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# Maritime security and international law in Africa<sup>1</sup>

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## Introduction

Ships and those who sail in them face many potential dangers, both from the natural perils of the sea and from the results of human conduct, which demand a precautionary response from seafaring nations. The promotion of maritime security, however, takes place within a context of international law that provides both opportunities and constraints. This article reviews the international legal principles affecting maritime security in Africa, and highlights some of their strengths and weaknesses.

The law of the sea is based on both custom and treaty. The customary principles have evolved over the centuries from the accepted practice of nations, and they have balanced

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the desire of maritime states for freedom of navigation against the interests of coastal states in the security and resources of their inshore waters. Customary law has the advantage that it binds all states that have not persistently objected to it (that is, they must opt out rather than in), but it also often suffers from uncertainty. The main principles of customary law have now been codified in the 1982 UN Convention on the Law of the Sea,<sup>2</sup> which came into force in 1994, and has been ratified by 159 states around the world.

## **UN Convention on the Law of the Sea**

The effect of the UN Convention on the Law of the Sea upon maritime security depends on a variety of factors, including crucially where the threat occurs and the nationality of the ships involved. The seas are divided into a network of maritime zones in which states have different powers and duties. Ships remain under the jurisdiction of their flag state (where they are registered) wherever they may go in the world, but at the same time they may fall under the concurrent jurisdiction of a coastal state in one of its maritime zones.

### **Territorial sea**

The territorial sea of a coastal state (which in most cases is now 12 nautical miles wide) is under the sovereignty of that state, but foreign ships have a right of innocent passage to navigate through it, provided that their presence is not prejudicial to the peace, good order or security of the coastal state.<sup>3</sup> The threat or use of force by foreign ships (among other behaviour) would not be innocent, and so they would forfeit their right of passage. Coastal states can also pass legislation affecting foreign ships in the territorial sea for various purposes, including navigational safety, fisheries, environmental protection, customs and immigration control. However, there are restrictions on their ability to enforce their criminal laws against foreign ships, unless the consequences of the crime affect the coastal state, the ship is engaged in drug trafficking, or the coastal state has been asked to intervene by the flag state.

### **Contiguous zone**

Beyond their territorial sea, states may claim a contiguous zone up to 24 nautical miles from the coastal baseline.<sup>4</sup> They do not have legislative jurisdiction over foreign ships there, but they have policing powers to enforce breaches of some of their laws committed inside their territory or territorial sea, including customs and immigration laws, although not security measures.

### **Exclusive economic zone**

The UN Convention on the Law of the Sea also endorsed the more recent claims to an exclusive economic zone (EEZ) extending from the limit of the territorial sea up

to a maximum of 200 nautical miles from the coastal baseline.<sup>5</sup> About 120 states have declared EEZs, while another 30 have limited their claims to exclusive fishery zones. Although coastal states do not have complete sovereignty over an EEZ, they have sovereign rights there for the purpose of exploiting and managing natural resources, including fish stocks. Foreign fishing boats must comply with the conservation laws of the coastal state, which is entitled to take enforcement measures against them, including boarding, inspection, arrest and judicial proceedings. Interception of foreign vessels is therefore legitimate in the EEZ, provided that it is undertaken by the coastal state to protect its natural resources. Otherwise, the coastal state must respect the rights of other states there, including the freedom of navigation.

## High seas

Waters beyond the EEZ constitute the high seas, which are traditionally open to all nations. The customary laws governing the high seas were first codified in the 1958 Geneva Convention on the High Seas,<sup>6</sup> which identified examples of the freedom of the high seas, including the freedoms of navigation and fishing. The provisions of the 1958 convention are largely repeated in the UN Convention on the Law of the Sea, with some additions to reflect later developments.<sup>7</sup> Ships on the high seas are under the exclusive jurisdiction of their flag state, which has a corresponding duty to exercise effective control over them. Although the convention requires there to be a genuine link between a flag state and the ships to which it grants its nationality, it is common practice for many ships to register under flags of convenience issued by states with which they have no other connection, and which may have little incentive or capacity to supervise them.

