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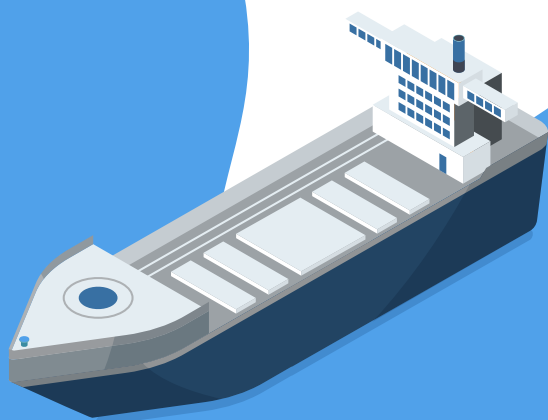
United Nations Office on Drugs and Crime

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2023

# JURISDICTION IN RELATION TO ILLICIT ARMS TRAFFICKING AND THE LAW OF THE SEA

ISSUE PAPER




From  
the People of Japan


GLOBAL MARITIME  
CRIME PROGRAMME



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
VIENNA



# JURISDICTION IN RELATION TO ILLICIT ARMS TRAFFICKING AND THE LAW OF THE SEA



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UNITED NATIONS



# I. INTRO DUC TION

The seizure from vessels of arms trafficked by sea is not an uncommon belligerent, national security, or maritime law enforcement response. However, it must be acknowledged at the outset that in many situations, the precise jurisdictions engaged by any particular incident of arms seizure may not always be clear or may indeed evolve over time in respect of a series of such seizures. For the sake of differentiation and clarity, therefore, it is essential to note at the outset that the scope of this report is limited to the issue of jurisdiction over illicit arms trafficking by sea in relation to the following:

Authorities in the *LOSC* 1982; and

Authorities in associated international instruments, primarily *UNTOC*, but also (as relevant) the *ATT* and selected other general weapons related instruments.

The approach that underpins this report, consequently, is a review of the *UNTOC* and *FP* through a *LOSC* 1982 lens.

## 1.2 WHAT IS NOT COVERED IN THIS REPORT

The scope of this report, as briefly outlined immediately above, is thus quite narrow. First, the report *does not* deal with *LoNW* or *LOAC*, and in particular with the belligerent rights of visit and search, capture, blockade, and the associated contraband regime. On this rule set, reference should be made to, inter alia, the *San Remo Manual* and relevant national doctrines and military manuals.<sup>1</sup>

Second, the report *does not* deal with the authority to seize arms shipments at sea in accordance with the *UNC* Article 51 right of national or collective self-defence. In this regard, there is a separate body of international law analysis<sup>2</sup>, as well as a variety of national legislation<sup>3</sup> that is relevant. Similarly, this report does not deal with the *2005 SUA Protocol* 'transport offences', which are dealt with in Chapter 11 of the *UNODC Maritime Crime: A Manual for Criminal Justice Practitioners* (Third Edition, 2020), and also in a separate paper before this *LEGM*.<sup>4</sup> Finally, this report does not deal with the seizure of weapons as an incident of ship-boarding security operations.<sup>5</sup>

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1 See the various National and Military Manuals accessible at <<https://usnwc.libguides.com/c.php?g=86619&p=557511>>

2 See, inter alia: Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, 2009), Ch10; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford, 2011), Ch4; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhof, 2013), Ch21; Efthymios Papstavridis, *The Interception of Vessels on the High Seas* (Hart 2014), Ch5.

3 Eg: *Defence Act 1903* (Australia), s46 (special powers), ss51D-51E (powers relating to means of transport and persons in specified area) <<https://www.legislation.gov.au/Details/C2021C00371>>

4 UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (Third Edition, 2020), sections 11.3-11.4, 11.6-11.7

5 Eg: *Maritime Powers Act 2013* (Australia), s66 (securing weapons) <<https://www.legislation.gov.au/Details/C2017C00123>>



Third, this report *does not* deal with the issue of floating arsenals and PMSC weapons storage vessels. Guidance on this issue may be found in the UNODC GMCP *Summary of Laws Regulating Floating Armouries and their Operations* (Annex A to *Maritime Crime: A Manual for Criminal Justice Practitioners, 2020*).<sup>6</sup> Additionally, this report *does not* deal with the issue of rules related to security detachment weapons carriage on merchant vessels, nor with port state rules regarding PMSC weapons carriage in merchant vessels. These issues have been the subject of analysis by, inter alia, the International Maritime Organisation<sup>7</sup>, academic commentators<sup>8</sup>, and are in part addressed in Part V of the UNODC GMCP *Handbook on the Use of Force by Private Security Companies* (Annex B to *Maritime Crime: A Manual for Criminal Justice Practitioners, 2020*<sup>9</sup>).

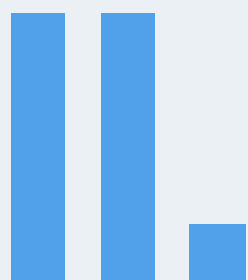
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<sup>6</sup> <https://www.unodc.org/unodc/en/piracy/manual-and-annexes.html>

<sup>7</sup> For example, MSC.1/Circ.1405/Rev.1 *Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, dated 16 September 2001, Section 3.4

<sup>8</sup> For example, Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates' (2013) 62:3 *International and Comparative Law Quarterly* 667, 675-686

