

# 1

## *Introduction*

### I. INTRODUCTORY REMARKS: ENQUIRING MARITIME INTERCEPTION ON THE HIGH SEAS

**M**ARITIME INTERCEPTION, OR the right of visit, as it is called under the UN Convention on the Law of the Sea (article 110),<sup>1</sup> is the most significant exception to the fundamental principle of the freedom of the high seas, which is predominantly of a negative nature. According to the UN Memorandum on the Regime of the High Seas (1950):

The freedom of the high seas, essentially negative, may nevertheless contain positive consequences . . . All maritime flag-States have equal right to put the high seas to legitimate use. But the idea of the equality of usage comes only in second place. The essential idea underlying the principle of freedom of the high seas is the concept of the prohibition of interference in peacetime by ships flying one national flag with ships flying the flag of other nationalities.<sup>2</sup>

From this prohibition of interference with non-national vessels flows the principle of exclusivity of flag-state jurisdiction, namely that ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the state whose flag they lawfully fly.<sup>3</sup> This principle is firmly rooted in the axioms of state equality and of the freedom of the high seas.<sup>4</sup> However, it is not an absolute rule from which no derogation is

<sup>1</sup> See United Nations Convention on the Law of the Sea, 1833 *United Nations Treaty Series* 397; entered into force 16 November 1994 (hereinafter: LOSC); as at 7 November 2012, LOSC has 164 parties, including the EC; see at [www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)#The United Nations Convention on the Law of the Sea.

<sup>2</sup> Memorandum on the Regime of the High Seas, by the Secretariat, (14 July 1950), UN Doc. A/CN.4/32, reprinted in (1950-II) *Yearbook of the International Law Commission*, 67, 69 (translation) (hereinafter: *UN Memorandum*). The Memorandum is believed to be the work of Gilbert Gidel.

<sup>3</sup> See generally I Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Clarendon Press, 2008) 225 (hereinafter: Brownlie, *Principles*); DP O'Connell, *The International Law of the Sea* Vol II (ed IA Shearer) (Oxford: Clarendon Press, 1984) 796 (hereinafter, O'Connell); R Jennings and A Watts, *Oppenheim's International Law*, 9th edn (London: Longman, 1992) 737 (hereinafter: Oppenheim's *International Law*).

<sup>4</sup> It was famously given judicial imprimatur in the dictum of Lord Stowell in the *Le Louis* case: 'All nations being equal all have an equal right to the uninterrupted use of the unappropriated parts of the oceans for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no

## 2 Introduction

permitted. On the contrary, international law has recognised since the inception and consolidation of *mare liberum* certain instances where interference is permissible. Piracy, slave trade and illegal fishing are a few examples of cases, which have involved the exercise of the right of visit of foreign vessels on the high seas in peacetime, while it is undisputed that belligerent states may exercise this right against enemy and neutral merchant vessels in wartime.

Recently, the number of cases in which this right is exercised has significantly increased, with the result that the negative concept of the freedom of the high seas is, arguably, challenged. Besides the unexpected rise of piratical acts off the coast of Somalia since 2008 and more recently in the Gulf of Guinea,<sup>5</sup> states have become increasingly involved in intercepting vessels on the high seas to counter threats, such as smuggling of migrants, drug trafficking, and the proliferation of weapons of mass destruction (WMD) at sea. Several partnerships in various forms have been established to this end, such as the Proliferation Security Initiative (PSI)<sup>6</sup> or the Agency for the Management of Operational Cooperation at the External Borders of the European Union (FRONTEX),<sup>7</sup> as well as numerous agreements concluded concerning the interdiction of suspect vessels in this regard. The 2005 SUA Protocol,<sup>8</sup> the 2000 Smuggling Protocol<sup>9</sup> and the 2008 CARICOM Maritime

one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another', *Le Louis*, 2 Dods, 210, 243, 165 Eng Rep (1817), 1464, 1475. On the other side of the Atlantic, Justice Story held in *The Marianna Flora* case that 'Upon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there', *The Marianna Flora*, 24 US (11 Wheat) (1826) 1, 42. See also *Lotus Case (France v Turkey)*, judgment, PCIJ, Ser A, No 10 (1927) 25.

<sup>5</sup> See SC Res 2011/2011 and SC Res 2039/2012 and discussion below, Ch 6.

<sup>6</sup> PSI is described on the website of the US Department of State as 'a global effort that aims to stop trafficking of weapons of mass destruction (WMD), their delivery systems, and related materials to and from states and non-state actors of proliferation concern': see [www.state.gov/t/isn/c10390.htm](http://www.state.gov/t/isn/c10390.htm).

<sup>7</sup> For further information regarding FRONTEX, see its website: [www.frontex.europa.eu](http://www.frontex.europa.eu). See also generally R Weinzierl and U Lissou, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (Berlin: German Institute for Human Rights, 2007) (hereinafter: Weinzierl and Lissou) and E Papastavridis, 'Fortress Europe and FRONTEX: Within or Without International Law?' 79 *Nordic Journal of International Law* (2010) 75.

<sup>8</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc LEG/CONF.15/21 (2005), available on the website of the US Department of State at [www.state.gov/t/isn/trty/81727.htm](http://www.state.gov/t/isn/trty/81727.htm) (hereinafter: 2005 SUA Protocol). The 2005 SUA Protocol entered into force on 28 July 2010 and as at 31 October 2012 it had 22 parties; see the list of states parties available at [www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf](http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf).

