

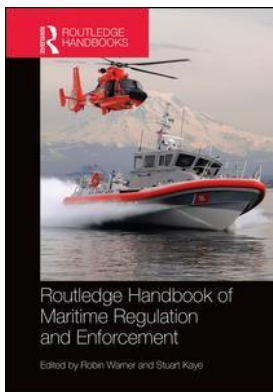
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### **The Use of Force**

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# The Use of Force

*Cameron Moore*

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## Introduction

At the heart of the issue of the use of force by warships and government law enforcement vessels engaged in maritime regulation and enforcement is the risk to life, limb and property. In any area of the law the use of force is usually subject to a great deal of regulation and discussion. It might be surprising then that the *Law of the Sea Convention* (LOSC) itself does not deal with the use of force much at all. There are some references to fisheries and environmental investigations<sup>1</sup> but there is no reference to powers in areas such as customs and immigration. In this sense the LOSC is an orthodox instrument of international law that governs relations between States and, through the concept of the flag state, their vessels. International human rights law provides some guidance on the relationship between states and private individuals subject to their jurisdiction, but does not specifically address the use of force at sea. The use of force at sea is therefore primarily a matter of customary international law<sup>2</sup> as well some limited conventional international law on specific matters, such as fisheries, or of a regional or bilateral character. Other than this the conduct of boarding officers is very much the domain of domestic law, whether it be the law of the nationality of the boarding officer or the law of the flag state of the vessel subject to the boarding. This chapter will therefore look at international judicial decisions and such conventional international law as there is, as well as some domestic law to give an indication of state practice.

This chapter will not address the law of naval warfare as, by its nature, it is a matter of warfare and not maritime regulation and enforcement. It is therefore outside of the scope of this book.<sup>3</sup> This chapter will also not address hot pursuit as it is the subject of other chapters. While hot pursuit can be a preliminary action to the use of force, it does not of itself necessarily involve the threat or use of force. Questions of enforcement jurisdiction are for other chapters in this book so it is important to note that the focus of this chapter is not so much on the jurisdictional basis to use force, except in so far it affects the level of force that may be permissible in a particular circumstance.

This chapter will consider the use of force across a number of specific sectors mainly because this is how the law is to be found. This will allow for some comparison of use of force provisions

intended for different law enforcement purposes. These sectors will include enforcement of United Nations Security Council Resolutions, narcotics, weapons of mass destruction, violence at sea, people smuggling and fisheries. This chapter will also address the extreme case of possible destruction of a civilian vessel at sea or civilian aircraft in the air in a situation of national self-defence or necessity. This is at the margins of what might be considered maritime regulation and enforcement, but it could also be below the threshold of armed conflict and therefore not regulated by the law of naval warfare.

It is important to keep in mind the various purposes of the use of force at sea in maritime regulation and enforcement. It might be for the purpose of compelling a vessel to go to a particular place without boarding, such as into port for a fisheries investigation, or simply away from the coastal state to prevent people smuggling. Alternatively, the use of force might be to board a vessel to divert, investigate or apprehend it. The use of force might also be to destroy a civilian vessel at sea or civilian aircraft in the air in a situation of national self-defence or necessity. Upon boarding, the use of force might occur in defence of the boarding officers themselves or those that they find on board. The use of force might also occur in the conduct of the investigation of an offence or, on the other hand, to restrain potential illegal immigrants while moving them away from the coastal state.<sup>4</sup>

It is not possible within the scope of this chapter to address the detail of matters such as arrest, detention, search and so on. Its aim instead is to discern the extent to which, in the absence of specific provision in the LOSC, there are still international law principles which can guide the use of force in maritime regulation and enforcement generally. This chapter argues that there is enough law and state practice to establish that there are such principles.<sup>5</sup> These principles are the use of minimum force and minimum interference, while maintaining the ability to enforce the law and the right of self-defence. Specifically, there must be efforts to ensure that life is not endangered, including a particular restraint on the use of force against civilian aircraft. There might be variations in emphasis between areas of regulation, such as between narcotics, fisheries and people smuggling probably due to the perceived risk of death or injury: however the principles remain essentially the same. The circumstances of destruction of vessels and aircraft in national self-defence stand as an exception to these principles, although destruction of vessels in cases of environmental necessity does not.