<sup>9</sup> <https://www.unodc.org/unodc/en/piracy/manual-and-annexes.html>



# **DEFINITION / SCOPE OF 'ARMS' AS RELEVANT TO THIS REPORT**



## 2.1 MATERIAL CONTEXT: 'ARMS TRAFFICKING'

The global stockpile of small arms was estimated in 2017 to be more than one billion, of which 85% (857 million firearms) was in civilian hands as opposed to managed by militaries (13%) and law enforcement agencies (2%).<sup>10</sup> This stockpile supports a very large illicit trade in arms - the Global Initiative Against Transnational Organised Crime's (GI-TOC) *Global Organized Crime Index* for 2021 'ranks arms trafficking as the third most prevalent criminal market globally', noting that this trade is 'particularly rife in Africa, the Americas and Asia.'<sup>11</sup> Similarly, the UNODC *Global Study on Firearms Trafficking 2020 Report* assessed - based on data it was able to collect and collate - that although only 'a total of 550,000 firearms were seized during each of 2016 and 2017', it was clear that :

*«The real global figure for seizures is much higher than 550,000, as some of the countries covered by this study underreported their seizures for administrative reasons, and the quality of data varied significantly between countries. Also, many countries have not provided any information, including some of the world's most populous nations.»<sup>12</sup>*

The data available also disclosed a number of relevant points in respect of the illicit traffic of arms by sea:

In terms of specific illicit arms trade related offences, 64% tend to be for illicit possession, but the second most common is offence is arms trafficking - 9%.<sup>13</sup>

The vast bulk of arms seized are seized elsewhere than in their country of manufacture<sup>14</sup>, indicating that illicit transborder movement is very common.

That although 'more than 9 in 10 seizures take place within the national territory'. border seizures 'shed considerable light on transnational illicit flows in that the data 'reveal[s] that while the number of cases involving customs-related seizures from vessels is relatively low, each case involved nearly 20 seized weapons.'<sup>15</sup>

- Of total arms seizures, whilst only 1.8% took place on vessels/in harbours, 'seizures from vessels [are] on average more than five times larger than any other type of conveyance'<sup>16</sup>, such that seizures from vessels accounted 6% of the total reported arms seized.<sup>17</sup>

Research also indicates that illicit arms trafficking by sea techniques are evolving. As the *Global Study on Firearms Trafficking 2020 Report* observes:

Another technique to cross the border avoiding the detection of customs was reported by the Philippines, whereby firearms were jettisoned from vessels at prearranged areas some distance from the shore and subsequently picked up by small boats.<sup>18</sup>

Thus, and of direct relevance to this report, *Global Study on Firearms Trafficking 2020* ultimately concluded that although trafficking by land is still the predominant mode of illicit arms trafficking,

Traffickers tend to use sea transport for large shipments. Cases of seizures from vessels involved more than five times the number of firearms typically intercepted from other

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10 Small Arms Survey <<https://www.smallarmssurvey.org/data-base/global-firearms-holdings>>

11 Guillermo Vázquez del Mercado, *Arms Trafficking and Organized Crime: Global trade, local impacts*, Global Initiative Against Transnational Organized Crime (GI-TOC) Policy Brief, August 2022 <<https://globalinitiative.net/analysis/arms-trafficking-and-organized-crime/>>

12 UNODC, *Global Study on Firearms Trafficking*, 2020, p7

13 Ibid, p33 fig 1

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14 Ibid, p53, fig 24

15 Ibid, p57

16 Ibid, p61, fig 6

17 Ibid, p62, fig 7

18 Ibid, p62



types of transportation. This suggests that law enforcement could get a better return on their investment if they focused on transportation by sea... Interceptions from vessels accounted for only around 6 per cent of all customs cases, but 33 per cent of the total number of firearms seized by customs.<sup>19</sup>

Additionally, it is also essential to note at the outset that illicit trafficking in arms is often linked to other crimes, including other maritime crimes. The *2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects* noted (in the Preamble) concern 'about the close link between terrorism, organized crime, trafficking in drugs and precious minerals and the illicit trade in small arms and light weapons, and stressing the urgency of international efforts and cooperation aimed at combating this trade simultaneously from both a supply and demand perspective...'.<sup>20</sup> This concern has been reiterated many times: As a 2018 UNODC Secretariat background paper related to the *UNTOC Firearms Protocol (FP)* similarly reported:

The dividing line between firearms trafficking, on the one hand, and other forms of organized crime and terrorist activities on the other, is often not very clear because of the multiple transactions and exchanges of services among the different actors involved. This is the case, for example, when terrorist groups exploit the infrastructure of organized criminal groups to procure tools or profit from organized crime activities, including firearms trafficking, to generate funds and pursue their goals. Another such interconnection is when organized criminal groups, including drug trafficking organizations, procure illicitly trafficked firearms to protect their illicit merchandise

or facilitate their trafficking activities.<sup>21</sup>

In this regard, the UNODC *Global Study on Firearms Trafficking 2020* report also noted that the nexus between firearms trafficking and terrorism remains high, with some estimates being that where there is cooperation between crime and terrorism networks, in three quarters of these cases it is the crime networks that supply weapons to the terrorist networks.<sup>22</sup>

## 2.2 MATERIAL CONTEXT: 'ARMS' EXCLUDED FROM SCOPE

This report is concerned with regular *conventional* arms trafficking. This means that two categories of items that are weapons or can be weaponised are not dealt with. The first is the trafficking of WMD and WMD precursors. The trafficking of WMD and precursors - by sea or otherwise - is the subject of a quite complicated regime. This regime includes components of general applicability to the arms trade and traffic (such as the *Arms Trade Treaty - ATT*<sup>23</sup>) as well as bespoke WMD-specific instruments and provisions (such as *SUA 2005 Protocol* transport offences), schemes and arrangements (such as the *Missile Technology Control Regime (MTCR)*<sup>24</sup> and the *Proliferation Security Initiative*<sup>25</sup>), and specifically targeted WMD sanctions regimes (such as UNSCR 1718 (2006) subsequent to a DPRK nuclear test<sup>26</sup>).

