

COASTAL STATE JURISDICTION IN THE TERRITORIAL SEA AND TRANSNATIONAL ORGANISED CRIME

ISSUE PAPER



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GLOBAL MARITIME
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UNITED NATIONS OFFICE ON DRUGS AND CRIME
VIENNA



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ISSUE PAPER
IN COOPERATION WITH OXFORD UNIVERSITY
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THIS PROJECT WAS FUNDED BY THE GOVERNMENT OF JAPAN.

GLOBAL MARITIME CRIME PROGRAMME
UNODC



UNITED NATIONS

* Professor of Public International Law, University of Oxford. Many thanks to the participants of the UNODC GMCP LEGM, which took place at the University of Oxford, with support from the University of Oxford Faculty of Law, in January 2023, for helpful comments and suggestions. Special thanks to Efthymios Papastavridis for additional comments, and to Amanda Brown for her research assistance.



I.

INTRO DUC TION

The United Nations Convention on Transnational Organised Crime (UNTOC)¹ and its Protocols² impose essentially 'inward-looking' obligations³ on parties to criminalise specific conduct in their domestic jurisdictions, and to establish processes for extradition, cooperation, monitoring, and the like. In and of themselves, however, UNTOC and its Protocols do not accord to parties any jurisdictional powers that the parties do not otherwise enjoy in accordance with general international law. UNTOC and its Protocols merely obligate parties to exercise their prescriptive jurisdiction to criminalise certain conduct, where such jurisdiction exists; and to some extent to also exercise their enforcement jurisdiction to extradite or prosecute offenders, where such jurisdiction exists. As such, determining whether a party to UNTOC and its Protocols *may exercise* such prescriptive and enforcement jurisdiction is a question of general international law. This question must be answered before one can discuss whether the party to UNTOC is *obligated* by UNTOC to exercise that jurisdiction (which it possesses under general international law).⁴

Transnational organised crime at sea presents particular difficulties because of the overlapping jurisdiction of states, both coastal states and flag states, in the maritime domain, depending on the maritime zone where critical facts take place. The relevant general international law in the instance is reflected in the United Nations Convention on the Law of the Sea of 1982 (UNCLOS),⁵ as well as in other applicable rules of international law. Essentially, the 'law of the sea' either 'finetunes' the jurisdictional powers of states in zones that are considered parts of the state's territory (such as internal waters and the territorial sea) or 'accords' jurisdictional powers to states in other zones beyond their territories, such as the Contiguous Zone, the Exclusive Economic Zone, the Continental Shelf, and the High Seas. As such, the jurisdictional regime established by the UNCLOS/the customary law of the sea must be seen against the background of the general rules of international law on state jurisdiction.

In what follows, this paper discusses the extent of prescriptive and enforcement jurisdiction in the territorial sea (section II), and the 'spanner' thrown in the works of what otherwise would be a relatively simple jurisdictional regime by the right of innocent passage (section III). In that, particular attention is paid to the exercise of both prescriptive and enforcement *criminal* jurisdiction, against the background of UNTOC.

1 United Nations Convention against Transnational Organised Crime (adopted 8 January 2001, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

2 Protocol to Prevent, Suppress, Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Protocol Against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (adopted 31 May 2001, entered into force 3 June 2005) 2326 UNTS 208.

3 On the concept of inward-looking obligations, ie international obligations that require states to take certain action or exercise powers within their domestic jurisdiction, see further Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011)

34 Loyola of Los Angeles International and Comparative Law Review 133 at 138–141.

4 See UNTOC arts 15 and 16(10).

5 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 (UNCLOS).



PRESCRIPTIVE AND ENFORCEMENT JURISDICTION IN THE TERRITORIAL SEA

The territorial sea (TS) is the maritime zone that extends seaward of the baseline for up to 12 nautical miles. Also known as ‘territorial waters’, the territorial sea is considered part of the territory of the coastal state,⁶ over which the coastal state exercises sovereignty.⁷ This must mean that the coastal state exercises in principle full prescriptive and enforcement jurisdiction in the TS, to the extent that the state has not assumed international obligations limiting the exercise of that jurisdiction.⁸ In simple terms, this means that the coastal state can both legislate (prescribe), and enforce the legislation it has adopted, presumptively unencumbered, in the territorial sea.