### The *Saiga* principles

The more common use of force at sea is in the context of national regulation and enforcement. As the LOSC is silent on the question of firing at or into a vessel and is very limited in respect of the use of force at all,<sup>6</sup> there are two significant cases referred to most by writers in this field, the *I'm Alone* and the *Red Crusader*.<sup>7</sup> There are other cases worth noting but it is these two that the International Tribunal on the Law of the Sea considered in the *Saiga Case*<sup>8</sup> in 1999, the most authoritative consideration of the question. Papastavridis describes this case as the *locus classicus* of the law on the use of force in interception operations<sup>9</sup> and Guilfoyle sees it as restating 'the general international law on the use of force to effect interdictions'.<sup>10</sup>

The *I'm Alone*<sup>11</sup> case involved the pursuit of a Canadian registered schooner by two US Coastguard vessels in 1929. After a long chase the US ships fired into *I'm Alone* and sank her with loss of life. The case raised a number of questions including the right of hot pursuit. On the use of force however, a Joint Canadian and American Commission found that the use of force had been excessive. It was acceptable to fire into a vessel to compel it to stop. If it sank as

an incidental result then this was also acceptable. It was not acceptable however to fire into the vessel for the purpose of sinking it:

... the intentional sinking of the vessel. . . could not be justified by any principle of international law.<sup>12</sup>

The *Red Crusader Case* saw the pursuit of a British trawler by a Danish fisheries vessel, the *Neils Ebbesen*, in 1961.<sup>13</sup> The *Red Crusader* had two members of the Danish vessel's crew onboard when she fled. The Danish vessel directed machine gun and 40 millimetre calibre gun fire into the mast, radar scanner and lights, then the stem, of the *Red Crusader* after the initial use of warning shots from the ship's 127 millimetre calibre gun. An Anglo-Danish Commission of Enquiry found that the Danish vessel:

Exceeded legitimate use of armed force on two counts:

- (a) firing without warning of solid [as opposed to explosive] gunshot;
- (b) creating danger to human life on board the *Red Crusader* without proved necessity, by the effective firing at the *Red Crusader*. . .

The Commission is of the opinion that other means should have been attempted, which if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure.<sup>14</sup>

The International Tribunal on the Law of the Sea came to consider these matters in the case of the *MV Saiga*.<sup>15</sup> In that case, a Guinean patrol boat opened fire on a St Vincent and the Grenadines registered tanker upon suspicion that it was bunkering fishing vessels contrary to Guinean customs law. The tribunal found that the Guinean patrol boat fired without warning. The tribunal considered a number of questions but particularly considered the use of force to apprehend vessels at sea. It considered the *I'm Alone* and *Red Crusader* cases as well as the use of force provision in art 22(1)(f) of the *United Nations Fish Stocks Agreement*,<sup>16</sup> discussed below. The essence of the Tribunal's decision on this point is that,

It is only after appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.<sup>17</sup>

The LOSC also specifies that states shall not impose custodial penalties for fishing offences so it is unlikely that use of potentially lethal force, merely in order to stop a vessel to board it, would be consistent with international law.<sup>18</sup>

From these considerations it would appear that the international law principles regarding firing into vessels require:

- That such action must be a last resort. It must be absolutely necessary evidenced by patiently exhausting all less forceful means available, including warning shots, unless an urgent threat to life demands otherwise.
- That it must follow an explicit warning that shots are to be fired into the vessel.
- That all efforts are made to ensure that life is not endangered. Any appreciable risk to life would render the use of direct fire unlawful. A death would not necessarily render the

action unlawful in itself provided that the risk of death from direct fire was extremely unlikely and mitigated against.<sup>19</sup>

As to the use of force in enforcement at sea generally, the Tribunal also usefully stated:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.<sup>20</sup>

The Tribunal, citing its *Saiga* decision, restated these principles in 2014 in the *MV Virginia G Case*<sup>21</sup> concerning the apprehension of a Panamanian flagged bunkering vessel in the exclusive economic zone (EEZ) of Guinea-Bissau.<sup>22</sup> In applying the *Saiga* principles it found that ‘the use of force [by Guinea-Bissau] did not go beyond what was reasonable and necessary in the circumstances.’<sup>23</sup>

Consistent with this, the ad hoc tribunal in the *Guyana/ Suriname* arbitration of 2007 stated:

... in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.<sup>24</sup>

(It is worth noting that in this case, the tribunal considered that the threat of the use of force by Surinamese warships against platforms in a disputed maritime area was not law enforcement but a threat of military action.<sup>25</sup> For this reason this chapter will not address this case further.)

## International law enforcement instruments

It comes then to consider the extent to which the *Saiga* principles reflect state practice in the use of force in maritime regulation and enforcement. A survey of a variety of instruments collected in Lowe and Talmon’s *The Legal Order of the Oceans*<sup>26</sup> provides a representative, even if not exhaustive, view of international law instruments which either reflect these principles or provide a little more guidance on the use of force at sea. While some of these are instruments of a regional rather than global character, it is still possible then to consider to what extent the principles which may be drawn from the *Saiga Case* represent customary international law.

