

CAMBRIDGE
STUDIES IN
INTERNATIONAL
AND
COMPARATIVE
LAW

Shipping Interdiction and the Law of the Sea

DOUGLAS GUILFOYLE



Shipping Interdiction and the Law of the Sea

Douglas Guilfoyle



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521760195

© Douglas Guilfoyle 2009

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2009

Reprinted 2011

First paperback edition 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Guilfoyle, Douglas.

Shipping interdiction and the law of the sea / Douglas Guilfoyle.

p. cm. – (Cambridge studies in international and comparative law)

Includes bibliographical references and index.

ISBN 978-0-521-76019-5 (hardback) 1. Seizure of vessels and cargoes.

2. Jurisdiction over ships at sea. 3. Maritime law–Criminal provisions.

4. Law enforcement. I. Title. II. Series.

KZ6580.G85 2009

341.4'5–dc22 2009018066

ISBN 978-0-521-76019-5 Hardback

ISBN 978-1-107-63907-2 Paperback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

Shipping Interdiction and the Law of the Sea

In this comparative study of shipping interdiction, Douglas Guilfoyle considers the state action of stopping, searching and arresting foreign flag vessels and crew on the high seas in cases such as piracy, slavery, drug smuggling, fisheries management, migrant smuggling, the proliferation of weapons of mass destruction and maritime terrorism. Interdiction raises important questions of jurisdiction, including how permission to board a foreign vessel is obtained, whether boarding-state or flag-state law applies during the interdiction (or whether both apply), and which state has jurisdiction to prosecute any crimes discovered. Rules on the use of force and protection of human rights, compensation for wrongful interdiction and the status of boarding-state officers under flag-state law are also examined. A unified and practical view is taken of the law applicable across existing interdiction regimes based on an extensive survey of state practice.

Douglas Guilfoyle is a Lecturer at University College London, where he teaches public law and public international law.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

General Editors

James Crawford SC FBA

*Whewell Professor of International Law, Faculty of Law,
University of Cambridge*

John S. Bell FBA

Professor of Law, Faculty of Law, University of Cambridge

Editorial Board

Professor Hilary Charlesworth *Australian National
University*

Professor Lori Damrosch *Columbia University Law
School*

Professor John Dugard *Universiteit Leiden*

Professor Mary-Ann Glendon *Harvard Law School*

Professor Christopher Greenwood *London School of
Economics*

Professor David Johnston *University of Edinburgh*

Professor Hein Kötz *Max-Planck-Institut, Hamburg*

Professor Donald McRae *University of Ottawa*

Professor Onuma Yasuaki *University of Tokyo*

Professor Reinhard Zimmermann *Universität
Regensburg*

Advisory Committee

Professor D. W. Bowett QC

Judge Rosalyn Higgins QC

Professor J. A. Jolowicz QC

Professor Sir Elihu Lauterpacht CBE QC

Judge Stephen Schwebel

A list of books in the series can be found at the end of this volume.

Foreword

Part of the fascination of the law of the sea is the way in which – despite major technological change – similar problems are faced, and familiar legal concepts deployed, over generations and even centuries. This is true of many of the issues addressed so adeptly by Douglas Guilfoyle in his work on interdiction of foreign ships at sea. We have piracy still with us, a subject dealt with in more detail by the 1982 Law of the Sea Convention than maritime delimitation. We have the old law of hot pursuit adapted to expanded maritime zones. We have *The Lotus*, which concerned jurisdiction to prescribe not to enforce, but which stipulated, *a fortiori*, a flag-state monopoly of high seas enforcement which constitutes the main challenge for those concerned to interdict suspect ships or cargos at sea.

At the same time, facing the relatively simple and well-known jurisdictional rules for high seas interdiction in time of ‘peace’ we have a range of old and new challenges to international and national law – people smuggling as well as drug smuggling, illicit fisheries, the suspected transport of weapons of mass destruction or of strategically interdicted cargos, and so on. Some of these problems may be transient – like the ‘pirate radio stations’ of the 1960s. Others are perennial.

As Guilfoyle shows, underlying every lawful interdiction there must be jurisdiction not only to enforce by the very act of boarding and inspection but also to enforce through prosecution and confiscation, disposal or return. That jurisdiction may be distributed among different states. It is more sustainable, and usually simpler from an operational point of view, to use existing recognized jurisdictions (especially that of the flag state) than to assert or invent new ones, via Chapter VII of the United Nations Charter or otherwise. This search for sustainable solutions helps to explain the quite high levels of co-operation revealed

in state practice, for example in the various ship-rider schemes and the conclusion of a range of bilateral and regional treaties and arrangements on such matters as drug trafficking (supplementing the UN Narcotics Convention of 1988) and interdiction of weapons of mass destruction and precursor material.