<sup>21</sup> *Practical measures under the Firearms Protocol that contribute to preventing criminal organizations and terrorist groups from acquiring weapons through illicit trafficking, and to monitoring the achievement of target 16.4 of the Sustainable Development Goals: Background paper prepared by the Secretariat (CTOC/COP/WG.6/2018/2)*, 06 March 2018, para 4 < <https://www.unodc.org/unodc/en/firearms-protocol/the-firearms-protocol.html> >

<sup>22</sup> *Global Study on Firearms Trafficking 2020*, p80

<sup>23</sup> See section 5 below

<sup>24</sup> <https://mtcr.info/>: 'The aim of the MTCR is to restrict the proliferation of missiles, complete rocket systems, unmanned air vehicles, and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometres, as well as systems intended for the delivery of weapons of mass destruction (WMD).'

<sup>25</sup> <https://www.psi-online.info/>

<sup>26</sup> UNSCR 2006 concerning DPRK, 14 October 2006, eg OP 8(e), (f)

<sup>19</sup> *Ibid.*, p10

<sup>20</sup> *2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, Preamble, para 7



The second category of weaponizable items that is not dealt with in this report is the regulated movement of dangerous goods, including explosives, as governed by instruments and regimes such as the *International Maritime Dangerous Goods (IMDG) Code* ('an international code for the maritime transport of dangerous goods in packaged form, in order to enhance and harmonize the safe carriage of dangerous goods and to prevent pollution to the environment')<sup>27</sup> and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.<sup>28</sup> This is not to imply that such cargoes cannot be weaponised (as clearly, they can), nor that there are no gaps in the regulation of maritime transport of weapons and weaponizable material such as 'high consequence dangerous goods' (as the UN's 2019 *Recommendations on the Transport of Dangerous Goods: Model Regulations* also serve to indicate<sup>29</sup>).

As a further note, this report does not deal with associated equipment such as body armour, laser range-finders, and nationally-designated prohibited or controlled edged weapons.

## 2.3 MATERIAL CONTEXT: WHAT CONVENTIONAL 'ARMS' ARE COVERED BY THIS REPORT?

Relevant international and regional arms control instruments have a different scope of application, with respect to the items covered by the instruments. The Arms Trade Treaty applies to 'all conventional arms within

the following categories: (a) Battle tanks; (b)

Armoured combat vehicles; (c) Large-calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.' Additionally, Articles 3 and 4 also bring within scope 'ammunition', and 'parts and components'. In contrast, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol), supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) only applies to firearms[FN], their parts and components [FN] and ammunition [FN]. The scope of application of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (Programme of Action on Small Arms) and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (International Tracing Instrument)

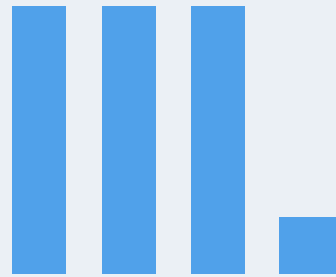
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27 <https://www.imo.org/en/OurWork/Safety/Pages/Dangerous-Goods-default.aspx>

28 <http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>

29 UN, *Recommendations on the Transport of Dangerous Goods: Model Regulations* (ST/SG/AC.10/1/Rev.21 Vol 1) 2019 <[https://unece.org/fileadmin/DAM/trans/danger/publi/unrec/rev21/ST-SG-AC10-1r21e\\_Vol1\\_WEB.pdf](https://unece.org/fileadmin/DAM/trans/danger/publi/unrec/rev21/ST-SG-AC10-1r21e_Vol1_WEB.pdf)>. See para 1.4.3.1.1: 'High consequence dangerous goods are those which have the potential for misuse in a terrorist event and which may, as a result, produce serious consequences such as mass casualties, mass destruction or, particularly for Class 7, mass socio-economic disruption.'

is broader than the Firearms Protocol in the categorization of weapons but does not apply to ammunition and weapon components. The two instruments use the term small arms and light weapons. While the terms small arms and firearms refer to the same items, the term light weapons is broader and includes weapons designed for use by two or three persons serving as a crew, such as heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres. Unlike these global instruments, some regional instruments, such as the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, also include explosives into their scope of application. When referring to «arms», the present paper means small arms and light weapons, their components and ammunition as well as explosives and weaponized unmanned aircraft systems.



# WHAT DOES THE LOSC 1982 SAY ABOUT ILLICIT ARMS TRAFFICKING BY SEA?

The *LOSC* 1982 does not deal explicitly with illicit trafficking of arms. The most appropriate way to assess the jurisdictions afforded in respect of this criminal activity is to assess the question from a flag state, coastal state, and third state perspective.

### 3.1 FLAG STATE JURISDICTION

The illicit trafficking of arms in a vessel flying its flag is a valid subject of jurisdiction for all flag states, regardless of the maritime zone in which the vessel is located. The illicit trafficking of arms is as an 'administrative, technical, and social matter' over which the flag state shall 'effectively exercise its jurisdiction and control' as per Art 94(1) and 94(2)(b). This is evident, for example, in the fact that the combined effect of *UNTOC* and the *Firearms Protocol* is to require that states criminalise the trafficking of firearms, their parts and components and ammunition where 'The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed'.<sup>30</sup> Consequently, if a vessel changes flag (appropriately, as per Article 92(1)) this change on relevant jurisdiction will have an effect on any arms cargo, and will constitute a transfer from one jurisdiction to another. That is, not only will the arms cargo need to now comply with the new flag State's regulatory scheme, but the change in flag may also create reporting obligations in respect of regulated arms cargo 'transfers' on the part of the prior flag State.