### *Narcotics*

The *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*<sup>27</sup> contemplates boarding of vessels with the consent of the flag state under art 17. It also states that actions taken under that article:

shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag state or any other interested state.

This goes to considerations of reasonableness and necessity which involve broader considerations than the risk to life. Its statement of the ‘need not to endanger . . . life’ is very close to

the words of the *Saiga Case*, even though the *Saiga Case* of 1999 did not refer to this *Convention* of 1988.

The 1995 *Implementing Agreement*<sup>28</sup> to this *Convention*, at art 12 and titled ‘Operational Safeguards’, restates the form of words regarding use of force under the *Convention* itself but goes on to elaborate that parties shall take into account that there are dangers in boarding at sea and that boarding could be more safely done at a vessel’s next port of call. It also draws attention to minimising interference with legitimate commercial activities and unduly detaining or delaying a vessel. More importantly it states ‘the need to restrict the use of force to the minimum necessary’ but with the additional words ‘to ensure compliance with the instructions of the intervening State’. These latter words emphasise the law enforcement character of the use of minimum force provision, which is absent from the *Saiga* principles but still consistent with them. The overall effect is still firmly a minimum force and minimum interference, but nevertheless a law enforcement, approach.

Moving to a regional perspective, an agreement of 2002 between the United States and Panama<sup>29</sup> on counter-narcotics enforcement uses the same formulation of words at art XV of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, titled the ‘Conduct of Law Enforcement’. It adds requirements to ‘observe the norms of courtesy, respect and consideration for persons on board the suspect vessel’ and ‘not endanger the lives of persons on board and the safety of civil aircraft’. Article XVIII directly addresses the use of force. While explicitly preserving the ‘inherent right of self-defense’, it states that the use of force otherwise

shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum necessary in the circumstances, except that neither Party shall use force against civil aircraft in flight.

It is consistent with the *Saiga* principles while building upon them to emphasise a minimum force law enforcement model, which also excludes the use of force against civil aircraft.

It is interesting to compare the 2002 US/ Panama Agreement to the 2003 *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area*.<sup>30</sup> These agreements are closely related in terms of subject matter, time and area of geographical concern. This *Agreement* therefore unsurprisingly also uses the same form of words with respect to the use of force as used in the US/ Panama Agreement and art XV of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. It adds the provisions found in the 1995 *Implementing Agreement* concerning the safety of boarding in port instead of at sea and unduly detaining or delaying a vessel. It does not at this point restate the provisions concerning legitimate commercial activity or minimum force. It does instead, at art 22, provide a much more detailed minimum force provision as follows:

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defence.
5. In the event that the use of force is authorised and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.

6. In the event that the use of force is authorised and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party.

Despite the extra detail, these provisions are still essentially consistent with those outlined in the other narcotics instruments discussed above. They reinforce an approach of minimum force and minimum interference and a general restraint on the use of force against civil aircraft, whilst still pursuing a law enforcement objective and maintaining rights of self-defence. This approach by the US and Caribbean flag states provides a good indication of state practice on the use of force in intercepting vessels. Guilfoyle addresses each of these rules separately in order to ascertain the extent to which they reflect customary international law. Without repeating that analysis, he usefully considers rules 1 to 5 and 8 together, concluding that together they are a restatement of the customary international law put forward in the *Saiga Case*.<sup>31</sup>

### *Weapons of mass destruction*

A further US agreement worth mentioning in this survey is the 2004 *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*.<sup>32</sup> Without using exactly the same form of words as already discussed, art 8 of this Agreement, titled 'Safeguards', addresses similar concerns as follows:

1. Where a Party takes measures against a vessel in accordance with this Agreement, it shall:
  - a. take due account of the need not to endanger the safety of life at sea;
  - b. take due account of the security of the vessel and its cargo;
  - c. not prejudice the commercial or legal interests of the Flag State;
  - d. ensure within available means, that any measure taken with regard to the vessel is environmentally sound under the circumstances;
  - e. ensure that persons on board are afforded the protections, rights and guarantees provided by international law and the boarding State's law and regulations;
  - f. ensure the master of the vessel is, or has been, afforded the opportunity to contact the vessels' owner, manager or Flag State at the earliest opportunity.
2. Reasonable efforts shall be taken to avoid a vessel being unduly detained or delayed.

A key development here is the addition of the regard for the environment, which echoes art 225 of the LOSC as discussed below. This agreement is also significant because the US entered into similar agreements with a large number of flag states during the first decade of this century, covering 60% of the world's shipping by tonnage.<sup>33</sup> It therefore represents a significant example of state practice with respect to the use of force in maritime regulation and enforcement. Even if it uses different wording to that appearing in the instruments dealing with narcotics, it relies upon the same principles of minimum force and minimum interference.

