Under the LOSC, the *Corfu Channel* regime of 'non-suspendable innocent passage' has something of a residual flavour, now applying only to straits not covered by the new regime of transit passage, considered below. However, there is no doubting the customary law status of the *Corfu Channel* regime which provides an assured minimum guarantee of passage though international straits for all vessels, including warships.

3. Transit passage

A major problem facing UNCLOS III concerned the consequences of the breadth of the territorial sea increasing from 3 to 12 n. miles. This meant that many major strategic waterways which had previously been high seas, such as the Straits of Dover, could become entirely territorial seas and at best be subject to the regime of non-suspendable innocent passage. During the Cold War, when super-power security was thought to depend in part on relatively undetectable submarine-based nuclear missiles, the idea that submarines should surface and show their flags when prowling the oceans was an additional concern. The result was a comprise that sought to further reduce the ability of coastal States to restrict passage within their territorial seas.

The LOSC regime of transit passage applies to all straits connecting high seas or EEZs with other areas of high seas or EEZs and which are used for international navigation unless there is a corridor of high seas or EEZ running through it (LOSC Article (36)) or the strait is formed by an island which belongs to the coastal State and seawards of which there is an alternative route (LOSC Article 38(1)). In cases covered by this latter rule, known as the 'Messina Strait' exception (after the Straits between Italy and Sicily), the *Corfu Channel* regime of non-suspendable innocent passage continues to apply. Straits covered by particular treaty regimes, such as the Turkish Straits (the Dardanelles and the Bosphorus) are also expressly excluded from the scope of the provisions concerning transit passage (LOSC Article 35(c)).

Whereas innocent passage only applies to ships and submarines, transit passage also applies to aircraft which are accorded the right of overflight. Although not expressly stated, the regime applies to military ships and aircraft, and submarines may proceed submerged. Ships or aircraft must 'proceed without delay' and 'refrain from any threat or use of force' against the States bordering the strait (thus, for example, hurrying through the Straits of Gibraltar to conduct military activities in the eastern Mediterranean would be permissible). Although ships and aircraft must comply with generally accepted international regulations regarding safety matters (LOSC Article 39), coastal States may themselves only regulate a very circumscribed list of activities: maritime safety (including traffic separate schemes); internationally approved regulations concerning discharges of oil, oily waste, and noxious substances in the strait; with respect to fishing vessels, prevention of fishing and the stowage of fishing gear; and loading and unloading in connection with customs, fiscal, immigration, or sanitary laws (LOSC Article 42(1)). The balance struck clearly favours the freedom of navigation. The customary law status of transit passage has been challenged (de Yturriaga, 1991) and remains unclear, although State practice outside the convention framework increasingly reflects these provisions. Whilst the increasing numbers of States party to the LOSC has taken some of the heat out of this debate, it remains the case that maritime powers which are not party to the Convention may need to rely on the customary status of transit passage in order to be assured of passage for warships and overflight of aircraft through or over straits of key strategic significance.

4. Archipelagic sea lane passage

Drawing archipelagic baselines converts vast tracts of waters which were previously either high seas or territorial seas into 'archipelagic waters'. LOSC Article 52 provides that the right of innocent passage applies throughout such waters and, moreover, Article 53 provides for a right of 'archipelagic sea lane passage' in 'corridors' to be designated by the archipelagic State. Archipelagic sea lane passage is substantially similar to transit passage, meaning that the jurisdiction of archipelagic States over a wide range of matters in waters within their baselines is substantially reduced. As a result, the demands of international navigation have been given precedence over local control.[22]

IV. THE HIGH SEAS

A. THE FREEDOMS OF THE SEAS

The idea that beyond the territorial seas lie the high seas which are free for use by all lies at the heart of the law of the sea. Both the 1958 HSC and the LOSC proclaim the high seas to be free and open to vessels of all States and give non-exhaustive lists of freedoms. The HSC mentions navigation, fishing, overflight, and cable laying (HSC Article 2), and the LOSC adds the construction of artificial islands and marine scientific research. All are to be enjoyed with 'due regard' (in the HSC, 'reasonable regard') to the interests of others (LOSC Article 87).

It has already been seen how that space has been eroded by the expansion of the territorial seas, and some of the balances that have been struck as a consequence. Later sections will look at how the high seas have been further eroded by the creation of zones of functional jurisdiction. This section considers how freedom of navigation on the high seas has fared.