<sup>9</sup> 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507 (entered into force 28 January 2004) (hereinafter: Smuggling Protocol). As at 25 November 2012, the Smuggling Protocol had 135 parties: see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en).

and Airspace Security Agreement<sup>10</sup> are the principal examples of such multilateral treaties. Concurrently, the notion of *mare clausum*, namely that the high seas are subject to the appropriation of states, seems to have been reinvented, not in the traditional sense of claims for maritime dominion, but rather in the sense of claims for more functional jurisdiction on the high seas<sup>11</sup> or in the sense of a common 'responsibility for the seas' in an era of *mare crisisium*.<sup>12</sup>

In essence, this book examines some of the legal issues that the relevant state practice has brought to the fore and thus aims at contributing to the current legal discourse on maritime interception on the high seas.<sup>13</sup> Its principal theoretical question is: how can the various grounds of interference with foreign vessels on the high seas, especially the foregoing regarding WMD, illicit migration and drug trafficking, be theoretically conceptualised and legally justified under a coherent regulatory order of the oceans? Given that none of these issues, but for privacy, are addressed by the pertinent provision of LOSC (article 110), it is questioned to what extent the legal order of the oceans, which is predicated upon the principle of non-interference on the high seas, can accommodate such claims for enforcement jurisdiction on the high seas. It is the purpose of this book to respond, inter alia, to this question and ascertain the role and the significance of these interception activities for the contemporary legal order of the oceans. In addition, it will endeavour to delineate the legal contours of interception operations on the high seas and address the question whether a new 'law of interdiction or interception' is emerging. Furthermore, it will provide a detailed appraisal of contemporary maritime interception operations against the background of both the law of the sea and general international law.

The overarching tenet of the present enquiry is that the oceans are subject to a certain organisational and regulatory scheme premised upon both negative and positive legal principles, which can aptly be designated as a

<sup>10</sup> CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008; available at [www.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_maritime\\_airspace\\_security\\_cooperation.pdf](http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf) (hereinafter: CARICOM Agreement).

<sup>11</sup> On the issue of functional jurisdiction in the maritime domain and its contemporary challenges see M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2007).

<sup>12</sup> See D Vidas, 'Responsibility for the Seas', in Vidas D (ed) *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Leiden: Martinus Nijhoff, 2010) 3, 35.

<sup>13</sup> The authors that have more recently contributed to this discourse are inter alia D Guilfoyle, *Shipping Interdiction and International Law of the Sea* (Cambridge: Cambridge University Press, 2009) (hereinafter: Guilfoyle, *Shipping Interdiction*), N Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011) (hereinafter: Klein, *Maritime Security*) and C Allen, *Maritime Counterproliferation Operations and the Rule of Law* (Westport, London: Praeger Security International, 2007) (hereinafter: Allen, *Counterproliferation*).

'legal order of the oceans'.<sup>14</sup> The latter term resembles the original conception of Myres McDougal and William Burke of 'public order of the oceans'; however, it is neither coterminous in substance, nor does it bring along the public policy considerations enshrined in these authors' work.<sup>15</sup> On the other hand, it shares some characteristics without, however, being identical to the notion of 'ocean governance',<sup>16</sup> which is premised more upon concepts, such as 'common heritage', 'public trusteeship', 'global commons' or 'public interest', rather than fundamental norms, such as the principle of non-interference, the nationality of vessels, the conservation and management of the marine living resources, and the protection of the marine environment.<sup>17</sup> These norms constitute the 'Grundnormen' of this legal order, in the sense that they are the cornerstones, against which any relevant legal development is assessed and further elaborated.<sup>18</sup> In addition to the above principles pertaining to the law of the sea, the legal order of the oceans consists also of norms of general international law, such as the prohibition of unnecessary and disproportionate use of force and the protection of fundamental human rights and of humanitarian law.<sup>19</sup>

## II. CONTEMPORARY CHALLENGES TO THE FREEDOM OF THE HIGH SEAS AND MARITIME INTERCEPTION

### A. Terrorism and WMD

In general, most instances of interference on the high seas pertain to the following issues: first, to the threats posed by international terrorism and

<sup>14</sup> cf *UN Memorandum*, para 26. The term 'legal order of the oceans', along with the Wolfian term '*civitas maxima* of the oceans' will be used interchangeably in the present thesis.

<sup>15</sup> See M McDougal, W Burke, *The Public Order of the Oceans* (New Haven, CT: Yale University Press, 1962) (hereinafter: McDougal and Burke).

<sup>16</sup> See inter alia Y Tanaka, *A Dual Approach to Ocean Governance: the Cases of Zonal and Integrated Management in International Law* (Farnham: Ashgate, 2008) and the contributions by various authors in 'International Ocean Governance in the 21st Century' 23 *International Journal of Marine and Coastal Law* (2008).

<sup>17</sup> See in general R Churchill, AV Lowe, *The Law of the Sea*, 3rd edn (Manchester: Manchester University Press, 1999) (hereinafter: Churchill and Lowe) and on the particular principles see inter alia: D Nelson, 'The Development of the Legal Regime of High Seas Fisheries' in A Boyle, D Freestone (eds), *International Law and Sustainable Development* (Oxford: Oxford University Press, 2001), 119; C Redgwell, 'From Permission to Prohibition: The 1982 Convention on the Law of the Sea and the Protection of the Marine Environment', in D Freestone, R Barnes (eds), *The Law of the Sea: Progress and Prospects* (Oxford: OUP, 2006), 180.

<sup>18</sup> On the notion of 'Grundnorm' see H Kelsen, *Pure Theory of Law* (transl and ed M Knight) (Berkeley: University of California Press, 1970).

<sup>19</sup> See inter alia L Sohn, 'Peacetime Use of Force on the High Seas' in H Robertson (ed), *The Law of Naval Operations* (Newport: Naval War College Press, 1991) 39; and B Oxman, 'Human Rights and the UNCLOS' 36 *Columbia Journal of Transnational Law* (1998) 399.

by the proliferation of WMD,<sup>20</sup> which have been the object of much public and academic concern as well as of numerous unilateral or multilateral efforts by individual states and by international organisations.<sup>21</sup> The PSI has a pivotal role in this regard. Initially conceived as a 'collection of interdiction partnerships' among 11 core members,<sup>22</sup> it has subsequently expanded to a multifaceted international effort to combat the transfer of banned weapons and weapons technology, receiving the support of another 80 states.<sup>23</sup> In addition, reference should be made to UN Security Council Resolutions 1373 (2001)<sup>24</sup> and 1540 (2004),<sup>25</sup> the IMO SOLAS Amendments<sup>26</sup> and the 2005 SUA Protocol, the NATO Operation Active Endeavour<sup>27</sup> and a plethora of other unilateral and bilateral measures in this regard.<sup>28</sup> In terms of the number of interdictions, suffice to note that in the course of NATO's 'Operation Active Endeavour' alone, 'NATO forces . . . hailed more than 100,000 merchant vessels, boarding some 155 suspect ships'.<sup>29</sup>

The so-called 'War on Terror', triggered by the shattering event of '9/11', has also led to operations involving the use of force, such as the armed intervention in Afghanistan in October 2001.<sup>30</sup> In the course of the latter

<sup>20</sup> eg the 2004 UN High-Level Panel Report emphasised that preventing the proliferation of nuclear, chemical, and biological weapons materials and their potential use must remain an urgent priority for collective security; see Report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change, (2004), 39. See also Allen, *Counterproliferation*, 11.