### *Violence against ships and platforms*

The *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, also known as the 2005 SUA Protocol,<sup>34</sup> at art 8 bis (10), uses very similar wording to that in the agreements relating to weapons of mass destruction. The *Protocol* concerns boarding operations to counter violence against shipping and platforms. Despite the different subject matter, the approach to the use of force is essentially the same. This lends weight to principles of minimum force and minimum interference underlying this form of words, even if not the words themselves, being principles of general application to the use of force at sea in maritime regulation and enforcement.

### *People smuggling*

Continuing the point about instruments on different subject matter relying upon similar provisions, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention on Transnational Organised Crime*, adopted by the General Assembly of the United Nations in 2000,<sup>35</sup> is relevant. It uses essentially the same form of words as used in the instruments on weapons of mass destruction and violence against shipping and platforms, with the notable additional requirement to ensure the safety and humane treatment of the person on board. This requirement precedes the other requirements. Papastavridis is of the view that there is less scope for the use of force in regulating people smuggling given the threat to the human cargo.<sup>36</sup> This would indicate a different emphasis within the principles of minimum force and minimum interference, which would suggest that the acceptable levels of force should be lower because of the context but not because there is a fundamentally different principle.

### *Fisheries*

The use of force in the regulation of fisheries has a markedly understated approach, although still broadly consistent with the minimum force and minimum interference approach discussed above. The *United Nations Fish Stocks Agreement* art 22(1)(f), to which the International Tribunal for the Law of the Sea referred in the *Saiga Case*, states that an inspecting state shall ensure that its inspectors:

avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

This maintains a law enforcement approach but is much less detailed than the provisions discussed above.

Guilfoyle suggests that fisheries law is more restrained in respect of the use of force because of a common perception it is not as serious as drug smuggling and fishermen are not dangerous criminals. He then cites the Australian experience of violence on fishing vessels towards boarding parties to suggest that this perception is misplaced.<sup>37</sup> Even so, the *Pacific Fisheries Treaty*<sup>38</sup> is a fisheries instrument which seeks to avoid the use of force at all and perhaps exemplifies this perception, the last few lines of Part 5 of art 1 of which state,

Such boarding and inspection shall be conducted as much as possible in a manner so as not to interfere unduly with the lawful operation of the vessel. The operator and each member



of the crew shall facilitate and assist in any action by an authorised officer of a Pacific Island party and shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an authorised officer in the performance of his or her duties.

The provision is cast in terms of duties rather than rights. In terms of ascertaining the extent to which there are general principles for the use of force in maritime regulation and enforcement, this example indicates that there are approaches to enforcement which eschew force almost completely. This does not deny that there can be general principles when there is provision for the use of force. It does demonstrate that provision for the use of force in an enforcement instrument is not always considered appropriate. This would lend weight to the principle that any use of force in maritime regulation and enforcement, where it is accepted as appropriate, should be the minimum necessary. It also suggests that what minimum force means can vary depending on the sector being regulated.

### The LOSC and the use of force

As to the LOSC itself, art 225 provides a general guideline as to the extent of force to be used in enforcement against foreign vessels:

In the exercise under this Convention of their powers of enforcement against foreign vessels, States, shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

Whilst the language in art 225 is prohibitive, it implies measures including force by expressly limiting the potential damage enforcement could cause. Article 225 is to be found in Part XII of the LOSC which deals with 'Protection and Preservation of the Marine Environment'. Whilst it refers to the exercise of powers 'under this Convention' it is curious that this provision does not appear together with the articles concerning the rights of coastal states or the articles concerned with the high seas. This suggests that art 225 is primarily concerned with the preservation of the marine environment and much less with the use of force against vessels.<sup>39</sup> It is nonetheless consistent with a minimum force and minimum interference approach.

### Human rights law at sea

Moving to more general international law, human rights law has little to say directly about maritime regulation and enforcement. It is relevant however because it provides some guidance on the general relationship between those who exercise authority and those who are subject to it. As national approaches to this question vary considerably, for example China is not a party to the *International Covenant on Civil and Political Rights (ICCPR)*,<sup>40</sup> human rights provisions are useful mainly as sources of principle to guide interpretation more than being rules of law applicable *de jure*. Further, it is a question as to whether, for the purpose of the application of human rights law, a person on a vessel subject to a boarding is 'subject to jurisdiction' of the flag state conducting the boarding.<sup>41</sup> However, as the International Tribunal for the Law of the Sea stated in the *Saiga Case*,<sup>42</sup> 'Considerations of humanity must apply in the law of the sea, as they do in other areas of international law'.<sup>43</sup>