The key to regulating activities within the high seas is the concept of flag State jurisdiction. All vessels must be registered according to the laws of a State and, in consequence, are subject to its legislative jurisdiction and, whilst on the high seas or within its own territorial sea or EEZ, to its enforcement jurisdiction. In principle, a flag State enjoys exclusive jurisdiction over its vessels, although there are exceptions. However, if a ship is stateless, or flies more that one flag so that its true State of registry is not clear, then any State can exercise jurisdiction over it.[23]

Although the content of domestic laws applicable to vessels will vary considerably, there are an increasingly large number of international conventions relating to matters such as pollution control, resource management, and health and safety at sea which seek to ensure as common an approach as possible. Beyond this lies the problem of enforcement. A State is obliged to 'effectively exercise its jurisdiction and control' over ships operating under its flag (LOSC Article 94(1)) but this is often easier said than done. Many States simply do not have the capacity to enforce their laws over vessels flying their flag, (many of which may only rarely, if ever, put into port in their State of registry), whilst others simply lack

[22] The first example of a designation was that of Indonesia. See Indonesian Government Reg No 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002 (2003) 52 *Law of the Sea Bulletin* 20.

[23] See, eg, *Molvan* v *Attorney General for Palestine* [1948] AC 351.

the will to do so. Moreover, States are entitled to set their own conditions for registering ships, and although a 'genuine link' must exist between the vessel and State, attempts to lend greater precision to this requirement have not been successful and the problem of vessels being registered under 'flags of convenience', which exercise little effective control over their activities, remains. It is against this background that the subtle but steady erosion of the exclusive jurisdictional competence of the flag State over its registered vessels must be assessed.

B. THE EXCEPTIONS TO FLAG STATE JURISDICTION

1. Visit

It is axiomatic that the authorities of one State may not board a vessel flying the flag of another without the consent of the flag State. There is, however, an increasingly long and increasingly detailed list of exceptions to this general principle. These exceptions will be outlined below, but since it will not always be immediately apparent whether such action is permissible, international law recognizes an intermediary position in which the authorities of a non-flag State are entitled to board a vessel on the high seas in order to verify whether their suspicions are justified. These instances arise where there are reasonable grounds for suspecting that a ship is engaged in piracy, the slave trade, or unauthorized radio broadcasting (LOSC Article 110(1)(a)–(c)), the consequences of which are considered below. In addition, a ship might be visited to confirm that it is either stateless or, in cases of doubt, that it is in fact of the nationality of the visiting authorities, meaning that the visiting authority can assert its jurisdiction on the basis of the principles outlined in the previous section. In all of these cases a visit and any subsequent action may only be undertaken by a warship or other vessel or aircraft duly authorized and clearly marked (LOSC Articles 110(5) and 107), but the right of visit cannot be exercised in respect of a warship of another State or any other non-flag State vessel entitled to immunity.

2. Piracy

Under both customary international law and the conventions all States may take action on the high seas, or in any other place beyond the national jurisdiction of a State, against individuals or vessels involved in acts of piracy. Those committing acts of piracy are often said to have rendered themselves 'enemies of all mankind' and piracy is the oldest and most well-attested example of an act which attracts universal jurisdiction.[24] However, the LOSC definition of piracy is comparatively narrow, covering only 'illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State' (LOSC Article 101(a)).

This definition conjures up a vision of pirates roaming the seas in their own private and unregistered vessels, beyond the reach of any flag State, and preying on other vessels whose

[24] See, eg, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3. Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 61; Separate Opinion of President Guillaume, para 5.

own flag State may not be in a position to react or respond. This model reflects historical experience (and Hollywood stereotypes) but it also resonates with the current reality in a number of regions and, in particular where weak or failing States have produced the forms of legal vacuum in which piracy flourishes. The situation off the coast of Somalia has given rise to particular concern in recent times and a number of powers have stationed military vessels in the vicinity in order to deter and offer protection. In June 2008 the UN Security Council, with Somalia's consent and acting under Chapter VII of the UN Charter, adopted Resolution 1816 which called on States to co-operate in tackling piracy off the coast of Somalia and authorized them to enter Somalia's territorial seas in order to exercise enforcement jurisdiction over acts of piracy or armed robbery which had occurred either in international waters or in the territorial sea itself[25] (Guilfoyle, 2008). Later that year, in Resolution 1846, the Security Council went further and authorized States to take action against vessels reasonably suspected of involvement in piracy.[26] Shortly afterwards the Council went further again, calling on States to take all necessary measures within the territory of Somalia itself to suppress piracy and armed robbery at sea[27] (Guilfoyle, 2009, pp 61–78). It remains to be seen whether this innovative and expansive response to piracy off Somalia offers a model which might be employed more generally or whether its relevance is limited by the very particular situation within that country.

