.

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