This book both assembles and organises the now extensive legal materials but explains them in a balanced and informed way. Douglas Guilfoyle's grasp not only of the law but also the practice (and the underlying practicalities) is most impressive. His will become the standard work in its field.

James Crawford
Lauterpacht Centre for International Law

Preface

This work reflects the law as it stood, to the best of the author's knowledge, on 14 August 2008, unless otherwise indicated. The discussion of piracy off Somalia, however, was updated to cover the numerous developments to 31 December 2008. In quoted material some spellings may have been regularised for consistency with the general text. On occasion, the author's translation of certain material is presented as a quotation. In such cases the original text is presented in the footnote.

An earlier draft of Chapters 2 and 9 was published as 'Maritime interdiction of weapons of mass destruction' (2007) 12 *Journal of Conflict and Security Law* 1. The case study on Somali piracy in section 4.1.8 was first published as 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO regional counter-piracy efforts' (2008) 57 *International and Comparative Law Quarterly* 690. Earlier versions of the author's arguments relating to the law of countermeasures in Chapter 6, section 6, and Chapter 10, section 3.2, appeared as 'Interdicting vessels to enforce the common interest: maritime countermeasures and the use of force' (2007) 56 *International and Comparative Law Quarterly* 69.

All website addresses were accurate as at 14 August 2008.

Acknowledgements

While writing may be a solitary activity, it does not occur in isolation. This book began as a doctoral dissertation at Cambridge, where I was enormously fortunate in the support I received over three years of study. First and particular thanks are due to my supervisor, Professor James Crawford, whose commitment to students is exemplary. I benefited greatly from his extraordinarily prompt and detailed comments on drafts; this work would have been very much the poorer without his influence.

I must also thank those practitioners and academics who were kind enough to speak to me about my research, some several times, or to offer comments on earlier drafts of certain chapters. I am especially grateful to Dr Rosalie Balkin, Annabelle Bolt, Professor Jane Dalton, Amos Donoghue, Ricardo Federizon, Vladimir Fedorenko, Dame Hazel Fox, Dr John Kalish, Lt Commander Brad Kieserman, Holly Koehler, Professor Dennis Mandsager, Peter McColl, Joao Neves, Wayne Raabe, Dr Rosemary Rayfuse, Captain J. Ashley Roach (Ret.), Abda Sharif, Leo Strowbridge, Chris Trelawny, Deirdre Warner-Kramer and Mark Zanker, among many others. Nothing in this book should be taken, however, as representing the views of others or the organisations for which they work.

The topic of this work was suggested in the course of writing a master's thesis under the supervision of Professor Christine Gray. I was lucky to have the benefit of her early influence and continued support. I was fortunate also in having Professor Bill Gilmore and Dr Roger O'Keefe as my doctoral examiners. Their thorough, challenging and helpful comments greatly improved the present work. Ultimate responsibility for the present text and any errors in it, of course, remains with me.

I gratefully acknowledge the generous financial support of the Gates Cambridge Trust throughout my doctoral study, as well as funding provided by the UK government's Overseas Research Students Award Scheme. Trinity Hall and the Faculty of Law's Yorke Fund provided vital grants for travel.

A researcher also benefits from a supportive environment. I owe the Trinity Hall community a great debt: individual friends will excuse my not singling them out. Similarly, among law research students, the Cherry Blossoms were (and continue to be) fabulously generous colleagues and friends. Particular thanks must go to those who read parts of this work in draft, especially Isabelle Van Damme, Kimberley Trapp and Alex Mills. Kerry Tetzlaff checked my Italian translations and Efthymios Papastavridis helped me to find a number of treaties. The final text of this book was prepared during a month spent at the Lauterpacht Centre for International Law, where I had the benefit, among many others, of sharing a desk with Natalie Klein and the proof-reading of John Morss. I would also like to thank Finola O'Sullivan, Jodie Barnes and Richard Woodham at Cambridge University Press, as well as the copy-editor Philippa Youngman, for all their assistance.

Final and heartfelt thanks are due for the support of my family throughout: my mother Pamela, my father Adrian, my sister Blythe, and especially Zoë, who was good enough to marry me the month after this work was submitted.