## 3.2 COASTAL STATE JURISDICTION

### 3.2.1 INTERNAL WATERS

The coastal state will have jurisdiction in respect of illicit trafficking of arms being conducted in a non-sovereign immune vessel flying the flag of another state when that vessel is within that coastal state's **internal waters**. Internal waters 'are subject to the sovereignty of the coastal State'<sup>31</sup> and 'fully encompass... prescriptive and enforcement jurisdiction, subject only to the limitations imposed under international law'.<sup>32</sup> That is, both the flag state and the coastal state (which is in this case the port state) will have jurisdiction.

There are three 'limitations imposed under international law' (as mentioned just above) which are of relevance to the issue of arms trafficking by sea. First, the provision in *LOSC* Article 8(2) (relating to the continued operation of the right of innocent passage in waters enclosed by a straight baseline, where those waters 'had not previously been considered' to be internal waters) may be relevant in terms of determining whether the relevant criminal jurisdiction is in respect of breaches of innocent passage in the territorial sea, or is to be assessed in relation to the authorisations available in respect of internal waters.<sup>33</sup> A similar concern also manifests in respect of historic bays as per Article 10(6).

The second possible limitation is the customary assumption in favour of free access to ports for foreign merchant shipping, as noted in, inter alia, the *Nicaragua* case: 'it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage

31 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* Merits judgment of 27 June 1986, (1986) ICJ Reps 14, [213]-[214]

32 Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart, 2010), p54

33 See the examples of national legislative reflection of this caveat noted in Rothwell and Stephens, *The International Law of the Sea*, p55

30 *UNTOC* Art 15(10)(b)

in territorial waters for the purposes of entering or leaving internal waters...'.<sup>34</sup> However, there is significant state practice<sup>35</sup>, and some treaty law, to the effect that states can for certain reasons – including protection and security – limit or bar access to their ports and other internal waters for certain types of foreign merchant vessels. The *Port State Measures Agreement* (IUU fishing)<sup>36</sup>, the *Port State Control MoU* (inspections and refusal of access in relation to a set of 'relevant instruments')<sup>37</sup>, and the *International Ship and Port Facility Security Code* (reporting, security, and access)<sup>38</sup>, for example, all empower states to take such action in certain circumstances.

The third limitation is whether, *in practice*, a port state seeks to exercise its criminal jurisdiction over a foreign merchant vessel in its port. There is a customary – but not universal – assumption (which, it must be emphasised again, is practice, not customary international law) that port states will generally not seek to interfere in matters of the internal discipline or 'internal economy' of a foreign merchant vessel. Equally, however, where conduct or cargo in the vessel may hold consequences for the interests of the coastal state, it is also generally accepted that the port state can exercise jurisdiction.<sup>39</sup> Given the obligation to take security and preventive measures in respect of arms cargoes in ports (*Firearms Protocol*, Article 11) and to cooperate in the suppression of the illicit trade in arms (*Firearms Protocol*, Article 13), as well as other obligations in respect of ship and port security

(for example), the presence of a cargo of illicit arms in a merchant vessel within a port state's internal waters, regardless of whether the intended destination is that port state or another state, is highly likely to be considered of sufficient port state interest to warrant the exercise of enforcement jurisdiction to seize the cargo. This assessment is buttressed by the fact that seizures of such cargoes are in fact made in ports, as the previously noted UNODC 2020 report indicates. Additionally, any attempt to distribute any of the illicit arms cargo will almost certainly constitute an importation offence, and any attempt to land and store any illicit arms cargoes for on-shipment will likely constitute a transit or licencing / documentation / labelling offence (eg, as per the *Firearms Protocol*). In particular, pursuant to article 10 of the *Firearms Protocol*, a country that exports firearms has the obligation to await a notice in writing of the transit countries that they have no objection to the transit. The transfer of firearms, their parts and components and ammunition across the territory of a State without the States authorization fulfills the offence of illicit trafficking under the Protocol. Finally, the existence of a UNSC mandate regarding arms cargoes that breach a UNC Ch VII sanctions regime will also provide additional authority for enforcement jurisdiction – as per UNSCR 2653 (2022) concerning Haiti<sup>40</sup>, for example, where the UNSC decided that:

...for an initial period of one year from the date of adoption of this resolution, all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to, or for the benefit of, the individuals and entities designated by the Committee *from or through their territories or by their nationals, or using their flag vessels or aircraft* of arms and related materiel of all types, including weapons and ammunition...'

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34 *Nicaragua case* [214]

35 Rothwell and Stephens, *The International Law of the Sea*, pp55-56

36 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2009), Art 9(1)

37 *Paris Memorandum of Understanding on Port State Control* (1982), sections 2.1 (the relevant instruments), 4.1, 4.2 (refusal of access)

38 *SOLAS Chapter XI-2: International Ship and Port Facility Security Code* (2003), Regulation XI-2/9.2.2 ('Every ship to which this chapter applies intending to enter the port of another Contracting Government shall provide the information described in paragraph 2.1 on the request of the officers duly authorized by that Government. The master may decline to provide such information on the understanding that failure to do so may result in denial of entry into port.')