The ICCPR could be considered to embody customary international law.<sup>44</sup> It states that ‘rights derive from the inherent dignity of the human person’ and is probably the starting point for legal interpretation of phrases such as ‘human dignity’.<sup>45</sup> In particular, the rights that the ICCPR recognises which may be relevant to maritime regulation and enforcement would also often be subject to domestic legal sanction in any event such as the right to life in art 6, the right not to be subject to arbitrary arrest and detention as well as the right to *habeas corpus* (to seek release from unlawful detention) in art 9. Further, art 7 concerns the right not to be subject to cruel, inhuman or degrading punishment, and art 10 concerns the dignity of those deprived of their liberty. This *Convention* therefore embodies principles which inform and underpin the principles of minimum force and minimum interference applicable to the use of force at sea in maritime regulation and enforcement.

## Destruction

Turning from the routine to the exceptional, the destruction of vessels at sea and aircraft in the air over the sea is at the highest end of the spectrum of the use of force at sea. There are situations where this can occur outside of armed conflict and this chapter will discuss them as a means of bounding its consideration of the issue.

The destruction of aircraft in flight is the most dramatic example of the use of force at sea and has been controversial. Article 2 of LOSC makes clear that airspace over the territorial sea is part of the coastal state’s sovereignty and therefore is national, rather than international, airspace. Unlike ships, aircraft have no right of innocent passage in another state’s airspace over the territorial seas.<sup>46</sup> The International Civil Aviation Organisation moved to limit the possibility of the use of force against civilian airliners after an incident involving the shooting down of a Korean civilian airliner by the Soviet Union, after it apparently strayed into national airspace in 1983.<sup>47</sup> The *Chicago Convention*<sup>48</sup> regulates overflight by civilian aircraft and its 1984 Protocol<sup>49</sup> set requirements for intercepts in art 3 bis (a) as follows:

... every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

The International Civil Aviation Organisation’s ‘Rules of the Air’ set out detailed rules for the conduct of intercepts.<sup>50</sup>

Since then, civilian aircraft have become seen as a legitimate threat in themselves after their use as weapons to attack the World Trade Center, New York City and the Pentagon building, Washington DC, in the US on September 11th 2001. This draws attention to the last sentence of art 3 bis (a), which indicates that it does not affect the right of self-defence by states under art 51 of the *United Nations Charter*. The non-state and isolated character of the September 11th 2001 attacks did not amount to a situation of armed conflict. However it was considered to be an armed attack within the meaning of art 51, which gave rise to a right of national self-defence.<sup>51</sup> It is on the basis of self-defence then that a state might use force against an aircraft in flight.

The precise circumstances of when this might be lawful are difficult to ascertain, as reflected in the decision of the German Constitutional Court to find German legislation which authorised the use of force against aircraft unconstitutional. This was partly on the basis that it was

contrary to the fundamental right to life.<sup>52</sup> On the other hand, Australian legislation provides for the use of force against civilian aircraft without being too prescriptive about what factual circumstances might justify this. The legislation is directed towards high level security threats, rather than just law enforcement, which would suggest that it would most likely only be relied upon in situations of national self-defence.<sup>53</sup> Given that the use of force against civilian aircraft has a high likelihood of having lethal consequences, it should only be available in exceptional circumstances of national self-defence.

There is less law or precedent with respect to destruction of vessels at sea in situations of national self-defence. The same Australian legislation provides for this to occur in essentially the same circumstances as for aircraft.<sup>54</sup> The main difference is that practically speaking there can be alternatives to destruction in the case of vessels as they are normally slower and operate on the surface. It still may be however that the threat which the vessel poses is such that boarding, for example, is not a realistic option. A threatening vessel might be well defended, present a dangerous chemical, biological, radiological or nuclear risk or simply be too fast or manoeuvrable to board. In situations amounting to national self-defence, destruction of such vessels could be within the right of states under art 51 of the *United Nations Charter*.<sup>55</sup>

It is not only national self-defence that might justify the destruction of a vessel at sea. Circumstances of necessity might also justify such action. It is much less likely to authorise the use of lethal force however. For this reason it is unlikely to justify the destruction of aircraft. In 1967 the United Kingdom's Royal Air Force had to bomb the abandoned and stricken tanker MV *Torrey Canyon* to prevent the wreck foundering upon the British coast and also to break up the oil slick.<sup>56</sup> This incident led to the *Intervention Convention*,<sup>57</sup> art I of which provides that parties 'may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline . . . from . . . pollution of the sea by oil'. The 1973 *Protocol*<sup>58</sup> to the *Convention* extends this to protection from substances other than oil, which it defines very broadly.<sup>59</sup> Article V of the *Convention* states that measures, which would presumably include the use of force, must be proportionate to the damage 'actual or threatened' and 'shall not go beyond what is reasonably necessary'. In assessing proportionality, this article requires account to be taken of the damage which would occur if the measures were not taken, whether the measures would be effective and the damage which the measures themselves might cause. The *Convention* and *Protocol* together therefore provide potentially far reaching authority for the use of force where necessity justifies it in circumstances of environmental peril. For non-parties, or in analogous circumstances not contemplated in the *Convention*, this would indicate that necessity alone might still justify destruction of vessels under customary international law.