University College London

Abbreviations

AFDI	<i>Annuaire Français de Droit International</i>
AJIL	<i>American Journal of International Law</i>
ALJ	<i>Australian Law Journal</i>
Annotated Commander's Handbook	A. Thomas and J. Duncan (eds.), <i>Annotated Supplement to the Commander's Handbook on the Law of Naval Operations</i> (Newport, Rhode Island: Naval War College, 1999)
Arrest Warrant Case	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i> , Judgment, [2002] ICJ Rep. 3.
AYBIL	<i>Australian Yearbook of International Law</i>
BCICLR	<i>Boston College International and Comparative Law Review</i>
Brownlie	Ian Brownlie, <i>Principles of Public International Law</i> , 6th edn (Oxford University Press, 2003)
BYIL	<i>British Yearbook of International Law</i>
CAMLR Convention	Convention for the Conservation of Antarctic Marine Living Resources 1980, (1980) 19 ILM 841
Caribbean Area Agreement	Agreement concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area 2003 (see W. Gilmore (ed.), <i>Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area</i> (London: The Stationery Office, 2005))

CCAMLR	The Commission for the Conservation of Antarctic Marine Living Resources
Churchill and Lowe	R. Churchill and A. Lowe, <i>The Law of the Sea</i> , 3rd edn (Manchester University Press, 1999)
CJIL	<i>Chicago Journal of International Law</i>
CJTL	<i>Columbia Journal of Transnational Law</i>
CWILJ	<i>California Western International Law Journal</i>
CYBIL	<i>Canadian Yearbook of International Law</i>
DLR	<i>Deakin Law Review</i>
DJILP	<i>Denver Journal of International Law and Policy</i>
EJIL	<i>European Journal of International Law</i>
FSA	The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 88
GGULR	<i>Golden Gate University Law Review</i>
Gidel	G. Gidel, <i>Le Droit International Public de la Mer: Le Temps de Paix</i> , 3 vols. (Paris: Sirey, 1932)
GILJ	<i>Georgetown Immigration Law Journal</i>
GWILR	<i>George Washington International Law Review</i>
Harvard Research	J. Bingham et al., <i>Harvard Research in International Law: Draft Convention on Piracy</i> , (1932) 26 AJIL Supp. 739
High Seas Convention	Geneva Convention on the High Seas 1958, 450 UNTS 82
HILJ	<i>Harvard International Law Journal</i>
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICTY	International Criminal Tribunal for the former Yugoslavia
IJMCL	<i>International Journal of Marine and Coastal Law</i>
IJRL	<i>International Journal of Refugee Law</i>
ILC	International Law Commission
ILC Articles on State Responsibility	The Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res. 56/83 (28 January 2002)

ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
IYBHR	<i>Israel Yearbook on Human Rights</i>
IYBIL	<i>Italian Yearbook of International Law</i>
JALC	<i>Journal of Air Law and Commerce</i>
JCSL	<i>Journal of Conflict and Security Law</i>
JICJ	<i>Journal of International Criminal Justice</i>
JIML	<i>Journal of International Maritime Law</i>
JMLC	<i>Journal of Maritime Law and Commerce</i>
LJIL	<i>Leiden Journal of International Law</i>
<i>Lotus Case</i>	Lotus Case, [1927] PCIJ Ser. A No. 10
McDougal and Burke	M. McDougal and W. Burke, <i>The Public Order of the Oceans</i> , reissue of 1962 edn (New Haven: New Haven Press, 1987)
Meyers	Herman Meyers, <i>The Nationality of Ships</i> (The Hague: Martinus Nijhoff, 1967)
Migrant Smuggling Protocol	The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime 2000, (2001) 40 ILM 384
MJIL	<i>Melbourne Journal of International Law</i>
MULR	<i>Melbourne University Law Review</i>
NAFO	North Atlantic Fisheries Organization
NAFO Scheme	NAFO Conservation and Enforcement Measures
NATO <i>Travaux Préparatoires</i>	J. Snee (ed.), <i>NATO Agreements on Status: Travaux Préparatoires</i> , International Law Studies 1961 (Newport, Rhode Island: Naval War College, 1966)
NEAFC	The North-East Atlantic Fisheries Commission
NEAFC Scheme	NEAFC Scheme of Control and Enforcement
NILR	<i>Netherlands International Law Review</i>
NJIL	<i>Nordic Journal of International Law</i>
n.m.	nautical miles
NPAFC	North Pacific Anadromous Fish Commission
O'Connell	D. O'Connell, <i>The International Law of the Sea</i> , I. Shearer, ed. 2 vols. (Oxford: Clarendon Press, 1984)
ODIL	<i>Ocean Development and International Law</i>