39 Rothwell and Stephens, *The International Law of the Sea*, pp56-57

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40 UNSCR 2653 concerning Haiti, 21 October 2022, OP 11

### 3.2.2 TERRITORIAL SEA

The coastal state has some jurisdiction over a foreign vessel exercising innocent passage in that coastal state's **territorial sea**. However, jurisdiction is in most circumstances related to trans-shipment rather than mere continuous and expeditious transit. First, if the illicit arms trafficking vessel does an act related to the illicit arms cargo which constitutes a breach of innocent passage, then the coastal state has enforcement rights in respect of that conduct (such as per Article 21(1)(h) in relation to FISC regulations).<sup>41</sup> Any attempt to offload an illicit arms cargo in the territorial sea (eg through the placement of a cache with a location marker which allows it to be then be picked up by another vessel) would be non-innocent passage (for example, Article 19(2)(g)). In this regard, the doctrine of constructive presence is also potentially relevant. This assessment would apply *mutatis mutandis* to Archipelagic Waters. Such offload restrictions would also apply to that part of a Roadstead that is outside the relevant Territorial Sea, as per Article 12. Coastal state criminal jurisdiction in respect of foreign flagged vessels in that coastal state's territorial sea (eg via Article 27(1)(a) or (b)) is the subject of a separate report.

### 3.2.3 STRAITS AND ARCHIPELAGIC SEALANES

The LOSC provides that the coastal state's jurisdiction in relation to straits used for international navigation 'is exercised subject to' [inter alia] the rules in Part III.<sup>42</sup> There are three types of straits described in Part III. The first is Article 35(c) straits in respect of which a special pre-existing regime applies (eg the Turkish Straits – Treaty of Montreux<sup>43</sup>). These will not

be further dealt with; the specific historical regimes applicable, and their underpinning treaties would need to be interrogated in respect of any peculiar jurisdiction and enforcement options. This said, the applicable regime may nevertheless need to be assessed in light of the general rules on innocent passage if the provisions of the instrument invite the application of these rules.<sup>44</sup>

The second type of LOSC Part III strait is those straits through which a non-suspendible right of innocent passage is available – Article 38(1) and Article 45 straits. In these straits, the regular Territorial Sea jurisdictions apply, as per 3.2.2 above. A maritime law enforcement operation to apprehend an illicit arms trafficking vessel whilst it is exercising non-suspendible innocent passage would not offend the non-suspendibility of innocent passage as the passage is by definition non-innocent and thus not subject to the non-suspension obligation.

The third type of LOSC Part III strait – an Article 37 strait – is subject to the right of transit passage as per Article 38. There are two arguments that support the continuation of an 'on-water' enforcement jurisdiction against an illegal arms trafficking vessel by the strait bordering state in respect of a vessel purporting to exercise the right of transit passage. First, transit passage (which is exercised in 'normal mode'<sup>45</sup> – a concept that presumably does not include engaging in criminal activity) is still subject to the strait bordering state's laws and regulations in relation to 'the loading or unloading of any commodity... in contravention of the customs, fiscal, immigration or sanitary laws and regulations' of the strait bordering state.<sup>46</sup> That is, if the vessel is reasonably suspected of

41 See, inter alia, Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates', p685: 'It is doubtful whether, in theory, the prescriptive power of the coastal State to regulate arms on board merchant ships extends beyond customs matters under Article 21 UNCLOS.'

42 LOSC 1982 Art 34(2)

43 *Montreux Convention regarding the Regime of the Straits*, 1936, Arts 1-3

44 For example, whilst the *Montreux Convention* has specific rules on sanitary issues for merchant vessels (Art 3), Art 1 contains a general affirmation of 'the principle of freedom of transit and navigation by sea in the Straits', and Art 2 provides that merchant vessels enjoy 'complete freedom of transit and navigation... with any kind of cargo...'

45 LOSC Art 39(c)

46 LOSC Art 42(1)(c)



intending to enter a port or the internal waters of the strait bordering state, or of intending to offload the illicit arms cargo whilst in the strait bordering state's Territorial Sea, it is difficult to see why enforcement action such as stopping and boarding the suspect vessel could not take place in the strait as equally as any other place in that state's Territorial Sea. Second, any activity in a strait in which transit passage is available, but which is 'not an exercise of the right of transit passage... remains subject to the other applicable provisions' of the LOSC.<sup>47</sup> The intended (ie reasonably suspected, or actually underway) illicit trafficking of arms into the strait bordering state is not an 'exercise of the right of transit passage' and thus would still be subject to enforcement jurisdiction.

This raises the more complicated question of whether a strait bordering state could take enforcement action against a vessel engaged in transit passage where that vessel is not suspected of intending to deliver that cargo into the strait bordering state. In this case, the vessel carrying the illicit arms cargo should be left to continue the transit as there is no jurisdiction in the strait bordering state because there is no breach of the applicable laws and regulations of the strait bordering state. Indeed, the LOSC requires that legitimate transit passage not be hampered.<sup>48</sup> Information sharing with neighbouring states (as per, for example, UNTOC obligations) would be an appropriate law enforcement response. The situation with respect to a weapons cargo subject to UNSCR Chapter VII sanctions would of course be different.

In respect of archipelagic sealanes passage (or more correctly in most situations, the exercise of the facsimile of ASLP available under Article 53(12)), the first point is that unless the entire passage from entry point into the ASL through to exit from the ASL is continuous and

expeditious<sup>49</sup> – that is, no port calls are made and the ASL is not departed from – then the passage is not ASLP but rather an exercise of the normal right of innocent passage as applicable in the Territorial Sea (and Archipelagic Waters).<sup>50</sup> In this case, the enforcement jurisdiction as per the Territorial Sea (which is replicated for Archipelagic Waters<sup>51</sup>) applies.