## Boarding

Despite the primacy of the flag state on the high seas, there are a few exceptional situations when ships may legally be boarded there by other states. Under article 110 of the UN Convention on the Law of the Sea, warships and military aircraft are permitted to board foreign ships on the high seas if there is reasonable ground to suspect that they are engaged in piracy, the slave trade or unauthorised broadcasting, or if the ship is stateless, or if (despite flying a foreign flag or refusing to show its flag) it is in reality of the same nationality as the intercepting warship or aircraft. However, if the suspicions prove unjustified, the ship must be compensated for any loss or damage due to the boarding. These boarding powers also apply to other authorised ships and aircraft that are clearly marked and identifiable as being on government service.

## Hot pursuit

Another exception to flag state primacy on the high seas is the right of hot pursuit under article 111 of the convention. If the authorities of a coastal state have good reason to

believe that a foreign ship has violated its laws and regulations, its warships, military aircraft or other ships and aircraft on government service may undertake the hot pursuit of that foreign ship on the high seas. Hot pursuit must normally be commenced when the foreign ship or one of its boats is still inside the territorial sea limits of the coastal state, but the power will also apply to a foreign ship in the contiguous zone, EEZ or continental shelf, provided that the violation relates to the laws applicable to that area. The pursuit may only be begun after a visual or auditory signal to stop has been given at a distance that enables it to be seen or heard by the foreign ship. Hot pursuit on the high seas must be continuous, the pursuit must cease if the foreign ship enters the territorial sea of its own or another state, and a ship that is unjustifiably stopped or arrested must be compensated for any loss or damage.

The right of hot pursuit, like most of the other exceptions to exclusive flag state jurisdiction on the high seas, has its origins in long established customary law, and many of its conditions are redolent of another era. It evokes the traditional chase of smugglers seeking to escape from customs officers in inshore waters, and it is designed to protect the interests of the coastal state rather than the mutual concerns of all nations. Consequently, it does not explicitly provide for cooperative action involving pursuit by more than one state. Also, the requirement of continuity in pursuit excludes the situation where a suspected ship is intercepted at long range by a vessel arriving from another direction, and it also raises the question whether it is legitimate for one ship to take over a pursuit from another.

## **Maritime search and rescue**

Subject to the general framework of the law of the sea described above, there are many more specific principles and measures affecting maritime security, including those relating to search and rescue. The duty of ships' masters to render assistance to persons and vessels in distress has for centuries been one of the fundamental principles of the customary international law of the sea. Today, it is enshrined in treaty, and is codified in article 98 of the UN Convention on the Law of the Sea. However, historically this legal responsibility for mutual support depended on the ability of mariners to assist each other, and until the invention of radio at the end of the 19th century it was contingent on ships sighting visual distress signals; even radio was limited in range, and only ships in the vicinity would be able to respond.

When the International Maritime Organisation (IMO) was founded in 1959,<sup>8</sup> its first important task was to update the International Convention for the Safety of Life at Sea (SOLAS), and the 1960 version of that treaty contained detailed provisions on radio communications for distress and safety at sea.<sup>9</sup> The SOLAS Convention was revised again in 1974<sup>10</sup> and its text has been regularly amended to reflect new technical developments.

Nevertheless, it was not until the adoption of the International Convention on Maritime Search and Rescue (SAR) in 1979 that an international framework was agreed to coordinate national search and rescue operations.<sup>11</sup> Previously, although some states had established institutions to respond to maritime emergencies, these reflected national concerns and resources, and there was no consistency between them; in many other countries there were no such arrangements at all.