Previous responses to the shortcomings of the definition of piracy in LOSC 110 have been enduring in their impact. The *Achille Lauro* incident in the mid-1980s concerned a situation in which a group of passengers turned hijacker and seized control of an Italian cruise liner, and subsequently killed one of the other passengers. Although those responsible were clearly susceptible to, *inter alia*, Italian jurisdiction, this incident prompted the adoption of the 1988 Rome Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (known as the 1988 SUA Convention). Following the pattern of numerous other international conventions, it sets out an extensive range of offences which States parties must make criminal under their domestic law and obliges them either to extradite or to submit the cases of those suspected of committing such acts to their prosecuting authorities. Although the SUA Convention does not grant States parties further jurisdictional competencies at sea, it does oblige them to extend and use their domestic law against those who imperil the freedom of navigation. Moreover, Article 17 of the SUA Convention sets out a highly developed framework for facilitating cooperation between contracting States, including procedures for flag States to authorize the boarding and searching of vessels suspected of prohibited activities by those requesting to do so. These provisions have been built upon in other contexts, as will be described below.

3. Hot pursuit

The problem of how to deal with vessels which commit offences within internal waters or the territorial sea but evade arrest by moving outside the zones of coastal State jurisdiction has already been mentioned and one response—that of the contiguous zone—has already

[25] SC Res 1816 (2 June 2008). This authorization was for a period of six months from the date of the resolution.

[26] SC Res 1846 (2 Dec 2008), extending the authorizations given in SC Res 1816 for a further 12 months. This has recently been extended for a further 12 months by SC Res 1897 (30 November 2009).

[27] See SC Res 1851 (8 December 2008).

been noted. The doctrine of 'hot pursuit' provides another means of addressing the same problem and forms another exception to the principle of exclusive flag State jurisdiction. According to this doctrine, the rather complex details of which are set out at length in LOSC Article 111, warships or military aircraft of a coastal State which have commenced the pursuit of a vessel within their territorial sea (or within their the contiguous zone or EEZ, if the offence in question is one for which an arrest might have been made there) may continue that pursuit outside of it provided that the pursuit is continuous, although the actual ship or aircraft involved in the pursuit might change: indeed, practice suggests that ships or aircraft of several nationalities may cooperate in arresting a vessel in the exercise of a right of hot pursuit.[28]

A further variant on this is 'constructive presence'. Rather than commit an offence within the territorial sea, some vessels choose to remain just outside and dispatch smaller boats, for example, to take illegal goods ashore. Under such circumstances, the 'mother' vessel might be chased and arrested even though it has never entered the territorial sea and the pursuit begins outside of it. The same is true should boats be sent out from the coastal State to meet the 'mother' vessel: in both cases there has been teamwork that implicates the vessel operating outside of the territorial seas with those committing offences within it.

How far can this approach be taken? In *R* v *Mills*, the *Poseidon*, a vessel registered in St Vincent, transferred a consignment of drugs on the high seas to a trawler sailing from Ireland to the UK. Following the arrest of the trawler in the UK, the *Poseidon* was also arrested, this being justified on the basis of 'constructive presence' (Gilmore, 1995). Taken to extremes, this suggests that any vessel which whilst at sea colludes with another vessel in the commission of an illegal act within the jurisdiction of a State is liable to arrest by that State anywhere on the high seas. Though not irreconcilable, this expansive approach sits rather uneasily with the caution expressed by the International Tribunal on the Law of the Sea (ITLOS) in *M/V Saiga (No 2)* in which stressed the need for a strict approach to be taken to the application of LOSC Article 111.[29]

4. Broadcasting

In the 1960s elements of the international community became agitated about the rise of commercial broadcasting into a country from foreign registered vessels on the high seas and over which they could not exercise any control (or extract revenues).[30] Regional State practice to address this problem in the North Sea through co-operative measures was subsequently built on, with the result that LOSC Article 109 permits the arrest and prosecution of any person engaged in 'unauthorized radio broadcasting' from ships or installations on the high seas by a range of States, including the State where the transmissions are received (Anderson, 2006, pp 340–341). A perhaps unexpected consequence of this arose in the early 1990s when a vessel called the *Goddess of Democracy* planned to broadcast messages of solidarity and support for those arrested in the pro-democracy demonstrations in

[28] In 2003 the *Viarsa 1* was arrested following a pursuit lasting some 21 days and extending over some 3,900 km and which involved vessels from Australia, South Africa, and the United Kingdom. See Molenaar, 2004.