This is essentially confirmed by the principle of territoriality, which permits a state, under general international law, to exercise full prescriptive and enforcement jurisdiction in its territory. The territorial state is of course still debarred from exercising its jurisdiction in accordance with any immunity rules that apply, and it may further limit its jurisdictional powers as it wishes through the assumption of international obligations. Full prescriptive and enforcement jurisdiction of the territorial state, then, covers any person or entity present in the territory of the state, subject to any applicable immunity rules or other rules of international law. This does not mean that the state of

nationality of a person or entity present in the territorial sea does not *also* have the power to regulate the person’s or entity’s conduct (ie, to assert prescriptive jurisdiction). Enforcement jurisdiction, on the other hand, is in the first instance exclusively reserved to the territorial state.⁹

As such, the coastal state exercises full prescriptive and enforcement jurisdiction in its territorial sea, and this covers any person or entity present in that maritime zone. There are two important caveats to this general position.

The first caveat is that the relevant rule of international law is permissive, and not prescriptive. This means that the coastal state may extend the application of all or some of its law to the territorial sea, but it is not obligated to do so in principle (unless specific rules of international law *demand* the exercise of prescriptive jurisdiction); and it may also exercise its enforcement jurisdiction over laws that it has prescribed for, or extended to, the TS, but again is not obligated to do so in principle (unless, again, specific rules of international law *demand* the exercise of enforcement jurisdiction). This has been established as early as the late 19th century in the well-known *Franconia* case.¹⁰

This position is important. UNTOC, as already mentioned,¹¹ does not grant parties more extensive jurisdictional powers than they already have under general international law. But it does *obligate* the parties to exercise whatever prescriptive jurisdiction they may possess to criminalise specific conduct (the conduct described in Articles 5, 6, 8, and 23 of the Convention), as well to exercise certain enforcement jurisdiction that they may possess

⁶ As per the ICJ in the *Fisheries Case* (United Kingdom v Norway) [Judgment] [1951] ICJ Rep 116 at 128, territorial waters are ‘appurtenant to the land territory’, which can be read as meaning that sovereignty over the TS is a consequence of sovereignty over land territory (or ‘derivative’), rather than per se sovereignty over the relevant maritime zone. This may have implications for questions such as cession of territory (eg, the TS cannot be ceded separately from the land territory to which it ‘appertains’), and is an expression of the general principle according to which ‘the land dominates the sea’, but does not affect the extent of jurisdiction of the coastal state over the zone. See also Kai Trümpler, ‘Article 8’ in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart/Nomos, 2017) at MN14, according to whom ‘sovereignty over internal waters is original and *not derivative* in nature as in the case of the territorial sea’ (emphasis added).

⁷ UNCLOS art 2.

⁸ See *SS ‘Lotus’ (France v Turkey)* [1927] PCIJ Ser A No 10 at 44: ‘Restrictions upon the independence of States cannot therefore be presumed’.

⁹ As per the Permanent Court of International Justice in *SS ‘Lotus’*, *ibid* at 18–19: ‘[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial [...]’.

¹⁰ *R v Keyn* (1876) 2 Ex D 63.

¹¹ See section I above.

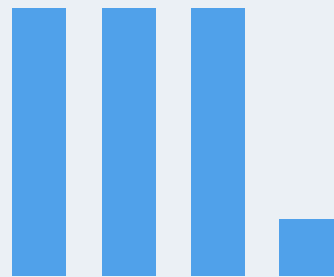


(in which I include adjudicatory or curial jurisdiction for present purposes¹²) with respect to the prosecution of alleged offenders of these and other defined crimes ('serious crimes' as defined in Article 2 of the Convention when allegedly committed by an organised criminal group and with a transnational element) or their extradition.

The second caveat is that, unlike other spaces that constitute state territory, such as the state's land territory and its airspace, the territorial sea comes with a pretty significant limitation: that is, the international obligation to tolerate, and not to hamper, the innocent passage of ships of any state through the territorial sea, and in and out of it for the purpose of calling into ports or entering internal waters (if permitted to so), or for calling into roadsteads or port facilities in the territorial sea (and thus outside of internal waters).