Destruction of vessels and aircraft at sea would be quite exceptional events, so it is not straightforward to apply general principles to them which might apply to other uses of force in maritime regulation and enforcement. They might apply more readily to situations of necessity however than of national self-defence.

## United Nations Security Council Resolutions

It is also worth considering the use of force at sea to enforce international law itself. There is some limited precedent for United Nations Security Council Resolutions (UNSCR) to authorise the use of force at sea.<sup>60</sup>

This first occurred in 1966 in respect of Rhodesia's unilateral declaration of independence from the United Kingdom. UNSCR 221<sup>61</sup> called upon the United Kingdom 'to prevent, by

*use of force if necessary*' the arrival of oil at the port of Beira in then Portuguese Mozambique, which would then be transported overland to Rhodesia. In 1990, in respect of Iraq's invasion of Kuwait, UNSCR 665<sup>62</sup> authorised member states 'to use such *measures commensurate to the specific circumstances as may be necessary* under the authority of the Security Council to halt all inward and outward maritime shipping' in order to enforce sanctions laid down in UNSCR 661.<sup>63</sup> In 1992, in respect of the break up of Yugoslavia, UNSCR 787<sup>64</sup> authorised member states to 'use such *measures commensurate with the specific circumstances as may be necessary* to halt all inward and outward maritime shipping. . .' (including on the Danube River) to enforce this and earlier resolutions. UNSCR 820<sup>65</sup> in 1993 subsequently sought 'to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except where authorised . . . or in case of force majeure'.

Later operations moved to a more direct form of words. In 1994 UNSCR 917<sup>66</sup> in respect of Haiti authorised member states to use 'all necessary means' to enforce the embargo on that country. Subsequently, in 2008, UNSCR 1816<sup>67</sup> used the same language. It authorised 'States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia', to:

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, *all necessary means* to repress acts of piracy and armed robbery;

In 2011, UNSCR 1973<sup>68</sup> in respect of the embargo on Libya also used the 'all necessary means' formulation. The words 'all necessary means' escalated the language from the UNSCR discussed in the previous paragraph to be consistent with that used in forceful land operations, such as that authorised in Somalia in 1992 by UNSCR 775<sup>69</sup> and East Timor in 1999 by UNSCR 1264.<sup>70</sup>

The broad language of these authorisations indicate that they operate at the strategic level and provide scant operational or tactical level direction. It is useful to be aware of the terminology favoured by the Security Council when authorising force in case of future similarly worded UNSCR, but otherwise the UNSCR cited really turn on their own circumstances.

## Conclusion

As stated above, the use of force by boarding officers is not a subject which the LOSC addresses. This makes the issue one primarily for customary international law, some international enforcement instruments which address particular regulatory sectors, the domestic law of the flag states of warships and government law enforcement vessels conducting interceptions, as well as the flag states of the vessels subject to them. On the face of it, this creates a bewildering array of potentially overlapping jurisdictions and different national and international approaches to the use of force in law enforcement. Situations of national self-defence or enforcement of United Nations Security Council Resolutions at sea do not really assist in ascertaining these principles. Even so, it is possible to derive principles from the *Saiga Case* international human rights law, and the representative selection of relevant international instruments discussed above.

The *Saiga* principles essentially provide that the general principles applicable to the use of force in national regulation and enforcement are the use of minimum force and minimum interference whilst still permitting law enforcement action. These principles do not detract from the inherent right to self-defence, but extend to a firm rule prohibiting the use of force against civil aircraft for law enforcement purposes. A number of international instruments dealing with specific regulatory sectors bear this out. The use of common wording on the use of force indicates a broad acceptance of the principles, whether in the form common to a number of narcotics instruments, or in the different form of words common to quite different instruments dealing with weapons of mass destruction, violence at sea or people smuggling. The less detailed and restrained approach in some fisheries enforcement instruments still rests upon principles of minimum force and minimum interference, but indicates that the regulatory context can alter perceptions of what minimum force might mean. Arguably then, the *opinio juris* and state practice are therefore sufficient to establish the *Saiga* principles as customary international law.