[29] *M/V Saiga No 2* (*St Vincent and the Grenadines* v *Guinea*), Case No 2, Judgment of 4 July 1999, paras 146–152.

[30] See generally Guilfoyle, 2009, ch 7. A recent film *The Ship that Rocked* (2008) provides an entertaining account of the issues as seen at the time.

Bejing. The Chinese authorities made it clear they would arrest the vessel if it did so, and the mission was aborted.

5. Slavery

The rather heavy-handed approach taken in respect of unauthorized broadcasting contrasts with the comparatively feeble manner in which other, more pressing, issues were tackled. The international prohibition of slavery is well-established in international law yet the 1982 convention does not permit the arrest of vessels engaged in slave trading by non-flag States; it merely provides that a State 'shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag' (LOSC Article 99). Admittedly, that Article also provides that any slave fortunate enough to escape and take refuge on a non-flag State vessel 'shall *ipso facto* be free' and since there is a right to visit vessels suspected of being involved in slave trading (LOSC Article 110(1)(b)) this should not be difficult to manufacture. Nevertheless, it remains difficult to see why those involved in the slave trade, and their vessels, should not be susceptable to arrest under such circumstances without the express authorization of the flag State. More attention has been paid to the related practice of smuggling migrants across boarders and the 'Migrant Smuggling Protocol' to the UN Convention against Transnational Organized Crime adopted in 2000 follows the model of the 1988 Vienna Convention against Illicit Traffic in Narcotics (considered below) in constructing a regime to encourage and facilitate the acquisition of flag-State consent to board and undertake other 'appropriate measures' to 'prevent and suppress' migrant smuggling.[31]

6. Drugs trafficking

As with slavery, the LOSC provisions concerning drugs trafficking have also been found wanting. Article 108 is an anodyne provision which merely provides that States 'shall co-operate' in the suppression of the drugs trade by vessels on the high seas and that a State which suspects a vessel flying its flag is involved in trafficking 'may request the co-operation of other states to suppress such traffic'. This states the obvious. The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances takes the matter further, developing and institutionalizing a more detailed framework for cooperation, but boarding a vessel still requires flag State authorization and there is no right of visit under LOSC Article 110. This was vividly illustrated in *R* v *Charrington* where irregularities in the manner in which the UK Customs and Excise obtained the consent of the Maltese authorities to board a vessel carrying £15m of cannabis resulted in the collapse of the domestic prosecution (Gilmore, 2000). State practice has gone further and, building on the model provided by the 1988 Convention, arrangements for mutual enforcement and assistance have been concluded in a number of spheres, particularly fishing. In addition, the UK has concluded bilateral arrangements permitting US authorities to board British vessels suspected of drugs offences on the high seas within the Caribbean region and has recently concluded a regional treaty to facilitate more widespread cooperation.[32]

[31] The Protocol entered into force in 2004 and currently has 123 States parties. See generally Guilfoyle, 2009, pp 184–226 for this and a consideration of related State practice.

[32] Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 10 April 2003. See Gilmore, 2005. For a more general review of the topic see Guilfoyle, 2009, ch 5.

Once again, it may be that long-standing dogmas have stood in the way of devising rather more effective means of tackling a matter of major international concern.

7. Terrorism and weapons of mass destruction

The 1988 SUA Convention was drafted in the wake of a terrorist outrage akin to piracy and so it was not surprising that the response was tailored to that form. As new concerns have emerged they too have been addressed within the model that the SUA provides, that is, through the identification and definition of additional forms of unlawful conduct and the utilization of cooperative arrangements to enable flag State consent to be more readily obtained for boarding, search and, if necessary, arrest of vessels by non-flag States. In October 2005 the International Maritime Organization adopted a Protocol to the SUA which would make it an offence under the convention to engage in an extremely broad range of activities at sea when the purpose of the activity, given its nature and context, is intended to 'intimidate a population, or to compel a Government or an international organization to do or to abstain from any act', or to knowingly transport persons who have committed such unlawful acts.[33] Moreover, the Protocol would permit participating States to notify the IMO Secretary General in advance that permission for boarding and searching is to be presumed if no reply is given to a requesting State within four hours of a request being made. This goes a long way to creating a presumption in favour of boarding by those States with reasonable grounds for suspicion and a heavy onus on those flag States that might seek to deny such a request. At the time of writing, however, the 2005 Protocol has not yet entered into force.[34]