To put things simply: a coastal state may exercise the full extent of both its prescriptive and enforcement jurisdiction over its own ships in its territorial sea (this means ships that are flying the flag of the coastal state). It may also exercise the full extent of both its prescriptive and enforcement jurisdiction over stateless vessels (or vessels equated with stateless vessels). But when it comes to ships of other states in the territorial sea, the question of the extent of the prescriptive and enforcement jurisdiction that the coastal state may exercise depends on the right of innocent passage—and it is to this question that the next section now turns.

12 Though some authors do distinguish among prescriptive, adjudicatory (curial), and enforcement jurisdiction, my position at least in this context is that adjudicatory jurisdiction will, depending on the circumstances, constitute an exercise of either prescriptive or enforcement jurisdiction. For an overview of the debate on such distinctions, see Ralf Michaels, 'Is Adjudicatory Jurisdiction a Category of Public International Law?' (20 September 2018) *Opinio Juris*, available at <https://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/>.



INNOCENT PASSAGE



As per Article 17 UNCLOS, 'ships of all states ... enjoy the right of innocent passage through the territorial sea', subject to the rules in the Convention. Both this provision and the other relevant rules in the Convention can be taken as reflecting customary rules of international law.¹³ For a ship to enjoy the right of innocent passage, it must conform to the relevant requirements. Should it fail to fulfil any of these, then it is not in innocent passage, and is thus unquestionably subject to the full extent of the coastal state's prescriptive and enforcement jurisdiction (unless it is immune).

(A) THE SHIP MUST BE IN PASSAGE

Article 18 UNCLOS defines the meaning of 'passage'. A ship is 'in passage' when it is engaging in navigation through the territorial sea for the purpose of traversing it (lateral passage), or for the purpose of proceeding to or from internal waters, or calling at a roadstead or port facility outside internal waters (inward or outward passage) in a manner that is continuous and expeditious and which does not involve stopping or anchoring (unless such is incidental to navigation, or rendered necessary by *force majeure* or distress, or for the purpose of rendering assistance to persons or craft in danger or distress).

If any of these conditions are not met, eg, if the ship is 'hovering' in the territorial sea, or 'cruising around' in it, or even if it slows down while 'preparing for a ship-to-ship transfer',¹⁴ then the ship is clearly not in passage, and so no question of 'innocent passage' can arise.¹⁵ You cannot be in *innocent* passage, unless you are engaging in *passage*, first. Such ships 'not in passage' are then subject to the full extent of

the coastal state's prescriptive and enforcement jurisdiction, as noted at the outset (unless they are immune).

(B) THE SHIP MUST BE IN INNOCENT PASSAGE

If a ship is in actual passage, then the question becomes whether that passage is 'innocent'. It is not the purpose of this paper to discuss the development of the right of innocent passage, and questions such as whether innocence is a question of the manner of passage or the activities undertaken during passage. Given that Article 19 UNCLOS determines the meaning of innocent passage, and should be taken to reflect customary law, focus will be limited to the provisions of this article.

Article 19(1) defines innocent passage as passage that is 'not prejudicial to the peace, good order or security' of the coastal state. This provision is, in and of itself, quite open-ended, and may refer to both *manner* of passage and *activities* undertaken during passage. As such, it accords considerable discretion to the coastal state.

However, paragraph 2 of Article 19 seeks to mitigate the open-ended character of paragraph 1 by determining that passage will be considered 'prejudicial to the peace, good order or security of the coastal state' if the ship engages in any of the listed activities while in the territorial sea. The provision then proceeds to list twelve categories of activities that are non-innocent. The last such is very nearly a catch-all activity: 'any other activity not having a direct bearing on passage'.¹⁶ The provision thus appears to maintain some considerable discretion for the coastal state.

The list in Article 19(2) has caused serious debates in literature. Does it mean that the ship must be *presumed* to be in innocent passage as

¹³ See, eg, Kari Hakapää, 'Innocent Passage' (May 2013) in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (online edn) at MN 43.

¹⁴ See *Duzgit Integrity (Malta v São Tomé and Príncipe)* (Award of 5 September 2016) PCA Case No 2014-07 at para 310.

¹⁵ See also Robin Churchill, Vaughan Lowe, and Amy Sander, *The Law of the Sea* (4th edn, Manchester UP 2022) 142.