<sup>21</sup> The possible use of WMD by 'rogue states' and by terrorists has been identified as a major security threat, for example, in NATO's New Strategy Concept, approved by heads of state and government participating in the meeting of NATO in Washington DC, on 23 and 24 April, 1999; available at [www.nato.int/docu/pr/1999/p99-065e.htm](http://www.nato.int/docu/pr/1999/p99-065e.htm). Cf inter alia the European Strategy in respect of WMD in J Littlewood, 'The EU Strategy against Proliferation of WMD' 1 *Journal of European Affairs* (2003) 1.

<sup>22</sup> See J Garvey, 'The International Institutional Imperative for Countering the Spread of WMD' 10 *Journal of Conflict and Security Law* (2005) 125, 129.

<sup>23</sup> See US Department of State, Proliferation Security Initiative Participants (as of 10 September 2011), available at [www.state.gov/t/isn/c27732.htm](http://www.state.gov/t/isn/c27732.htm).

<sup>24</sup> SC Res 1373 (28 September 2001) UN Doc S/RES/1373. See M Happold, 'Security Council Resolution 1373 and the Constitution of the UN' 16 *Leiden Journal of International Law* (2003) 593.

<sup>25</sup> SC Res 1540 (27 April, 2004) UN Doc. S/RES/1540. See also S Sur, 'La Resolution 1540 du Conseil de Sécurité (28 Avril 2004)' 104 *Revue Générale de Droit International Public* (2004) 855.

<sup>26</sup> The new Chapter XI-2 and the ISPS Code, which came into force in July 2004, introduced far-reaching measures to improve the security of ships and port facilities. See inter alia G Hesse, 'Maritime Security in a Multilateral Context' 18 *IJMCL* (2003) 327; F Odier, 'La Sécurité Maritime ou les Lacunes du Droit International', in *Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Pedone, 2003) 455.

<sup>27</sup> See relevant information at [www.nato.int/cps/en/natolive/topics\\_7932.htm](http://www.nato.int/cps/en/natolive/topics_7932.htm).

<sup>28</sup> See AJ Roach, 'Initiatives to Enhance Maritime Security at Sea' 28 *Marine Policy* (2004) 41.

<sup>29</sup> See above n 27.

<sup>30</sup> See from the vast bibliography on the use of force in Afghanistan, E Myjer, N White, 'The Twin Towers Attack: An Unlimited Right of Self-defence?' 7 *JCSL* (2002) 5; O Corten, F Dubuisson, 'Operation *Liberté Immuable*' 106 *Revue Générale de Droit International Public* (2002) 51.

campaign, named 'Operation Enduring Freedom' the states involved were considerably engaged in visitations of suspect vessels on the high seas, similar to interceptions in the course of NATO's 'Operation Active Endeavour' in the Mediterranean Sea.<sup>31</sup> There is, however, an important legal difference between these operations, which lies in the fact that the states parties to the armed conflict in the territory of Afghanistan enjoyed *ipso facto* the belligerent right of visit and search on the high seas. Suffice it also to include in this category the Israeli operation off Gaza Strip in 2010<sup>32</sup> which involved interdiction measures on the high seas justified under the rules of the law of war, as well as Operation Unified Protector in Libya in 2011.<sup>33</sup>

## B. Drug Trafficking

Similar enforcement measures on the high seas are often exercised in the context of drug trafficking.<sup>34</sup> Although a wide variety of methods are utilised by drug traffickers in plying their trade, the use of private and commercial vessels has long been significant. This is particularly the case with drugs such as cocaine, opium and its derivatives, and cannabis, all regulated by the Single Convention on Narcotics Drugs, as amended,<sup>35</sup> where transportation from source to consumer country frequently involves passage over ocean areas.<sup>36</sup> For example, given its relative widespread availability and low cost, the vast majority of marijuana and cocaine entering the US from abroad is said to be transported by private vessels.<sup>37</sup> As is reported by the UN Office on Drugs and Crime (UNODOC),

For the North American market, cocaine is typically transported from Colombia to Mexico or Central America by sea and then onwards by land to the United States and Canada. Cocaine is trafficked to Europe mostly by sea, often in container shipments. Colombia remains the main source of the cocaine found in

<sup>31</sup> See P Jimenez-Kwast, 'Maritime Interdiction of WMD in an International Legal Perspective' 38 *Netherlands Yearbook of International Law* (2007) 163, 235 (hereinafter: Jimenez-Kwast).

<sup>32</sup> See Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), available at [www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) and comments by D Guilfoyle at [www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel%E2%80%99s-blockade-of-the-gaza-strip/](http://www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel%E2%80%99s-blockade-of-the-gaza-strip/).

<sup>33</sup> On Libya see inter alia SC Resolutions 1970 (2011), 1973 (2011) and 2009 (2011), and on the Operation see [www.nato.int/cps/en/SID-D936FE09-8BE07838/natolive/topics\\_71652.htm](http://www.nato.int/cps/en/SID-D936FE09-8BE07838/natolive/topics_71652.htm).

<sup>34</sup> See in general Guilfoyle, *Shipping Interdiction*, 69–85 and P Van der Kruit, *Maritime Drug Interdiction in International Law* (Utrecht: Druk OBT / TDS, 2007).

<sup>35</sup> See Single Convention on Narcotic Drugs (1961) 520 UNTS 151; as amended by the 1972 Protocol 976 UNTS 3.

<sup>36</sup> See P Van der Kruit, above n 34, 21.

<sup>37</sup> See W Gilmore, 'Narcotics Interdiction at Sea, US-UK Cooperation' (1989) *MP* 218.