However, if the suspected illicit arms trafficking vessel appears to be exercising the right of ASLP, then the same rules as apply to transit passage would be enlivened – including the Article 42(1)(c) jurisdiction over the loading and unloading of certain illicit cargoes, which is applied *mutatis mutandis* to ASLs and ASLP via Article 54. However, Article 54 also applies Article 44 to ASLs and ASLP. This means that ASLP should not be hampered if there is no (in the case of arms trafficking) Article 42(1)(c) jurisdiction enlivened by the vessel's conduct or suspected intentions. Thus, as with the vessel carrying an illicit arms cargo that is exercising transit passage but is not suspected of intending to enter a strait bordering port, a similar vessel exercising ASLP should likewise be left unhampered.

### 3.2.4 CONTIGUOUS ZONE

In the **contiguous zone**, and dependent upon whether the State in question characterises weapons transfers as a 'customs' matter, if a vessel has already committed an illicit arms trafficking offence in the internal waters (eg by loading or unloading an illicit arms cargo in port) or the territorial sea (eg by caching an illicit arms cargo for future recovery) of a coastal state, that coastal state has a continuing power to punish that conduct so long as the delinquent vessel is halted, or any hot pursuit of the delinquent vessel commences, before it exits the contiguous zone (Article 33(1)(b)). However, in respect of the 'prevent'

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47 LOSC Art 38(3)

48 LOSC Art 44

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49 LOSC Art 53(3)

50 LOSC Art 52(1)

51 Eg, LOSC Arts 49, 52



power relating to FISC matters (including suspicions as to intended illicit arms imports), the presence of an inbound suspect vessel in the contiguous zone does not generate any enforcement jurisdiction. However, the scope of authority contained in the 'prevent' power may be relevant if a coastal state takes the view that this power enables it to stop and 'turn back' a vessel which is reasonably suspected of an intention to import an illicit arms cargo into that coastal state's internal waters, or to cache it in that coastal state's territorial sea. However, this is a controversial interpretive and practice issue, and States will differ on this question just as they differ on the scope of the contiguous zone 'prevent' authority in terms of empowering the turn back of inbound migrant smuggling vessels encountered in the contiguous zone.<sup>52</sup> Additionally, from a law enforcement perspective, it is more likely that a State would seek to monitor a suspected arms trafficking vessel in order to ensure it enters full enforcement jurisdiction in order to be able to seize and prosecute.

### 3.2.5 EXCLUSIVE ECONOMIC ZONE

The **EEZ** has no implications for, and grants no specific authority in relation to, coastal state jurisdiction over illicit arms trafficking. The one exception to this assessment is in relation to artificial installations in the EEZ, which are subject to coastal state jurisdiction over, inter alia, FISC matters (Article 60(2)). In respect of the doctrine of constructive presence and the right of hot pursuit (the subjects of separate reports) the additional relevant LOSC 1982 authority is the authority to declare a 500 metre safety zone around that installation (Article 60(5)).

## 3.3 THIRD STATE HIGH SEAS JURISDICTION

The *LOSC* 1982 grants no specific jurisdiction for third states to board foreign flagged vessels, on the high seas (including in the EEZ beyond 12 nm in respect of non-EEZ matters, as per Art 58(2)) based upon a reasonable suspicion that the foreign flagged vessel is engaged in the illicit traffic of arms. Nor does the *LOSC* set out any general duty to cooperate in the suppression of illicit traffic of arms by sea in the same way as there is such a duty in respect of the illicit traffic of drugs by sea (Article 108(1)). A third state may ask for flag state permission to carry out a boarding based on a suspicion regarding illicit arms trafficking, but this is no different to any other situation where such permission may be sought. The one exception to this general rule, however, is where the UNSC has instituted an arms related embargo or other mandate, using its Ch VII powers, in such a manner that flag state consent is not required. This is to be the subject of further, future reports.

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<sup>52</sup> See, eg: Natalie Klein, 'Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 *Melbourne Journal of International Law* 1, 7: 'Competing arguments could be raised as to whether intercepting vessels in the contiguous zone is a permissible preventive measure or whether it is an impermissible punitive measure (impermissible because the vessels are stopped before they reach the territorial sea and violate Australian law).' Rothwell ad Stephens, p80.



# IV.

## WHAT DOES THE *FIREARMS PROTOCOL* SAY ABOUT ARMS TRAFFICKED ILLICITLY BY SEA?

## 4.1 JURISDICTION UNDER THE ORGANIZED CRIME CONVENTION

The *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime* makes no specific reference to the illicit trafficking of arms by sea. However, as UNTOC Article 37(4)<sup>53</sup>, and Article 1 of the *Firearms Protocol*<sup>54</sup>, make clear, the *Firearms Protocol* is to be read in conjunction with and in the context of the *UNTOC*:

Provisions of the Convention apply to the Protocol, mutatis mutandis, and should be interpreted together... the Protocol must be read as supplementary to the Convention and interpreted together with it. All offences established under the Protocol are also considered offences established in accordance with the Convention, and provisions of the Convention apply to the Protocol.<sup>55</sup>

Consequently, although the *Firearms Protocol* makes no specific mention of jurisdictions in respect of illicit trafficking of arms by sea, the relevant jurisdictional grant is explicit in the general UNTOC provisions on jurisdiction:

53 UNTOC Art 37(4) "Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol."

54 *Firearms Protocol*, Art 1: "1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention."

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention."

55 *Legislative Guide for The Implementation of the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime*, UNODC, 2005, para 174(f) <<https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>>

Article 15. Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) *The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

...