¹⁶ UNCLOS art 19(2)(l).

long as it is engaged in passage and as long as it does not undertake any activity included in the list? Or does the coastal state have residual authority to determine the innocence of a ship's passage even if it does not undertake any activity clearly included in the list? Relatedly, is it necessary for the coastal state to point to *some* activity undertaken by the ship in passage, even if not included in the list of Article 19(2), to demonstrate its non-innocence, or can it more generally rely on passage being prejudicial to the peace, good order or security of the coastal state in accordance with Article 19(1)? Is the list of Article 19(2) itself exhaustive or only indicative? And, is this last question even meaningful given the evidently broad scope of Article 19(2)(l) ('any other activity not having a direct bearing on passage'), which can clearly be read as an escape clause?

All these questions have an impact on the implementation of UNTOC. This is because whether a ship is in innocent passage or not appears to affect the coastal state's power to extend its legislation regarding conduct to be criminalised under UNTOC and regarding 'serious crimes' that fall within the scope of UNTOC over ships in innocent passage, as well as its powers to enforce this legislation over such ships. It is thus crucial to determine the extent of jurisdictional powers over ships in innocent passage.

Before we turn to this, however (in subsection III(d), below), let us assume that the ship is in non-innocent passage (whether because it is not in passage, or because it is in passage that is non-innocent under Article 19 UNCLOS). It was stated above that in this case the state can exercise the full gamut of its prescriptive and enforcement jurisdiction. Is it really so? A brief note in this respect is required.

(C) SHIP IN NON-INNOCENT PASSAGE (OR NOT EVEN IN PASSAGE): EXPEL OR ENFORCE?

If a ship is determined to be in non-innocent passage, Article 25(1) UNCLOS empowers the coastal state to 'take the necessary steps in its territorial sea to *prevent* passage which is not innocent'. The formulation is not particularly clear: does this mean that the coastal state may merely take the necessary steps to *expel* the ship from the territorial sea? Or can it also arrest the ship and subject it to the application of its domestic law? And questions can also be raised regarding the powers of the coastal state in cases where the ship is in no passage at all (eg, it is hovering). In that latter case, Barnes, referring to O'Connell, seems to suggest that the coastal state can expel the offending ship from its territorial waters.¹⁷ That is undoubtedly so. But the crucial question for UNTOC purposes is not whether the coastal state can expel the offending vessel, making its activity or engagement or use in transnational organised crime someone else's (or no one's) problem. It is rather whether the coastal state can exercise its full gamut of jurisdictional powers over the ship.

In both cases, the correct position under international law must be that the coastal state can exercise the full gamut of jurisdictional powers over a ship that is in its territorial sea and that, for whatever reason, is not engaged in innocent passage. As such, the rules of international law permit the state both to legislate over, and to enforce against, the vessel and anyone on-board the vessel. But this is only a permission. In that sense, the coastal state may wish not to be bothered, and thus may elect to simply expel the ship from its territorial sea. However, it is in that latter case (which represents an option otherwise open to the coastal state under general international law and UNCLOS) that UNTOC comes to bear: in

¹⁷ Richard A Barnes 'Article 18' in Proelss (n 6) at MN1.



situations where UNTOC imposes an obligation on the coastal state to exercise its prescriptive jurisdiction to criminalise certain conduct or to exercise its enforcement jurisdiction to prosecute or extradite, the coastal state *must* do so and will not be able to merely require a ship to leave the territorial sea (unless of course the ship is an immune warship or other government ship in non-commercial service¹⁸).

This is a crucial point for the purpose of understanding how UNTOC relates to UNCLOS and the law of the sea more generally when it comes to ships in the territorial sea. Should the coastal state opt to merely eject a ship in non-innocent passage from its territorial sea, it is possible that this will be in breach of its obligations under UNTOC (even if it is fully in line with general international law and UNCLOS). This will be so, in particular, if the coastal state does not extend the application of its criminal laws adopted in accordance with UNTOC on ships in the territorial sea, as well as if it does not exercise its enforcement jurisdiction in order to prosecute or extradite alleged offenders. Indeed, as is clear in the case of the relationship of the European Convention on Human Rights (ECHR) with UNCLOS, expelling a ship from the territorial sea may be allowed under the law of the sea, but may at the same time be in breach of other obligations of the coastal state (in the instance, the ECHR).¹⁹

(D) JURISDICTIONAL POWERS OVER SHIPS IN INNOCENT PASSAGE

If one is to presume that ships in passage through the territorial sea are in the first instance (or for lack of any information of them engaging in activities listed in Article 19(2) UNCLOS) engaged in innocent passage, it must then be determined what prescriptive and enforcement jurisdiction the coastal state

is entitled to exercise over such ships.