Europe, but direct shipments from Peru and the Plurinational State of Bolivia are far more common than in the United States market.<sup>38</sup>

Also, the means employed by the drug-traffickers in Central America have become highly sophisticated: apart from 'go-fast' vessels,<sup>39</sup> they use semi-submersible vessels, which are almost impossible to be properly stopped and visited.<sup>40</sup> Such vessels are 'both difficult for the Coast Guard to detect and easy for crewmembers, who often prefer losing their cargo to being caught, to sink. At the first sign of the Coast Guard, drug traffickers can quickly sink the vessel and jump into the ocean, which destroys the evidence necessary to prosecute them for a drug offense . . .'.<sup>41</sup>

This traffic by sea has led to various initiatives taken by those states most affected, such as the US and European countries. Central to this has been the policy of interception of vessels not only in the territorial waters of the consumer states, but also on the high seas and even further in the territorial waters of the source or transit States. This policy has been effectuated either through informal means, ie ad hoc consent of the flag state or of the vessel's master (consensual boarding), or through bilateral and multilateral treaties, such as the Caribbean ship rider agreements<sup>42</sup> and

<sup>38</sup> See at [www.unodc.org/unodc/en/drug-trafficking/index.html](http://www.unodc.org/unodc/en/drug-trafficking/index.html). The latest World Drugs Report-Executive Summary (2011) issued by the UN Office on Drugs and Crime, recorded that 'since 2006 seizures have shifted towards the source areas in South America and away from the consumer markets in North America and West and Central Europe. The role of West Africa in cocaine trafficking from South America to Europe might have decreased if judged from seizures only, but there are other indications that traffickers may have changed their tactics, and the area remains vulnerable to a resurgence in trafficking of cocaine'; see [www.unodc.org/documents/data-and-analysis/WDR2011/WDR2011-ExSum.pdf](http://www.unodc.org/documents/data-and-analysis/WDR2011/WDR2011-ExSum.pdf)

<sup>39</sup> These are typically 25–50 ft open boats, powered by twin outbound engines and capable of sustaining speed of 20–40 knots in 1–3 ft seas. Such boats present significant detection problems and their high speed enables them to escape into foreign territorial waters when confronted by the possibility of interdiction on the high seas; see W Gilmore, *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area* (London: The Stationery Office, 2005) 2 (hereinafter: Gilmore, Caribbean).

<sup>40</sup> Drug submarines, which can be made for as little as \$500,000 each and assembled in fewer than three months, are thought to carry almost thirty percent of Colombia's cocaine exports; see David Kushner, *Drug-Sub Culture*, NY TIMES, April 23, 2009, 30, available at <<http://www.nytimes.com/2009/04/26/magazine/26drugs-t.html>>. It is reported that 'One self-propelled semi-submersible vessel intercepted by the Coast Guard, for example, contained seven tons of cocaine, worth \$187 million'; see A Bennett, 'The Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act' (2012) 37 *Yale Journal of International Law* 433, 434.

<sup>41</sup> *Ibid*, 434.

<sup>42</sup> The problem of maritime illicit traffic of narcotic drugs is particularly acute in the Caribbean region, where there are a number of contiguous nations separated by relatively narrow bodies of water which serve, for the smugglers, as natural 'stepping stones' between source and consumer states. These nations provide the 'quintessential drug trafficking havens due to their sparse populations and limited enforcement capability'; see K Rattray, 'Caribbean Drug Challenges', in M Nordquist and JN Moore (eds), *Ocean Policy: New Institutions, Challenges and Opportunities* (The Hague: Nijhoff, 1999) 179, 185.

the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, respectively.<sup>43</sup>

### C. Illicit Migration

Another realm, where the interception of vessels on the high seas looms large, pertains to illicit migration and asylum. It is a truism that the high seas have always furnished a way to safety for potential asylum-seekers or forced migrants. In the last century alone, the world witnessed the plight of Jewish refugees fleeing Nazi persecution before World War II,<sup>44</sup> the 'boat people' from Indochina during the 1970s<sup>45</sup> and, more recently, the thousands of Haitians and Cubans travelling to the United States<sup>46</sup> and many of diverse nationalities heading to southern Europe across the Mediterranean Sea.<sup>47</sup> Episodes like the *Tampa*<sup>48</sup> and the *Monica*,<sup>49</sup> which involved asylum-seekers at sea, have attracted notable media coverage

<sup>43</sup> See UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988) 21 *International Legal Materials* (1988) 1261 (hereinafter: 1988 Vienna Convention). As at 25 November 2012, the Convention had 188 state parties; see [treaties.un.org/Pages/ViewDetails.aspx?src=1REATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=1REATY&mtdsg_no=VI-19&chapter=6&lang=en). For commentary see inter alia UN Economic and Social Council, *Commentary on the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1998) (hereinafter: Vienna Commentary).

<sup>44</sup> See G Thomas, M-M Witts, *The Voyage of the Damned* (New York: Stein and Day, 1974). Famous was the *St Luis* episode, where over 900 Jews fleeing Nazi Germany en route to Cuba were not allowed to disembark in that country and were summarily rejected by a number of the Latin American governments and the US and Canada; see J van Selm and B Cooper, *The New 'Boat People': Ensuring Safety and Determining Status* (Washington DC: Migration Policy Institute, 2006) 91 (hereinafter: Van Selm and Cooper).

<sup>45</sup> See inter alia B Grant, *The Boat People* (London: Penguin, 1980).

<sup>46</sup> For the last quarter of century, the US shores have been the target destination of thousands of undocumented migrants or asylum-seekers coming mostly from Cuba, Haiti and Dominican Republic. In response to discrete episodes of mass irregular migration, the US government has authorised various maritime interdiction programmes, which have evolved into standing boarder enforcement. See Van Selm and Cooper, 79.

<sup>47</sup> Migrant and refugee flows have long been a challenge to the states bordering the Mediterranean Sea. These maritime movements to a greater or lesser degree affect all Mediterranean states. See for further information: Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean (Madrid, 23–24 May 2006), available at [www.unhcr.org/refworld/pdfid/45b8d8b4.pdf](http://www.unhcr.org/refworld/pdfid/45b8d8b4.pdf).