As to whether this is an area that requires reconsideration in the form of new treaties or amendment to the LOSC, this is probably unnecessary. The *Saiga* principles are reasonably clear and not apparently subject to serious dissent. Their manifestation in more precise or detailed but quite varied form in a range of enforcement instruments indicates a wide degree of support for them. The best way to develop these principles would be for future sectoral instruments to try to adopt similar wording to that already adopted, although with the liberty to make relevant adaptations as required. This would reinforce the general principles whilst permitting flexibility to address the particular concerns at hand.

## Notes

- 1 For example, LOSC arts 73 and 226.
- 2 D. Rothwell and T. Stephens appear to share this view in *The International Law of the Sea*, Oxford: Hart, 2010, p. 419; see also I. Shearer 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', *International and Comparative Law Quarterly*, 1986, vol. 35, p. 341; M. Tsamenyi and K. Mfodwo 'Enforcing Fisheries Jurisdiction in the EEZ: Some Legal and Policy Considerations' in D. Mackinnon and R. Sherwood (eds) *Policing Australia's Offshore Zones: Problems and Prospects*, Centre for Maritime Policy, University of Wollongong 1997, pp. 257, 259–260 and 262–264.
- 3 For this reason this chapter will not address the Israeli enforcement of a blockade of Gaza. Whether the law of naval warfare authorised the boarding of the *Mavi Marmara* in 2010 or not, the incident is inseparably connected with the hostilities between Israel and Gaza. It is not possible within the confines of this chapter adequately to analyse the complex legal questions involved. See the discussion in J. Kraska and R. Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, Leiden, 2013, pp. 895–901.
- 4 These examples are discussed below.
- 5 A position for which Papastavridis and Guilfoyle also argue. E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Oxford: Hart, 2013, pp. 81–82. D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge: Cambridge University Press, 2009, p. 266.
- 6 See discussion in Shearer, op. cit. pp. 349–352.
- 7 Primary references cited with discussion of each case below. See D.P. O'Connell, *The Influence of Law on Sea Power*, Manchester: Manchester University Press, 1975 pp. 65–69; Guilfoyle, op. cit., 271 and 277; Rothwell and Stephens, op. cit. 420–422.
- 8 *The 'M/V Saiga' (No.2) Case* International Tribunal for the Law of the Sea, Year 1999, (Saint Vincent and the Grenadines v. Guinea).
- 9 Op. cit., 69.
- 10 Op. cit., 277.
- 11 'Claim of the British Ship "P'm Alone" v United States, Joint Interim and Final Reports of the Commissioners, 1933 and 1935', *American Journal of International Law*, 1935, vol. 29, p. 326.
- 12 At 330. See discussion in Kraska and Pedrozo, op. cit., 760–762.

- 13 35 *International Law Reports* 485 (1962) pp. 497–499, see discussion in Kraska and Pedrozo, op. cit., pp. 762–763.
- 14 ILR, *ibid.*, p. 499.
- 15 Op. cit.; see discussion in Kraska and Pedrozo, op. cit., pp. 763–766.
- 16 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995*, done 4 December 1995, 2167 UNTS 88, entered into force 11 December 2001.
- 17 *Saiga* para 156.
- 18 LOSC art 73(3).
- 19 Kraska and Pedrozo, op. cit., p. 549, state that the *Saiga* principles are similar to those in the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.
- 20 *Saiga* para 155.
- 21 The '*M/V Virginia G*' Case International Tribunal for the Law of the Sea, Year 2014, (Panama v Guinea-Bissau).
- 22 *Ibid.*, para 48.
- 23 *Ibid.*, para 361.
- 24 (2008) 47 *International Law Materials* 164 at para 445. Discussed in Papastavridis, op. cit., p. 70; Guilfoyle criticises the ambiguity of this distinction, op. cit., 275–276.
- 25 *ILM*, *ibid.*
- 26 A.V. Lowe and S.A.G. Talmon, *Basic Documents on the Law of the Sea: The Legal Order of the Oceans*, Oxford: Hart, 2009.
- 27 Done 20 December 1988, 1582 UNTS 165, entered into force 11 November 1990.
- 28 *Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, done 31 January 1995, 2136 UNTS 81, entered into force 1 May 2000.
- 29 *Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, done 5 February 2002, entry into force 5 February 2002, cited in Lowe and Talmon, op. cit., p. 443.
- 30 Done 10 April 2003, not yet in force, cited in Lowe and Talmon, op. cit., p. 789.
- 31 Guilfoyle, op. cit., 282 and 278–294 more generally.
- 32 Done 11 February 2004, entered into force 8 December 2004, cited in Lowe and Talmon, op. cit., p. 805.
- 33 Kraska and Pedrozo, op. cit., p. 788. The 'safeguards' article is very similar across the various agreements. The flag states concerned are Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama (building on the agreement discussed above) and St Vincent and the Grenadines. See <http://www.state.gov/t/isn/c27733.htm> for the text of the agreements.
- 34 Done 14 October 2005, 1678 UNTS 304, not yet in force. Discussed by Guilfoyle, op. cit., at p. 266.
- 35 UN Doc. A/RES/55/25 (2000) of 15 November 2000, entered into force 28 January 2004.
- 36 Papastavridis, op. cit., p. 301.
- 37 Guilfoyle, op. cit., pp. 290–291.
- 38 *Agreement among Pacific Island States Concerning the Implementation and Administration of the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America of 2 April 1987*, done at Port Moresby on 2 April 1987, *Australian Treaty Series* 1988 No.42, entered into force 15 June 1988.
- 39 See Rothwell and Stephens, op. cit., pp. 419–420.
- 40 *International Covenant on Civil and Political Rights* done 19 December 1966, 999 UNTS 171, entered into force 23 March 1976.
- 41 [First] *Optional Protocol to the International Covenant on Civil and Political Rights*, done 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 1. See discussion in Papastavridis, op. cit., pp. 242–243, who is of the view that the 'preponderant view' is that such persons are under the jurisdiction of the flag state conducting the boarding. Whilst this author is inclined to agree with Papastavridis on this point, it is not necessary to argue a decided position in this chapter, nor is there is space to. Guilfoyle's view is consistent with that of Papastavridis, op. cit., p. 268.
- 42 Op. cit.