The 2005 Protocol had already been prefigured by the 'Proliferation Security Initiative' (PSI), instigated by the USA in 2003 and which provides an enhanced framework for cooperation between participating States (see Byers, 2004; Guilfoyle, 2009, ch 9). The USA has also entered into reciprocal bilateral treaties with a number of States which, like the 2005 Protocol, provide for a presumption that a request for boarding has been granted if no response if given within a limited period of time.[35] Once again, these developments are consonant with the traditional principles of high seas and flag State jurisdiction, but point to a reality very different from that which those principles suggest for those willing to accept them through participating in the SUA Protocol, PSI or other bilateral arrangements. However, there is as yet no evidence to suggest that such broad-ranging rights and facilitative arrangements for boarding and search—even in this context—are reflective of customary international law.

[33] These acts not only embrace the use or discharge of any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage but also include the transportation of explosive or radioactive materials in the knowledge that they are intended to be so used, knowingly transporting a BCN weapon and a further range of related activities including the transportation of any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon with the intention that they will be used for such purposes. See 2005 Protocol, adding Article 3 *bis* to the SUA.

[34] The Protocol had only attracted ten of the 12 ratifications needed to enter into force.

[35] The USA has so far concluded nine such bilateral agreements, with the Bahamas (2008), Belize (2005), Croatia (2005), Cyprus (2005), Liberia (2004), Malta (2007), Marshall Islands (August 2004), Mongolia (2007), and Panama (May 2004). These States account for much of the registered shipping in the world. The time period for notification before the presumption in its favour takes effect in these agreements is the even shorter period of two hours.

C. CONCLUSION

The freedom of navigation has, then, been the subject of some whittling away, both by reason of the increasing breadth of the territorial sea, outlined in Section III, and by the erosion of exclusive flag-State jurisdiction outlined above. However, the modifications to the regime of innocent passage and the new regime of transit passage, as well as the limited and piecemeal nature of the increased jurisdictional competence over non-flag State vessels, all point in the direction of the continuing significance of the freedom of navigation, albeit that this is 'freedom under the law' (Anderson, 2006, at p. 345). This is further underscored by the remaining sections of this chapter which chart the rise of functional zones of jurisdiction and which, although representing a marked diminution in other freedoms of the high seas, left navigation relatively untouched and also ensured that the increase in the breadth of the territorial sea was kept within modest bands.

V. RESOURCE JURISDICTION

A. THE CONTINENTAL SHELF

During the opening decades of the twentieth century improvements in technology made the exploration and exploitation of seabed and subsoil resources beyond the territorial sea—particularly oil and then natural gas—both increasingly possible and economically viable. In theory, these deposits were available to all since legally speaking they were high seas resources. However, orderly and effective development required some degree of involvement by a proximate coastal State and in the Truman Proclamation (1945), the US President declared 'the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the US as appertaining to the US, subject to its jurisdiction and control'.[36] Following consideration by the ILC, the 1958 CSC provided that 'The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources' and did so independently of express acts or declarations (Articles 2(1) and 2(3)). In the *North Sea* cases the ICJ recognized this as a statement of customary law, stressing that these rights existed '*ipso facto and ab initio*'.[37] LOSC Article 77 reiterates this approach.

Natural resources include both mineral and other non-living resources of the seabed and subsoil and well as 'sedentary species' (CSC Article 2(4); LOSC Article 77(4)). Thus pearling is clearly covered by this definition, whereas jurisdiction over wrecks is not. Whether crabs and lobsters are continental shelf resources is more controversial, although the EEZ now provides an alternative means of securing coastal State jurisdiction over such resources.

The most vexed question concerns the outer limit of continental shelf jurisdiction. The seabed off a coast may not be a 'continental shelf' in a geophysical sense at all: the coast may swiftly plunge to great depths, as it does off the western coasts of much of South America, or merely be shallow indentations into which water has flooded, as in the Gulf region of the Middle East. The continental shelf proper is merely a component of the 'continental

[36] 1 *New Directions in the Law of the Sea* 106.

[37] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, paras 19, 39, and 43.