<sup>48</sup> In August 2001, the Norwegian-flag cargo vessel *M/V Tampa* rescued 440 people from an Indonesian ferry that was sinking about 75 nm north-west of Christmas Island, Australia. When *Tampa* sought to offload its passengers in Australia, the latter, concerned with an influx of immigrants, refused to accept them. Following lengthy negotiations, New Zealand and Nauru eventually accepted the refugees. For the facts, see D Rothwell, 'The Law of the Sea and the *M/V Tampa* Incident' 13 *Public Law Review* (2002) 118.

<sup>49</sup> On 17 March 2002, the merchant vessel *Monica*, a 75-metre long cargo ship, flying the flag of Tonga and with more than 900 Kurdish refugees on board, was detected and subsequently intercepted in the Eastern Mediterranean by the French Navy, which proceeded to verify the identity of the ship, after a signal from the Italian authorities. See I Thomas, 'L'affaire du "*Monica*"' 106 *RGDIP* (2002) 391.



and triggered serious academic and political debate.<sup>50</sup> Given that the prime concern of these people is to flee from their country of origin, rather than to flee to any particular place, it is not surprising that they flee by whatever means possible, including overcrowded and unseaworthy vessels.<sup>51</sup> Such vessels will often be at risk of sinking and indeed many do sink, with the result that thousands of lives are lost every year.<sup>52</sup> This has been particularly noticeable in the period since January 2011, which has seen an increase in departures of migrant boats from North Africa and, allegedly, at least 1,500 persons have lost their lives while trying to cross the Mediterranean.<sup>53</sup> Currently, there is a mass exodus of Syrian nationals fleeing from their country often by boats due to the deteriorating security situation in Syria.<sup>54</sup>

It is evident that in the contemporary era the focus of most, especially developed, states has predominantly shifted to preventing asylum-seekers or illicit migrants from reaching their territory.<sup>55</sup> Amongst the 'non-arrival' policies employed to this end,<sup>56</sup> a primary role is attributed to interception, which has attained even more vigour recently in the light of the adoption of the Smuggling Protocol, as well as of the relevant

<sup>50</sup> See inter alia: X Hinrichs, 'Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective' 36 *Revue Belge de Droit International* (2003) 413 (hereinafter: Hinrichs), P Mathew, 'Australian Refugee Protection in the Wake of Tampa' 96 *American Journal of International Law* (2002) 661.

<sup>51</sup> Reports to IMO recount almost unimaginable means of transportation, such as a small inflated raft for children of two metres length, carrying two migrants, a windsurfer with two migrants, an improvised raft (a wooden door with plastic bottles tied to it) with two migrants etc; see Second Biannual Report, IMC, doc MSC3/Circ 2 (October 31, 2001); available at [www.imo.org](http://www.imo.org).

<sup>52</sup> See information and reports of dead or missing people up to 2011 in the UNHCR's website on asylum and migration, entitled 'All in the same boat: the challenges of mixed migration'; available at [www.unhcr.org/pages/4a1d406060.html](http://www.unhcr.org/pages/4a1d406060.html).

<sup>53</sup> See inter alia Report by T Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg, 7 September 2011) – CommDH (2011) 26, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1826921>. See also the recent allegations with respect to NATO vessels leaving people to die off the coast of Libya at [www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants](http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants) (8 May 2011), and commentary in S Trevisanut's and E Papastavridis' posts at EJILTALK, available at [www.ejiltalk.org](http://www.ejiltalk.org).

<sup>54</sup> According to UNHCR, there are 'more than 280,000 people registered or in need of humanitarian assistance and protection as of end of September [2012]; see UN, Syrian Regional Response Plan, Second Revision (September 2012); available at <http://data.unhcr.org/syrianrefugees/uploads/SyriaRRP.pdf>.

<sup>55</sup> In terms of immigration and refugee matters, it is submitted that the current debate is premised on a rather stark dichotomy between protection and control as ways of regulating migration in a globalised world. This is more apposite now than ever, in the aftermath of 9/11; see G Loescher, 'Refugee Protection and State Security: towards a Greater Convergence' in RM Price and MW Zacker (eds), *The UN and Global Security* (New York: Palgrave Macmillan, 2004) 161.

<sup>56</sup> The usual measures employed in order to tackle this problem, besides interception, are inter alia pre-inspection, visa requirements, carrier sanctions, 'safe third country' concepts, security zones, and international zones; see G Goodwin-Gill and J McAdam, *The Refugee in International Law* 3rd edn (Oxford: Oxford University Press, 2007) 374 (hereinafter: Goodwin-Gill and McAdam).

practice of states, like Australia,<sup>57</sup> the US<sup>58</sup> and various European states.<sup>59</sup> The latest example is manifestly the 2009 'push-back' operations conducted by Italy in cooperation with Libya in the central Mediterranean Sea.<sup>60</sup>

A central role in the interception of asylum-seekers or illicit migrants has been ascribed to FRONTEX, which was established in 2004 to help EU Member States in implementing community legislation on the surveillance of the EU borders, including maritime borders, and to coordinate their operational cooperation.<sup>61</sup>

While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency, as a body of the Union . . . shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code . . . It shall do so by ensuring the coordination of the actions of the Member States in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and of surveillance of the external borders of the Member States.<sup>62</sup>

As officially stated by FRONTEX, the Agency 'plans, coordinates, implements and evaluates joint operations conducted using Member States' staff and equipment at the external borders (sea, land and air)'.<sup>63</sup> Truly, many joint interception operations have been executed by EU

<sup>57</sup> Following the *Tampa* incident in 2001, the then Howard Government passed a series of laws – commonly referred to as 'Pacific Strategy' (previously, 'Solution') – 'excising' various islands and coastal ports from the migration zone. See in this regard A Schloenhardt (ed), *Migrant Smuggling, Illegal Migration and Organized Crime in Australia and Asia Pacific Region* (Leiden: Martinus Nijhoff, 2003). Instrumental to the implementation of the Pacific Strategy were maritime interception operations; see P Mathew, 'Address: Legal Issues Concerning Interception', 17 *Georgetown Immigration Law Journal* (2003) 221, 227.

<sup>58</sup> For interception operations recently launched in relation to Haiti see B Frelick, 'Abundantly Clear: Refoulement' 19 *Georgetown International Law Journal* (2005) 245.