- 43 Para 155.
- 44 See Guilfoyle, *op. cit.* p. 268.
- 45 *ICCPR* Preamble.
- 46 A plain reading of art 17 shows that the LOSC is silent on whether aircraft have a right of innocent passage, from which it can be inferred not to exist. Article 19 states that launching, landing or taking aboard any aircraft is not innocent passage (but does not expressly prohibit overflight).
- 47 P. Grier, 'The Death of Korean Airlines Flight 007', *Air Force Magazine*, 2013, vol. 96(1), p. 62.
- 48 Properly titled the *Convention on International Civil Aviation* done 7 December 1944, 15 UNTS 295, entered into force 4 April 1947.
- 49 *Protocol relating to an Amendment to the Convention on International Civil Aviation* done 10 May 1984, *Select Documents on International Affairs* No.32 (1984) 2.
- 50 Being Annex 2 to the *Chicago Convention*, see specifically chapters 5, 6, 8 and 9.
- 51 See discussion of this issue in Daniel Bethlehem, 'Self-Defense Against Imminent or Armed Attack by Nonstate Actors', *American Journal of International Law*, 2012, vol. 106(4), p. 769.
- 52 Bundesverfassungsgericht (BVerfG – Federal Constitutional Court) 59 *Neue Juristische Wochenschrift* (NJW) 751 (2006) discussed in O. Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act' *German Law Journal*, 2006, vol. 7(9), p. 761.
- 53 *Defence Act* (Cth) s 51SE, discussed in S. Bronitt and D. Stephens, "'Flying Under the Radar" – The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments', *Oxford University Commonwealth Law Journal*, 2007, vol. 7, p. 265.
- 54 *Ibid.*
- 55 See discussion in Papastavridis, *op. cit.*, 148–154.
- 56 Rothwell and Stephens, *op. cit.*, 364.
- 57 *Ibid*; *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, done 29 November 1969, 1975 UNTS 212, entered into force 6 May 1975.
- 58 *Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil*, done 2 November 1973, 1313 UNTS 4, entry into force 30 March 1983.
- 59 Art I.
- 60 Kraska and Pedrozo discuss this issue at some length, *op. cit.*, pp. 903–921. See also R. McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea?', *International and Comparative Law Quarterly*, 2002, vol. 51(2), p. 249.
- 61 UN SCOR, 1277th mtg UN Doc S/Res/221 (1966).
- 62 UN SCOR, 2938th mtg UN Doc S/Res/665 (1990).
- 63 UN SCOR, 2932nd mtg UN Doc S/Res/661 (1990).
- 64 UN SCOR, 3137th mtg UN Doc S/Res/787 (1992).
- 65 UN SCOR, 3200th mtg UN Doc S/Res/820 (1993).
- 66 UN SCOR, 4987th mtg UN Doc S/Res/917 (1994).
- 67 UN SCOR, 5902nd mtg UN Doc S/Res/1816 (2008).
- 68 UN SCOR, 6498th mtg UN Doc S/Res/1973 (2011).
- 69 UN SCOR, 3110th mtg UN Doc S/Res/775 (1992).
- 70 UN SCOR, 4045th mtg UN Doc S/Res/1264 (1999).