The 1979 SAR Convention came into force in 1985. Its objective was to develop an international search and rescue plan, so that irrespective of where an accident happened, the rescue of people in distress at sea would be coordinated by a search and rescue organisation, with cooperation from neighbouring organisations when necessary. The oceans were divided by IMO into 13 search and rescue areas. However, the original wording of the convention imposed inflexible duties on coastal states in terms of the measures that they were required to take and the installations that they had to provide, which were seen as too burdensome by many developing countries, and so participation by such nations was initially limited. As a result, in order to increase the membership on which the effectiveness of the convention crucially depends, the text was amended in 1998 to provide more discretion, and these revisions came into force in 2000. There are now 95 state parties, which represent nearly 60 per cent of the world's merchant shipping, and 18 of those countries are in Africa.<sup>12</sup>

The current version of the SAR Convention requires states, to the extent that they are able, to participate in the development of search and rescue services either individually or in cooperation with other states and IMO. The basic elements of a search and rescue service are specified as a legal framework, a responsible authority, available resources, communication facilities, coordination and operational functions, and processes to improve the service. As far as practicable, states should follow the minimum standards and guidelines specified by IMO, which (together with the International Civil Aviation Organisation) has published the *International Aeronautical and Maritime Search and Rescue (LAMSAR) Manual*.<sup>13</sup>

The revised convention clarifies the responsibilities of governments and places more emphasis on a regional approach and on coordination between maritime and aeronautical search and rescue operations. Parties must establish search and rescue regions within their sea areas by mutual agreement, and then accept responsibility for providing search and rescue services in a particular sector. The convention requires states to coordinate their search and rescue organisations (and where necessary their operations) with those of their neighbours; they should also allow rescue units from other countries to enter their territorial sea. Operating procedures in emergencies (including the appointment of an on-scene coordinator) are specified for rescue coordination centres and rescue sub-centres, and the convention also makes recommendations on the use of ship reporting systems to minimise delays in responding to distress incidents.

In 2004, further amendments were made to the SAR Convention to ensure that refugees, asylum seekers, migrants and stowaways in distress at sea are not excluded from its protection, but also to guarantee that ships' masters are relieved of responsibility for them once they have been delivered to a place of safety. These amendments came into force in 2006.

Although the SAR Convention supports a global plan for carrying out maritime search and rescue operations, it does not itself improve the vital communications systems on which those operations depend. That is the task of the Global Maritime Distress and Safety System (GMDSS). The GMDSS provides a network of automatic emergency communications for ships throughout the world, using a combination of satellites and terrestrial radio to alert search and rescue authorities (as well as other vessels in the area) about a ship in distress. It was introduced through amendments to the SOLAS Convention in 1988, which came into force in 1992, and were phased in by 1999. It requires cargo ships of at least 300 tons and all passenger ships on international voyages to carry prescribed equipment, including 'emergency position indicating radio beacons' and 'search and rescue transponders' to identify their position and improve the chances of rescue.

Another critical issue for the success of the SAR Convention is the willingness and capacity of coastal states to discharge their responsibilities. While the convention provides a legal framework, its implementation depends crucially on the political will and the human and economic resources of coastal states. At an IMO conference in Florence in 2000, a resolution was adopted inviting African countries to establish five regional rescue coordination centres and 26 sub-centres around their Atlantic and Indian Ocean coasts. It was also recommended that an International Search and Rescue (ISAR) Fund should be established to support these services; the ISAR Fund, which is a multi-donor trust fund administered by IMO, was created in 2004. Since then, multilateral agreements have been signed by four groups of African nations, and the first Maritime Rescue Coordination Centre (MRCC), involving Kenya, Tanzania and Seychelles, was inaugurated in Mombasa in May 2006. In January 2007, Comoros, Madagascar, Mozambique and South Africa established a similar regional centre in Cape Town, and in May 2008 nine West African states launched the third at Lagos;<sup>14</sup> a fourth MRCC was commissioned at Monrovia by five states in April 2009.<sup>15</sup> Although the whole of the African coast is not yet covered, these important developments represent a major step forward for maritime safety in the region.