<sup>59</sup> From time to time, European states such as Italy or Spain have engaged in interception at sea; see UNHCR, Selected Reference Materials, Rescue at Sea, Maritime Interception and Stowaways (November 2006), available at [www.unhcr.bg/other/law\\_of\\_the\\_sea.pdf](http://www.unhcr.bg/other/law_of_the_sea.pdf).

<sup>60</sup> According to the Italian authorities, from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya; see further information at <http://migrantsatsea.wordpress.com/2010/03/18/unhcr-files-ecthr-third-party-intervention-in-hirsi-v-italy/> and also V Moreno-Lax, 'Seeking Asylum in the Mediterranean: against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' 23 *International Journal of Refugee Law* (2011) 174, 185 and M Giuffr , 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *International Journal of Refugee Law* (forthcoming) [on file with the author].

<sup>61</sup> See above n 7.

<sup>62</sup> See art 1 of Regulation (EU) No 1168/2011 of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (FRONTEX) (25/10/2011), OJ L 304 (hereinafter: 2011 FRONTEX Regulation).

<sup>63</sup> See at <http://frontex.europa.eu/about/mission-and-tasks>.

Member States at sea.<sup>64</sup> Currently, there are five joint operations coordinated by FRONTEX, namely *Operation Hera* in the Canary Islands, *Operations Indalo and Minerva* in the south coast of Spain, *Operation Hermes* in the central Mediterranean, *Operation Aeneas* in South Italy and the Adriatic Sea and finally *Operation Poseidon* in the Aegean Sea.<sup>65</sup> Moreover, the operation capabilities of FRONTEX have been significantly enhanced by the very recent Regulation (EU) No 1168/2011, which amended the Council Regulation (EC) No 2007/2004 establishing FRONTEX. Under this Regulation, the Agency, inter alia, has the authority to plan, on its own, joint operations or pilot projects, while Member States should contribute with an appropriate number of skilled border guards and make them available for deployment on a semi-permanent basis.<sup>66</sup>

#### D. Piracy and Armed Robbery at Sea

Besides international peace and security, drug trafficking and illicit migration, which have recently come at the centre of the focus of international community, the most hotly debated relevant issue lately is piracy in Africa. While piracy *jure gentium* had been considered almost obsolete until 2008, it has forcefully come to the fore since then. The extraordinary growth in piracy off the coast of Somalia has attracted unprecedented media coverage and has led the international community to take many measures to suppress and to prevent this scourge.<sup>67</sup> NATO as well as the European Union have launched maritime operations to protect international shipping from such attacks and the UN Security Council has made a series of Resolutions under Chapter VII authorising entry into the territorial waters or even into the mainland of Somalia for the purpose of arresting the suspect pirates.<sup>68</sup> Lately, the theatre of many pirate attacks

<sup>64</sup> Examples of recently accomplished operations include inter alia: Operation EPN-Hermes, from 20 February 2011 to 31 March 2012, which aimed to implement coordinated sea border activities to control illegal migration flows from Tunisia towards south of Italy (mainly Lampedusa and Sardinia); JO EPN Hera 2009 (extended in 2010), on tackling illegal immigration coming from West African countries disembarking in Canary Islands; JO Operation POSEIDON 2009 (extended in 2010) in the Eastern Mediterranean Sea; see <http://frontex.europa.eu/operations/archive-of-accomplished-operations>.

<sup>65</sup> Information provided in a personal communication with the author under conditions of anonymity (12.11.2012).

<sup>66</sup> See inter alia 2011 FRONTEX Regulation, art 1(5) amending art 3 of Regulation No 2007/2004.

<sup>67</sup> See inter alia [www.imo.org/MediaCentre/resources/Pages/Piracy-and-armed-robbery-against-ships.asp](http://www.imo.org/MediaCentre/resources/Pages/Piracy-and-armed-robbery-against-ships.asp).

<sup>68</sup> On piracy off Somalia see inter alia R Geiss, A Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: OUP, 2011) (hereinafter: Geiss and Petrig); D Guilfoyle, 'Combating Piracy: Executive Measures on the High Seas' 53 *Japanese Yearbook of International Law* (2010) 149; E Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A Abass (ed),

has shifted to West Africa, in particular the Gulf of Guinea, which has been condemned by the Security Council.<sup>69</sup> Closely related to the uprising of piracy *jure gentium* is the novel crime of armed robbery at sea, which describes those piratical acts that take place within a coastal state's jurisdiction.<sup>70</sup> Often, such incidents of armed robbery at sea are closely intertwined with *acta pirata* off the Somali coast and other African states.

## E. IUU Fishing

Lastly, it should not be omitted that one of the most long-standing and recurrent grounds for interference with foreign vessels on the high seas is illegal fishing, or, as currently labelled, illegal, unreported, unregulated (IUU) fishing.<sup>71</sup> Combating IUU fishing has been one of the main issues on the international fisheries agenda for the past decade, as it has been recognised as a major threat to fisheries conservation and marine biodiversity.<sup>72</sup> It is reported that 'in case of fisheries, more than 75 per cent of the world's fish stocks are reported as already fully exploited or overexploited and increasing numbers of marine species are considered threatened or endangered'.<sup>73</sup> Numbers regarding IUU fishing are telling: 'the 2008 estimates for the total value of IUU losses worldwide are between USD 10 and 23 billion annually'.<sup>74</sup> The international community has endeavoured

*Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 122 (hereinafter: Papastavridis, *Somalia*).

<sup>69</sup> See above n 5.

<sup>70</sup> IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, adopted 29 November 2001, Res A922(22), art 2(2), [www.pmaesa.org/Maritime/Res%20A.922\(22\).doc](http://www.pmaesa.org/Maritime/Res%20A.922(22).doc). Cf also art 1 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (28 April 2005), *International Legal Materials* (2005) 829.

<sup>71</sup> See 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005, available at [ftp://ftp.fao.org/fi/document/ministerial/2005/iuu/declaration.pdf](http://ftp.fao.org/fi/document/ministerial/2005/iuu/declaration.pdf). See also Closing the Net: Stopping Illegal Fishing on the High Seas, Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas, 2006, available at [www.high-seas.org](http://www.high-seas.org) and M Palma et al, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Martinus Nijhoff, 2010) 245 (hereinafter: Palma, *Fisheries*).