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Consequently, the two key bases for *Firearms Protocol* jurisdiction are that the illicit traffic takes place in the territory of a state (including that state's internal waters), or on a vessel flagged by the state. The *Firearms Protocol* contains no general grant of jurisdiction to interfere with foreign flagged vessels beyond the jurisdictions granted in other instruments such as the *LOSC* 1982.

## 4.2 SPECIFIC ADDITIONAL QUESTIONS RELEVANT TO THE FIREARMS PROTOCOL

There are several other provisions of the *Firearms Protocol* that need to be considered in terms of assessing whether this instrument affords any additional jurisdictions in respect of the illicit trafficking of arms by sea. First, Article 3(e) of the *Firearms Protocol* defines 'illicit trafficking' as

...the import, export, acquisition, sale, delivery, movement or transfer of firearms,



their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol.<sup>56</sup>

The UNODC *Legislative Guide* notes that this definition discloses two potential offences<sup>57</sup>: '(b) Illicit trafficking (two offences): (i) Any transnational transfer without legal authorization; and (ii) Any transnational transfer if firearms are not marked'.<sup>58</sup> Notably, the offence of transnational transfers without legal authorization can particularly be enforced in transit countries. For instance, in 2015, the Italian Guardia di Finanza detected and seized 170 carbines and 200,000 rounds of ammunition destined for Libya and concealed in containers at the port of Genoa. The Public Prosecution Office launched criminal investigations related to the unauthorized entry of materiel into Italian territory and the attempt to violate the arms embargo on Libya and investigated the companies in the United Arab Emirates that had originally purchased the materiel from

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<sup>56</sup> *Firearms Protocol*, Art 3(e)

<sup>57</sup> Article 5(1) of the *Firearms Protocol* deals with criminalization, requiring that 'Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:... (b) Illicit trafficking in firearms, their parts and components and ammunition...'

<sup>58</sup> *Firearms Protocol Legislative Guide*, para 167, although, as is further explained at para 208 'It should also be noted that, as an offence in relation to the marking of firearms, the offence of trafficking unmarked firearms is required to apply only to firearms and not to parts and components or ammunition.' For the sake of completeness, the concept of 'illicit' is further elaborated by Art 4(2) which explains that the *Firearms Protocol* 'shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.' The UNODC 2020 Report (p33) on 'illicit trafficking' offence definition in art 3 similarly states: 'This definition contains two crucial elements: (1) a transnational character, and (2) a violation of a regulatory measure (i.e. lacking authorization or having improper markings). The related offences defined by the Protocol are intended to increase transparency associated with the cross-border movement of firearms and related items.'

three German companies.[FN: S/2016/209, annex 35, paras. 4–7]. In another case, in 2013, Greece authorities stopped the Sierra-Leone flagged cargo ship "Nour-M" on an irregular course, transporting 59 containers, containing around 32 million rounds of ammunition, to be unloaded in Tripoli and delivered to the Libyan Ministry of Defense. Prior to the transfer, no exemption under the arms embargo imposed on Libya was obtained and the transit through Greek territory waters was not authorized. [FN: S/2014/106, paras. 89 et seq]. While these cases demonstrate how States can enforce the trafficking offence at sea, neither of these cases discloses any ... Neither of these offences discloses any additional jurisdictional reach beyond that accorded under either *UNTOC* or *LOSC 1982*.

Second, Article 6(1) of the *Firearms Protocol*, dealing with confiscation, seizure and disposal, provides that:

Without prejudice to article 12 of the Convention [dealing with confiscation and seizure of proceeds of crime and items used in the commission of the offence], States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of firearms, their parts and components and ammunition that have been illicitly manufactured or trafficked.

Again, this provision does not grant any broad confiscation power that could be used against foreign vessels other than in accordance with the previously noted incidents of jurisdiction. As the *Legislative Guide* indicates, this seizure and confiscation authority is clearly bound by the broader jurisdictional limits built into *UNTOC* – that is, it is exercisable within ports or vessels in ports, or over vessels flying the relevant state's flag.<sup>59</sup>

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<sup>59</sup> *Firearms Protocol Legislative Guide*, paras 139-143

Third, Article 11 of the *Firearms Protocol* deals with security and preventive measures, including in respect of licensing for transit through the 'territory' of a transit state. But transit in this case clearly concerns transit via a port/terminal<sup>60</sup>, or transit involving entering into the customs/regulatory system of the transit state, but not entering the domestic market of that state.<sup>61</sup> It does not relate to transit via a vessel otherwise engaged in innocent passage. Indeed, as the UNTOC *Travaux Préparatoires* to Article 10 (which also employs the term 'transit') notes,

Japan noted that 'transit' should be clearly defined, since it would not be appropriate to impose obligations on a State party in the following cases: aircraft merely flying over the territory of the State party; a ship making innocent passage through territorial waters; aircraft in transit through an airport of the State party; or a ship in transit through the seaport of the State party. Japan also suggested that, in setting up structures based on this paragraph, full consideration should be given to the protection of privacy and a civil servant's obligation to preserve secrets, as provided for in related domestic law (see A/AC.254/5/Add.1 and Corr.1)<sup>62</sup>

The finally settled Article 11 (security measures) did not include a definition of transit. The reason is not explained within the *Travaux Préparatoires*; however, it is clear from the context that 'transit' in this article does not include innocent passage, but rather covers situations where the shipment enters (or should enter) the transit state's export and import / customs jurisdiction awaiting on-shipment. Indeed, the *Firearms Protocol's* references to 'transit' are all related to the concept of bringing 'through the transit state's territory', and sit within in a broader context and purpose of increasing the 'effectiveness of import, export and transit

controls, including, where appropriate, border controls, and of police and customs transborder cooperation'.<sup>63</sup> On that basis, it might be assumed the Japanese proposal for a definition that specifically excluded innocent passage was considered to no longer be necessary. It is relatively clear, therefore, that nothing in respect of these references to jurisdiction over illicit arms cargoes 'in transit' can be read as empowering seizure beyond those situations already encompassed in the *UNTOC, LOSC 1982*, or other relevant instruments of international law.