## **Piracy and terrorism against ships**

While the international law on search and rescue is primarily concerned with protecting people from the accidental and natural hazards of the sea, in recent years attention has

concentrated more on the risks posed by deliberate human violence. After the attack on the World Trade Center in September 2001, the International Maritime Organisation recognised the vulnerability of shipping to terrorist action, and undertook a review of existing international measures to protect ships and ports. In November 2001, the IMO Assembly adopted a Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships,<sup>16</sup> together with a resolution on Measures to Prevent the Registration of 'Phantom' Ships that have false identification documents.<sup>17</sup> These were followed in December 2002 by amendments to the 1974 SOLAS Convention, which came into force in July 2004, and included the incorporation of an International Ship and Port Facility Security (ISPS) Code.<sup>18</sup>

### **International Ship and Port Facility Security Code**

The ISPS Code is designed to provide standard mechanisms for assessing the threats faced by individual ships and port facilities, in order to enable appropriate security measures to be determined. For ships, the minimum security requirements include the preparation of ship security plans, the appointment of ship security officers and company security officers, and the provision of certain onboard equipment. Similarly, port facilities must have port facility security plans and port facility security officers. In addition, in the case of both ships and port facilities, access must be monitored and controlled, the handling of cargo and stores must be supervised, and security communications must be readily available. Training, drills and exercises are also important requirements.

Contracting governments or their designated authorities must set the security level applicable at any particular time on a three point scale covering Security Level 1 (normal), Level 2 (heightened risk of a security incident) and Level 3 (probable or imminent risk). Passenger ships, cargo ships of 500 tons or more and mobile offshore drilling units engaged on international voyages must have ship security plans, approved by their national administration, which set out the operational and physical measures for each security level. Company security officers must ensure that a ship security assessment is undertaken, and a security plan prepared for each of their ships; it is the role of the ship security officer to see that the plan is implemented. Ships must also carry an International Ship Security Certificate, which will be subject to port state inspection, to prove that they have complied with the ISPS Code. The mandatory fitting of automatic identification systems for ships has been accelerated, and there is also a requirement for ship security alert systems to notify authorities and other ships of terrorist hijackings.

In the case of ports that are used for international voyages, governments are responsible for undertaking port facility security assessments. These assessments provide the basis for the preparation by port facility security officers of port facility security plans, which specify the precautions required there at each of the three security levels. These plans must be approved by governments, and implemented by the port facility security officers.

The provisions of the ISPS Code were required to be fulfilled by July 2004, and the degree of compliance has been remarkably high.

## Proliferation Security Initiative

Most of the international instruments that have been discussed so far are of a legally binding nature. In contrast, the Proliferation Security Initiative is a non-statutory arrangement launched by the United States in 2003 as part of its strategy to combat weapons of mass destruction (WMD). It aims to promote proactive cooperation to prevent trafficking in WMD, and is supported by 95 states, although few of them are in Africa.<sup>19</sup> In September 2003, the participants adopted a statement of interdiction principles, which calls on all states to board and search their own vessels in their maritime zones or on the high seas, if they are reasonably suspected of transporting WMD, and to seriously consider giving consent to boarding, searching and seizure by other states.<sup>20</sup> Since these principles depend on flag state consent, they do not infringe existing international law. The US has also entered into bilateral ship boarding agreements with nine states, including Liberia,<sup>21</sup> which prescribe procedures whereby one party may authorise the other to board its vessels beyond the territorial sea if they are suspected of involvement in proliferation.

## The legal distinction between piracy and hijacking

The oldest exception to the principle of exclusive flag state jurisdiction on the high seas arises in the context of piracy, which has been a global problem since classical times. Article 100 of the UN Convention on the Law of the Sea requires all states to cooperate to the fullest possible extent in the repression of piracy on the high seas, thus recognising that this is a shared responsibility for a matter of common concern.