<sup>72</sup> See T Lobach, 'Combating IUU Fishing: Interaction of Global and Regional Initiatives', in Vidas D (ed), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Leiden: Martinus Nijhoff, 2010) 109, 109.

<sup>73</sup> R Rayfuse, 'Moving Beyond the Tragedy of Global Commons: The Grotian Legacy and the Future of Sustainable Management of the Biodiversity of the High Seas', in Leary D and Pisupati B (eds), *The Future of International Environmental Law* (Tokyo: United Nations University Press, 2010) 201, 204.

<sup>74</sup> K Gjerde, 'High Seas Fisheries Governance: Prospects and Challenges in the 21st Century', in Vidas D and Schei J (eds), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden: Martinus Nijhoff, 2011) 221, 224.

to address this particular problem either globally by adopting multilateral instruments, such as the UN Fish Stocks Agreement (1995)<sup>75</sup> and the FAO Compliance Agreement (1993),<sup>76</sup> or regionally by the action of an array of regional fisheries management organisations (RFMOs).<sup>77</sup> To this end, joint enforcement operations and inspection schemes have been extensively employed both in areas under national jurisdiction and on the high seas.<sup>78</sup>

In conclusion, there are certain international problems that have given rise to extensive interception activities on the high seas, which, arguably, challenge the fundamental principle of the freedom of the high seas. Such activities concern not only long-standing matters, such as piracy or fisheries, but also contemporary challenges, in the form of maritime terrorism, proliferation of WMD, drug trafficking and illicit migration.

## F. Are They All 'Threats to Maritime Security'?

Having said that, it is fitting to note here that there is a trend to include all these challenges under the generic and all-encompassing heading 'maritime security'. While there is a lack of any specific mention to 'maritime security' in LOSC or in the relevant IMO instruments, many authors speak of 'maritime threats' or of 'threats to maritime security'.<sup>79</sup> The latter term is also employed by the UN Secretary General in his 2008 *Report on Oceans and the Law of the Sea*, which has identified seven specific 'threats to maritime security': 1) piracy and armed robbery against ships, 2) terrorist acts against shipping, offshore installations and other maritime interests, 3) illicit trafficking in arms and weapons of mass destruction, 4) illicit trafficking in narcotic drugs and psychotropic substances, 5) smuggling

<sup>75</sup> UN Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 88. The Agreement was opened for signature on 4 December 1995 and entered into force on 11 December 2001 (hereinafter: Straddling Stocks Agreement). As of 7 November 2012, there were 80 parties; see [www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement%20for%20the%20implementation%20of%20the%20provisions%20of%20the%20Convention%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks).

<sup>76</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1994) 2221 UNTS 91. The FAO Compliance Agreement was approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the FAO Conference and entered in force on 24 April 2003 (hereinafter: FAO Compliance Agreement).

<sup>77</sup> See eg M Lodge, 'Developing a Model for Improved Governance by Regional Fisheries Management Organizations', in Vidas D (ed), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Leiden: Martinus Nijhoff, 2010) 157–74.

<sup>78</sup> See inter alia R Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden: Brill Academic Publishers, 2004).

<sup>79</sup> See eg JA Roach, 'Initiatives to Enhance Maritime Security at Sea', above n 28, 41.

and trafficking of persons by sea, 6) IUU fishing, and 7) intentional and unlawful damage to the marine environment.<sup>80</sup>

Such activities are also included in the first comprehensive multilateral treaty concerning maritime security, the CARICOM Agreement (2008), which refers in article 1 para 2 to activities ‘likely to compromise the security of a State party or the Region if it involves trafficking in drugs, arms or people, terrorism, smuggling, illegal immigration, serious marine pollution, injury to off-shore installations, piracy, hijacking and other serious crimes’. Besides this Agreement, there are also various shipboarding and shiprider agreements that the US has concluded with states in Africa or in the Pacific, which aim to suppress ‘illicit transnational maritime activity’ in general.<sup>81</sup>

As N Klein observes, ‘while “maritime security” is widely used and understood in the day-to-day workings of naval and law enforcement officials, other government officials, vessel owners and operators, as well as in the academic literature, it is rarely defined in a categorical way, and instead tends to have a context-specific meaning’.<sup>82</sup> Apparently, this lack of precise definition manifests that the identification of what is threat to maritime security is not free from complexity.<sup>83</sup> More importantly, it is argued that each alleged ‘threat to maritime security’, which gives rise to maritime interception on the high seas, requires different legal treatment, as it is premised upon a different rationale. Hence, the inclusion of all such ‘threats’ under the same heading is a pragmatic, yet an oversimplified approach to contemporary challenges to the freedom of the high seas.

This notwithstanding, there are many cases, in which organised criminal groups would be associated with more than one illicit activity at sea, for example illegal fishing with smuggling of migrants.<sup>84</sup> This poses significant hurdles both in respect of the prevention of such crimes and in respect of the applicable legal framework. In any event and as far as inter-

<sup>80</sup> UNGA, ‘Oceans and the Law of the Sea: Report of the Secretary-General’ (10 March 2008), UN Doc A/63/63, paras 54, 63, 72, 82, 89, 98, 107–8. In the 2010 Report, the Secretary-General mentions only ‘threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests’; UNGA, ‘Oceans and the Law of the Sea: Report of the Secretary-General’ (17 March 2011), UN Doc A/65/37, para 82.

<sup>81</sup> A list of such agreements is included in A Roach and R Smith, *Excessive Maritime Claims*, 3rd edn (Leiden: Martinus Nijhoff, 2012), Appendix 16 (on file with the author) (hereinafter: Roach, Appendix).

<sup>82</sup> Klein, *Maritime Security*, 11.

<sup>83</sup> For example, at the 2008 meeting of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), State representatives contested the inclusion of IUU fishing as a threat to maritime security; see Letter dated 25 July 2008 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly, UN Doc A/63/174 Part B, paras 70–71.