(i) Prescriptive Jurisdiction

With respect to prescriptive jurisdiction, Article 21(1) UNCLOS provides that the coastal state 'may adopt laws and regulations' relating to innocent passage through the territorial sea, in respect of what appears to be a closed list of matters which tracks closely, though it does not fully replicate, the list of activities that render passage non-innocent in Article 19(2). The relevant matters are: (a) safety of navigation and regulation of maritime traffic; (b) protection of navigational aids and facilities and other facilities or installations; (c) protection of cables and pipelines; (d) conservation of the living resources of the sea; (e) prevention of infringement of the fisheries laws and regulations of the coastal State; (f) preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; and (h) prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Notably, the list of matters in Article 21(1) is broader than the activities that would render passage non-innocent. For example, it is 'wilful and serious pollution' that renders passage non-innocent under Article 19(2)(h), but the coastal state can legislate for the perseveration of its environment and the prevention, reduction and control of pollution more generally under Article 21(1)(f). This makes sense, as the violation of coastal state law applicable to a ship in the territorial sea should not, in and of itself, render passage non-innocent. However, one does wonder why such a permissive rule would be required for the coastal state to legislate over its own territory, even for ships that are in innocent passage, if breach of coastal state law does not render passage non-innocent as long as it does not *also* constitute one of the proscribed activities of Article 19(2).

¹⁸ See UNTOC art 3(d); UNCLOS arts 29–32.

¹⁹ See *Women on Waves v Portugal* App no 31276/05 (ECTHR, 3 February 2009).

Indeed, if there is any point in Article 21 from a jurisdictional perspective, this is mainly in its paragraph 2, which does, in no uncertain terms, prohibit the coastal state from exercising prescriptive jurisdiction over ships engaged in innocent passage with respect to their 'design, construction, manning or equipment ... unless [the relevant legislation is] giving effect to generally accepted international rules or standards'.

The provision of Article 21(1) UNCLOS is peculiar. It appears to give explicit authority to the coastal state to legislate over issues it has the right to legislate anyway under international law. One explanation may be that the coastal state retains full prescriptive jurisdiction over vessels in innocent passage, but the provision is merely meant to remind the coastal state to exercise restraint, as a matter of comity, taking into account the interests of all states in having their ships engage in innocent passage.²⁰ I am not sure however that such reading is in line with the principle of effectiveness. It seems to render the provision redundant in normative terms.

Another explanation may be to understand the provision of Article 21(1) UNCLOS by analogy to what the International Tribunal for the Law of the Sea (ITLOS) stated in *M/V 'Norstar'*. In the instance, the Tribunal was commenting on the extension of a law other than the law of the flag state over a ship in the High Seas. It stated that 'any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties'.²¹ In the context of Article 21(1) UNCLOS, this could mean that for the coastal state to extend its prescriptive jurisdiction over a ship in innocent passage beyond the confines of Article 21 would constitute an interference (hampering) of that

passage, even if the coastal state were not to take any measures to enforce the prescription. Such interference can be understood in the sense that the ship could still be subjected to the enforcement jurisdiction of the coastal state when it finds itself in the internal waters or in a port of the coastal state, even long after the passage has been completed. So, an assertion of prescriptive jurisdiction beyond the confines of Article 21(1) could be seen as a method to dissuade ships from engaging in innocent passage through a territorial sea that is encumbered with a thick regulatory network (going beyond Article 21(1)). This may constitute a breach of the obligation not to hamper innocent passage under Article 24 UNCLOS, and in particular of the obligation not to 'impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage'.²²

If that is the case, it becomes really interesting to ask whether the coastal state can extend its prescriptive jurisdiction over ships in innocent passage in order to comply with UNTOC. Given that UNTOC is very nearly universally ratified, almost all states have assumed the obligation to criminalise the relevant conduct in their domestic jurisdictions. As such, it would be difficult to meaningfully argue that a state extending a regime over ships in innocent passage that almost every other state in the world is obligated to have adopted is actually 'impairing' that innocent passage. Even more importantly, an argument can be made that almost all obligations to prescribe under UNTOC and its Protocols would fall within either Article 21(1)(h), ie prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State, or Article 21(d), (e), or (f), ie conservation of the living resources of the sea; prevention of infringement of the fisheries laws and regulations of the

²⁰ See Churchill, Lowe, and Sander (n 15) 158–159.