Every state is empowered to seize pirate ships on the high seas, irrespective of their nationality, and may try the pirates in its courts. Piracy is defined in article 101 of the convention as any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship, and directed against another ship, persons or property on the high seas. Thus, the seizure of a ship by its own crew or passengers is not considered to be piracy. Paradoxically, the archetypal fictional pirate, Long John Silver in the novel *Treasure Island*,<sup>22</sup> would not have committed piracy under the convention, as he was already employed as a cook on the ship that he seized; he was in modern parlance a hijacker, but hijacking is not piracy. This principle posed a dilemma when the Italian cruise ship *Achille Lauro* was hijacked by passengers belonging to the Palestine Liberation Front in 1985. The UN Convention on the Law of the Sea also confines piracy to events on the high seas, whereas most piracy today occurs closer inshore. Moreover, the condition that piracy must be committed for private ends presumably excludes politically motivated or state-sponsored terrorism. The convention has merely codified a customary law principle rooted in the traditions of the 18th century that is imperfectly adapted to current concerns.

## SUA Convention

The definitional problems revealed by the *Achille Lauro* incident led to the adoption by IMO of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).<sup>23</sup> This convention and its associated 1988 Protocol on Fixed Platforms Located on the Continental Shelf<sup>24</sup> entered into force in 1992 and have been widely ratified; 153 states have joined the SUA Convention and 141 are party to the Protocol.

The SUA Convention obliges contracting states to make various acts on or against ships punishable as offences under their national laws (including seizure by force, acts of violence and placing explosive devices), and they must punish or extradite those who commit them. Unlike piracy under the UN Convention on the Law of the Sea, there is no requirement for two ships to be involved. The 1988 Protocol applies similar requirements to actions on or against offshore installations. However, there is no provision in the original texts for boarding foreign ships on the high seas.

After 11 September 2001, the adequacy of the SUA Convention and its Protocol was reviewed by IMO, and new protocols to amend them were adopted at a diplomatic conference in October 2005.<sup>25</sup> The amendments will extend the range of offences to include threats from the transport or use of nuclear, biological and chemical weapons or material; they will also allow for the boarding of vessels suspected of involvement in terrorist activities. While boarding foreign vessels on the high seas will still depend on consent, flag states could elect to give a general permission in advance, or could allow permission to be presumed if they did not respond to a request. Offences under the revised SUA Convention may not be regarded as political in order to prevent extradition, although a person may not be extradited if the motive is to persecute them for racial, religious or other reasons. Another amendment governs the circumstances in which a prisoner may be transferred to a different state in order to give evidence. However, the amended SUA Convention has so far received only eight of the 12 ratifications needed to bring it into force, and so it remains ineffective at present. Although the amended protocol on fixed platforms only needs three ratifications, which have already been achieved,<sup>26</sup> it cannot come into force before the amendments to the convention itself.

## Somalia

In its latest annual report on piracy, the International Maritime Bureau recorded 187 actual and attempted attacks on ships in African waters during 2008, including 92 in the Gulf of Aden, 40 off Nigeria and 19 off Somalia.<sup>27</sup> The incidents in the Gulf of Aden were attributed to Somali pirates, and attacks in Africa amounted to 64 per cent of the global total. The situation in Somalia is exacerbated by the lack of capacity of the Transitional Federal Government to interdict and prosecute pirates itself, and

in February 2008 the government asked the United Nations for urgent assistance to safeguard shipping.

Chapter VII of the Charter of the United Nations empowers the Security Council to take measures, involving the use of armed force if necessary, to maintain or restore international peace and security. In June 2008, the Security Council adopted Resolution 1816 (2008), which called on member states with naval and military capabilities in the region to coordinate their efforts to deter piracy and armed robbery at sea in cooperation with the Transitional Federal Government. It also authorised those states (with the consent of the government and for an initial period of six months) to enter Somali territorial waters for the purpose of repressing piracy and armed robbery there, in the same way that such action is already permissible on the high seas under international law.