<sup>84</sup> For numerous of such examples see eg UNODC, *Transnational Organized Crime in the Fishing Industry. Focus on Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (Vienna, 2011).



ception is concerned, it must be stressed that each illicit activity or 'threat to maritime security' is subject to a different set of rules and a different legal basis for interception at sea.

### III. THE OUTLINE OF THE BOOK

The book will proceed as follows: Chapter 2 will be devoted to discussion of the theoretical framework of the right of visit on the high seas. In this chapter, the historical claims to the freedom of the seas and the celebrated controversy between *mare liberum* and *mare clausum* will be canvassed. Drawing valuable insights from this historical survey, it will be possible to revisit this controversy and ascertain the role of interception on the high seas in the legal order of the oceans of the twenty-first century. It is posited that the rationales behind the contemporary interception operations reflect the old-fashioned *mare clausum* arguments and they fall under three general categories, namely, the maintenance of international peace and security, the protection of the *bon usage* of the oceans and the maintenance of welfare and *ordre public* of the states and of international society. These categories, far from being hermetically sealed or isolated, are interconnected and leave considerable room for permeation by the various grounds for interference. They also inform the content of the following chapters, in the sense that the various interception activities will be explored in the light of this categorisation.

Before turning to the detailed analysis of these activities, it is necessary to have a thorough discussion over the 'law of maritime interception or interdiction', ie the legal framework of interception activities on the high seas. Accordingly, in Chapter 3 the classical belligerent right of visit and search, but, more importantly, its peacetime counterpart, the right of visit under article 110 of LOSC, will be canvassed. In more detail, questions such as its *modus operandi*, the requirement for the existence of 'reasonable suspicions', as well as its restrictions under the law of the sea and general international law, will be adequately addressed and analysed. As far as the latter are concerned, reference will be made to question of the use of force in the course of interception operation and whether it constitutes another exception to article 2(4) of the UN Charter. In addition, the restrictions posed by human rights and humanitarian law as well as other considerations, such as the protection of marine environment or of commercial interests will be discussed in this regard. Finally, particular reference will be made to the assertion of prescriptive and enforcement jurisdiction over these criminal acts at sea. Attention will be also drawn to questions, such as whether and to what extent technological developments have altered the traditional conception of the right of visit on the high seas. It will be argued that to a certain extent this has occurred. Nonetheless, it will be

submitted that there is no such thing as a distinct 'law of interdiction', albeit an array of international legal rules delineating the contours of interception activities on the high seas.

Chapter 4 will be devoted to the first theoretical category, namely, the interference on the high seas for the maintenance of international peace and security and more specifically, to the issues of the belligerent right of visit and search as it applies today and of the maritime enforcement of SC Resolutions. It will scrutinise the belligerent right of visit and search as has been exercised in the past, but also in more recent international and internal armed conflicts. It will be submitted that there is certainly merit in considering it relevant in the twenty-first century. In addition, all the maritime interdiction operations authorised by the UN Security Council will be discussed.

Chapter 5 will be a canvass of the novel threats of terrorism and of proliferation of WMD. The latter threats will be assessed against the background of the initiatives taken by international organisations, namely the UN, NATO and IMO, as well as by states individually and collectively, such as the PSI, and unilaterally. This assessment will include analysis of the possible legal justifications for unilateral interdiction measures under international law. Finally, there will be a brief consideration of the legal restrictions involved in the exercise of the right of visit in that context, mainly of the issue of enforcement jurisdiction over terrorism and WMD on the high seas.

In Chapter 6, the focus will shift to maritime interception activities to safeguard the fundamental freedoms of the high seas, namely interception activities to counter piracy *jure gentium* and IUU fishing. It is not surprising that more emphasis will be placed on the revival of piracy in the Gulf of Aden and the West Indian Ocean and recently in East Africa. In this regard, there will be a thorough analysis of the legal bases for the operations taking place both on the high seas and in the territorial seas of the African states concerned as well as of the various challenges posed by the non-assertion of jurisdiction over piracy and armed robbery by the intercepting states. Also, the question of the applicability of human rights in these operations will be addressed. The chapter will close by a short reference to the threats posed by IUU fishing and to the measures, including interception on the high seas, which states and the RFMOs concerned have taken in this respect.

Chapter 7 will revolve around the problem of drug trafficking on the high seas. The relevant discussion will consider both the treaty-law bases for interference with drug smuggling on the high seas, such as the 1988 Vienna Convention against Illicit Trafficking in Narcotic Drugs and the customary law bases, such as the consent of the flag State. It will also scrutinise the relevant international legal restrictions governing such interference including the question of the use of force and the question of jurisdiction over the relevant offences.

A similar structure will be followed in respect of the third current problem and source of interception activities on the high seas, namely, illicit migration and human trafficking. Accordingly, the analysis in Chapter 8 will commence with a legal characterisation of the relevant issues, and then will assess both the treaty and the customary law justifications for such interference on the high seas. The chapter will end with a brief canvass of the pertinent international legal restrictions, including the rules on the use of force and the prohibition of *non-refoulement* under refugee and human rights law.

What is left out of the scope of the book? From the alleged 'threats to maritime security' or from the grounds of interference included in article 110, only the issue of the pollution of the marine environment and that of 'unauthorised broadcasting', respectively, are left out. The former is excluded, because it has never involved significant interception activities on the high seas, notwithstanding the recent CARICOM Security Agreement (2008),<sup>85</sup> and the latter, as it seems to have fallen in desuetude. For reasons of space and because it has extensively been analysed elsewhere, the issue of state responsibility arising from the exercise of the right of visit is also excluded.<sup>86</sup>

The present enquiry will close with some concluding remarks in Chapter 9 assessing the impact of these challenges on the existing legal order of the oceans.

<sup>85</sup> Art 1(2) of the 2008 CARICOM Agreement designates 'a serious or potentially serious pollution of the environment' as 'an activity likely to compromise the security of a State Party' and thus the right of visit is accorded under art 9 of the Agreement. To the knowledge of the author, there is no relevant practice in this regard.

<sup>86</sup> On this issue, see the excellent treatises of P Wendel, *State Responsibility for Interferences with the Freedom of Navigation in International Law* (Berlin: Springer, 2007) (hereinafter: Wendel) and of D Guilfoyle, *Shipping Interdiction*, Ch 12.