²¹ *M/V 'Norstar' (Panama v Italy)* (Preliminary Objections) ITLOS Reports 2016, para 222.

²² UNCLOS art 24(1)(a). See also Barnes 'Article 24' in Proelss (n 6) at MN1 and MN6, who finds that the obligation not to hamper innocent passage applies to both *prescriptive* and enforcement jurisdiction and requires the state not to adopt laws and regulations as stringent as to nullify the right or render it impractical.



coastal State; preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof, assuming that the coastal state's domestic law imposes some heavy penalties in cases of breach, which would render these 'serious crimes' under UNTOC.²³

(ii) Enforcement Jurisdiction

Article 27 UNCLOS provides for the exercise of criminal jurisdiction 'on board a foreign ship'. The provision is the first of subsection B of section 3 of Part II of the Convention on the 'Territorial Sea and Contiguous Zone'. Section 3 in particular is entitled 'Innocent Passage in the Territorial Sea', and subsection B is entitled 'Rules Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes'. The placement of the provision, as well as its language, makes its interpretation somewhat problematic.

First, it must be clear that the provision refers to the exercise of enforcement jurisdiction with respect to crimes committed on board a ship. It then makes sense that it is placed in subsection B, as subsection C makes clear that the most that a coastal state can do with respect to a warship (or other government ship in non-commercial service) which violates its domestic law is to require it to leave the territorial sea (see Articles 30, 32 UNCLOS). The coastal state is not allowed to exercise any enforcement jurisdiction against such non-commercial ships.

Second, however, it is unclear whether the provision is meant to circumscribe the exercise of enforcement criminal jurisdiction over ships that are in innocent passage, or over those that are not. If the latter is the case, then the provision makes little sense: as discussed above, the

coastal state should retain full prescriptive and enforcement jurisdiction under international law over ships in its territorial sea that are not in innocent passage. The provision would then be redundant. If the former is the case, then the language of the provision, being hortatory as it is ('should not be exercised' instead of, say, 'shall not', or even 'may not'), makes one wonder what its effect is meant to be. A textual interpretation, which is after all confirmed by the preparatory work of the Convention,²⁴ makes the provision so open-ended as to render it redundant again.

Barnes has sought to salvage the provision by arguing that it is concerned with 'matters on board the vessel' rather than its 'external conduct', which is addressed by Article 25 UNCLOS.²⁵ I am not sure how this works—it is matters on board the vessel that constitute its external conduct. It is not easy to conceive how a vessel can engage in weapons practice, or load or unload commodities or persons contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State, or engage in wilful and serious pollution, without the people on board the vessel (or at least some of them) being involved in that conduct. On the other hand, it is conceivable that people on board the vessel may engage in criminal activity that does not affect the activities of the vessel, eg, assault, or petty theft, or what have you. This may very well be. But then the whole point of the provision is marginal at the very best. Here is why:

According to Article 27 UNCLOS,

the criminal jurisdiction of the coastal State *should not* be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, *save only* in the following cases: (a) if the consequences

²³ Though a problem does remain with the obligation to criminalise participation in an organised group (UNTOC art 5). I would argue that money-laundering, corruption, and obstruction of justice (UNTOC arts 6, 8, and 23) can reasonably fit, to the extent they will be ever relevant to a ship, within prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State (UNCLOS art 21(1)(h)).

²⁴ See 'Official Records, Volume I: Preparatory Documents' United Nations Conference on the Law of the Sea (Geneva 24 February–27 April 1958) UN Doc A/CONF.13/37.

²⁵ See Barnes 'Article 27' in Proelss (n 6) at MN1.

of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.²⁶

In the cases of (a), (b), and (d) a strong argument can be made that the ship is no longer in innocent passage in any event and full enforcement jurisdiction can be exercised. Even if that is not *always* the case in (a), it is still only a marginal situation that would not render the ship in non-innocent passage. In the case of (c), given that consent (by means of a request) has been given by the master or the diplomatic agent or consular officer, the coastal state again can exercise enforcement jurisdiction (perhaps the point of the provision is to clarify that the master can make such a request without further permission of the flag state, again a marginal issue).