Since then, three further resolutions have been adopted in October and December 2008,<sup>28</sup> which repeat the call for military assistance, invite measures to facilitate the prosecution of pirates, and encourage coordination and the establishment of an international cooperation mechanism; they also urge states to implement the SUA Convention, protect the World Food Programme's maritime convoys, and advise their registered ships about self-protection. In particular, Resolution 1846 (2008) has extended the period for international intervention until December 2009. However, the resolutions are also careful to stress that these special measures are restricted to Somalia, and they do not create general principles of customary international law that apply elsewhere. Canada, Denmark, France, India, the Netherlands, Russia, Spain, the United Kingdom and the United States have all responded with naval assistance. NATO has deployed seven warships from its Standing Maritime Group 2, and the European Union has undertaken Operation EU NAVFOR-ATALANTA to escort humanitarian aid convoys off the Somali coast.

## Conclusion

This article has sought to show how international action to promote maritime security in Africa, whether the hazards are natural or man-made, depends both on fundamental principles of the law of the sea and on a range of specialised modern agreements. Law is essential to maritime security, because it determines what nations may or may not do, and it provides mechanisms to facilitate cooperation between states. At the same time, however, international law is fallible because it depends ultimately on the principle of consent; if nations do not wish to assist each other or conform to international legal standards, there is little that can be done to enforce participation. Ultimately, the successful implementation of international law is contingent on the willingness of states to collaborate and on the availability of the technical skills and economic resources to fulfill their legal commitments.

Good laws are a necessary pre-condition for the achievement of maritime security, but they will only be effective if there is also the political will and the practical capacity among seafaring nations to carry them out. While much still remains to be done, recent developments in Africa provide some positive grounds for encouragement.

## Notes

- 1 This article is based on a paper delivered by the author at the 3rd Sea Power for Africa Symposium, Towards Effective Maritime Governance for Africa, Cape Town, 8–12 March 2009.
- 2 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982.
- 3 Ibid, part II.
- 4 Ibid, article 33.
- 5 Ibid, part V.
- 6 Convention on the High Seas, Geneva, 29 April 1958.
- 7 UN Convention on the Law of the Sea, part VII.
- 8 The IMO was originally called the Inter-Governmental Maritime Consultative Organisation (IMCO), but was renamed in 1982.
- 9 International Convention for the Safety of Life at Sea, 1960, London, 17 June 1960.
- 10 International Convention for the Safety of Life at Sea, 1974, London, 1 November 1974.
- 11 International Convention on Maritime Search and Rescue, 1979, Hamburg, 27 April 1979.
- 12 Algeria, Angola, Cameroon, Congo, Côte d'Ivoire, Gambia, Kenya, Liberia, Libya, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Senegal, South Africa, Tanzania and Tunisia.
- 13 *International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual*, London and Montreal: International Maritime Organisation and International Civil Aviation Organisation, 2008.
- 14 The nine states are Benin, Cameroon, Congo, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Nigeria, São Tomé and Príncipe and Togo.
- 15 The five states are Côte d'Ivoire, Ghana, Guinea, Liberia and Sierra Leone.
- 16 IMO Resolution A922(22), 29 November 2001.
- 17 IMO Resolution A923(22), 29 November 2001.
- 18 *International Ship and Port Facility Security (ISPS) Code*, London: International Maritime Organisation, 2003.
- 19 The African participants are Angola, Djibouti, Liberia, Libya, Morocco and Tunisia.
- 20 *Interdiction Principles for the Proliferation Security Initiative*, Washington: Bureau of International Security and Nonproliferation, 4 September 2003, <http://www.state.gov/t/isn/c27726.htm> (accessed 24 May 2009).
- 21 Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Washington, 11 February 2004.
- 22 Robert Louis Stevenson, *Treasure Island*, London: Cassell, 1883.
- 23 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988.
- 24 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988.
- 25 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, London, 14 October 2005; Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, London, 14 October 2005.
- 26 Six states had ratified the 2005 SUA Protocol by June 2009.
- 27 *Piracy and armed robbery against ships: Annual Report 1 January – 31 December 2008*, London: ICC International Maritime Bureau, 2009.
- 28 UN Security Council Resolutions 1838 (2008), 1846 (2008) and 1851 (2008).