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<sup>60</sup> *Firearms Protocol Legislative Guide*, paras 91-114

<sup>61</sup> UNTOC *Travaux Préparatoires*, p619

<sup>62</sup> UNTOC *Travaux Préparatoires*, p666, note 3

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<sup>63</sup> UNTOC *Travaux Préparatoires*, pp677-680



**V.**

**WHAT DOES  
THE *ATT* SAY  
ABOUT ARMS  
TRAFFICKED  
ILLICITLY  
BY SEA?**

## 5.1 THE ATT DOES NOT GRANT ADDITIONAL ENFORCEMENT JURISDICTION BEYOND THAT ALREADY AVAILABLE IN RESPECT OF ARMS TRAFFICKING

Article 6 of the *ATT* prohibits a state party from authorising the transfer of any of the conventional arms listed in Article 2(1), or of items covered under Article 3 or Article 4, 'if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes', or would 'violate [the state party's] relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.' Fundamentally, the *ATT* is focussed upon state arms trade and export authorisation mechanisms as a means of ensuring compliance with other obligations, as opposed to endowing states with additional jurisdictions to deal with the illicit trafficking of arms (including trafficking by sea).

## 5.2 OTHER RELEVANT ATT PROVISIONS

Article 9 of the *ATT* deals with the issue of transit or trans-shipment:

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.<sup>64</sup>

Again, the limitation of this authority to shipments 'under its jurisdiction... through its territory in accordance with international law' does not indicate any additional authority to

seize (for example) a shipment of arms rendered illicit through non-compliance with the *ATT*. That is, beyond the existing jurisdictions in respect of ports and internal waters, flagged vessels, and the more limited jurisdictions available in the territorial sea and archipelagic waters, and the contiguous zone (as they exist in other components of international law), the *ATT* provides no further geographic or extraterritorial jurisdictional grant. Rather, the *ATT* provides additional scope within those already settled jurisdictions to deal with arms cargoes that are not compliant with that particular state's obligations under the *ATT*.

Article 11 of the *ATT* requires states party to cooperate on, inter alia, preventing their import, transit, and trans-shipment processes and facilities from being used to divert legitimate shipments, 'in order to mitigate the risk of diversion of the transfer of conventional arms'. Furthermore, in accordance with article 11, para. 4 of the *ATT*, States parties that detect a diversion of transferred conventional arms shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include examining diverted shipments and taking follow-up measures through investigation and law enforcement. Again, this provision provides no additional or extraterritorial jurisdiction in relation to illicit trafficking of arms by sea beyond that already afforded elsewhere in international law. Similarly, the cooperation obligations throughout the *ATT* (eg Article 15) are focussed upon effective implementation of the treaty as opposed to creating scope for new extraterritorial enforcement jurisdiction.

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<sup>64</sup> *ATT*, Art 9



# VI.

## CONCLUSIONS



**Conclusion:**

A state has enforcement jurisdiction to board a vessel suspected of being engaged in the illicit trafficking of arms by sea where:

1. The delinquent vessel is flagged by that state (and at the time of boarding is outside the internal waters, territorial sea, or archipelagic waters of another state).
2. The delinquent vessel is present in the internal waters of that state.
3. The delinquent vessel has left the internal waters of that state, but has still not proceeded beyond the contiguous zone of that state.
4. The delinquent vessel engages in non-innocent passage through the territorial sea or archipelagic waters of that state, by doing some act (such as dropping an arms cache, or unloading arms into another vessel) that is a breach of the laws of that state (noting that the right of hot pursuit also attaches to this situation so long as the hot pursuit is commenced before the delinquent vessel exists the contiguous zone, and also that the doctrine of constructive presence is available).
5. Where the delinquent vessel is suspected of intending to unload/load the illicit cargo in a strait or ASL (or before it has departed the Territorial Sea at any rate), it will still be subject to the relevant strait bordering or archipelagic state's enforcement jurisdiction. However, if the vessel is not reasonably suspected of intending to load/offload in the relevant state's Territorial Sea or Archipelagic Waters, then transit passage or ASLP (as relevant) should be left unhampered.
6. The delinquent vessel is engaged in illicit trafficking of weapons into/out of an offshore platform or artificial installation with the coastal State's EEZ (noting that the right of hot pursuit also attaches to this situation so long as the hot pursuit is commenced before the delinquent vessel exists the installation 500 metre safety zone (if declared), and also that the doctrine of constructive presence is available)

**Recommendations:**

**Consider use of a broader definition of the 'arms' liable to illicit trafficking by sea than is used by the *Firearms Protocol*. There are other instruments that use broader categorisations, and the UNSC also clearly already does so.**

**Transit States should exploit the full potential of the *Firearms Protocol's* criminal provisions in order to investigate, prosecute and adjudicate cases of illicit arms trafficking by sea, by establishing jurisdiction about unauthorized arms transfers through their ports, internal waters, territorial waters and straights.**



**JURISDICTION  
IN RELATION TO  
ILLICIT ARMS  
TRAFFICKING  
AND THE LAW  
OF THE SEA**



**UNODC**  
United Nations Office on Drugs and Crime

GLOBAL MARITIME  
CRIME PROGRAMME