Even in all other cases, however, the coastal state is merely told that it 'should not', not that it 'shall not', or 'must not', or even that it 'may not' exercise its criminal jurisdiction. This, according to Barnes,²⁷ creates an apparent antinomy with the words 'save only'. But the apparent antinomy can be explained away: in the cases that are saved, the coastal state should simply exercise its criminal jurisdiction. This is nothing more than a direction to the state on how to exercise its discretion, should it wish to follow it.

Indeed, the provision is mostly read as a restatement of the Anglo-American theory of a general practice of not exercising enforcement jurisdiction over matters regarding the internal economy of the vessel as a matter of comity

rather than as a matter of obligation. This by and large means that as far as UNTOC is concerned, any conduct falling within its scope can be the subject of enforcement action against the ship by the coastal state, either because such conduct renders the ship's passage non-innocent, or because Article 27 does not constitute a bar to the exercise of all criminal jurisdiction of the coastal state, save if the latter feels 'polite'.

And yet, a similar argument can be made here as was made in subsection III(d)(i) above regarding prescriptive jurisdiction: it is the obligation not to hamper innocent passage in Article 24 UNCLOS as understood above that may give some meaning to the 'direction' in Article 27. Exercising enforcement jurisdiction over crimes when it 'should not' do so, may mean that the coastal state is violating its obligation not to hamper innocent passage. Still, this is, again, of marginal importance when it comes to UNTOC and its Protocols. If the crimes prescribed therein do not render passage non-innocent in and of themselves, they are certainly of the kind that 'disturb the peace of the country or the good order of the territorial sea', all of them being 'serious crimes' of one iteration or another.

²⁶ Emphasis added.

²⁷ Barnes (n 25) at MN12.



IV.

WHAT DOES ALL THIS MEAN FOR UNTOC?

As per Barnes, also referring to Shearer, coastal states have 'wide discretion' on how to respond to ships in non-innocent passage: they may choose to expel them from the territorial sea, or to prosecute offences allegedly committed.²⁸ Part of the point of UNTOC is to limit this 'wide discretion', as argued above, and to *require* the coastal state not only to extend its prescriptive jurisdiction over crimes falling within the scope of the Convention and its Protocols over the ship, but also to exercise its enforcement jurisdiction in accordance with UNTOC.

When it comes to ships that are in innocent passage (if in fact they can ever remain so in circumstances where UNTOC and its Protocols are engaged), the limitations imposed by UNCLOS on the coastal state's prescriptive and enforcement jurisdiction seem to be marginally relevant with respect to the implementation of UNTOC. A coastal state that has the will to fully implement UNTOC has ample arguments to exercise both its prescriptive and its enforcement jurisdiction over the relevant vessel without breaching its obligation not to hamper innocent passage under Article 24 UNCLOS.

If anything, the problem lies elsewhere: that is, it lies in the *willingness* of the coastal state not to hide behind the (rather convoluted) provisions on innocent passage in UNCLOS, but to fully implement UNTOC and its Protocols. A proper reading of UNTOC would indicate that the coastal state is obligated to exercise both its prescriptive and its enforcement jurisdiction within the broad scope that UNCLOS allows, even when it comes to ships in innocent passage.

Of course, the coastal state may argue that, given the near universal participation in UNTOC (and less so in its Protocols), matters could just as well be left to the flag state, so as to avoid any complications with the right of innocent passage. This is not a good argument for two reasons: a purely legal reason and a policy reason.

The legal reason is that, even if UNCLOS allows such discretion to the coastal state, UNTOC does not actually do so: it demands compliance where the jurisdictional regime of international law so permits. The policy reason is that, even if it were permitted as a matter of the law, leaving the issue of enforcement of UNTOC obligations to the domestic law of a state whose flag may well be a flag of convenience will defeat the whole purpose of proper cooperation in the fight against transnational organised crime at sea. Rather, a proper reading of UNCLOS alongside UNTOC demands coastal states to assert themselves against flags of convenience in almost all circumstances.

²⁸ Barnes 'Article 25' in Proelss (n 6) at MN6.

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