Official Records: Narcotics Convention Conference	UN Economic and Social Council, <i>Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</i> , Vienna, 25 November–20 December 1988, vol. II, Summary Records of Meetings of the Committees of the Whole, Committee II
Oppenheim, 8th edn	H. Lauterpacht, <i>Oppenheim's International Law: A Treatise: Volume I, Peace</i> , 8th edn (London: Longman, 1958)
Oppenheim, 9th edn	R. Jennings and A. Watts, <i>Oppenheim's International Law: Volume I, Peace</i> , 9th edn (Harlow: Longman, 1992)
PSI	Proliferation Security Initiative
RDI	<i>Rivista di Diritto Internazionale</i>
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2005, (2005) 44 ILM 829
<i>Recueil des Cours</i>	<i>Recueil des Cours de l'Académie de Droit International de la Haye</i>
RFMO	Regional Fisheries Management Organization
RGDIP	<i>Revue Générale de Droit International Public</i>
SCLR	<i>Southern California Law Review</i>
SDILJ	<i>San Diego International Law Journal</i>
SDLR	<i>San Diego Law Review</i>
SEAFO	South East Atlantic Fisheries Organization
Shaw	M. Shaw, <i>International Law</i> , 5th edn (Cambridge University Press, 2003)
SJICL	<i>Singapore Journal of International and Comparative Law</i>
SOFA	Status of Forces Agreement
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, (1992) 1678 UNTS 201
SUA Protocol 2005	Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, 1 November 2005
SYBIL	<i>Spanish Yearbook of International Law</i>

Third Restatement of Foreign Relations Law	American Law Institute, <i>Restatement of the Law Third: The Foreign Relations Law of the United States</i> (St. Paul, Minn.: American Law Institute, 1987)
TLCF	<i>Transnational Law & Contemporary Problems</i>
TMLJ	<i>Tulane Maritime Law Journal</i>
UMIALR	<i>University of Miami Inter-American Law Review</i>
UNCLOS	United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3
UNCLOS Commentary	M. Nordquist et al. (eds.), <i>United Nations Convention on the Law of the Sea 1982: A Commentary</i> , 5 vols. (The Hague, Martinus Nijhoff, 1985-95).
UNHCR	(Office of the) United Nations High Commissioner for Refugees
UN Narcotics Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, (1989) 28 ILM 497
UN Practical Guide	UN Office on Drugs and Crime, <i>Practical Guide for Competent National Authorities under Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988</i> (New York: United Nations, 2003)
UQLJ	<i>University of Queensland Law Journal</i>
VJTL	<i>Vanderbilt Journal of Transnational Law</i>
WCPFC	Western and Central Pacific Fisheries Commission
YBILC	<i>Yearbook of the International Law Commission</i> ; references to pages are given in the format [1955] I YBILC, 10
YJIL	<i>Yale Journal of International Law</i>
ZaöRV	<i>Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht</i>

Table of treaties and other international agreements

MULTILATERAL AGREEMENTS

1904

International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83 227

1910

International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278 (as amended) 227

Protocol amending the International Agreement for the Suppression of the White Slave Traffic 1904 and the International Convention for the Suppression of the White Slave Traffic 1910, [1949] ATS 19 227

1921

International Convention for the Suppression of the Traffic in Women and Children, 9 LNTS 415 (as amended) 227

1926

Slavery Convention, (1927) 60 LNTS 253; [1927] UKTS No. 16 228
Article 1 75, 228

1933

Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431 (as amended) 227

1937

Nyon Arrangement on Submarine Warfare, 181 LNTS 135 37-8

1944

Convention on International Civil Aviation, 15 UNTS 295 (as amended)
Article 3bis 282

1945

Charter of the United Nations (as amended), 9 Hudson 327; UKTS
(1946), Cmd 7015 272-7

Article 2(4) 272-3, 274-6

Article 25 240

Article 51 273-4, 292

Article 103 240, 272

1949

North Atlantic Treaty, 34 UNTS 243, as amended by Protocol to the
North Atlantic Treaty on the Accession of Greece and Turkey, 1951,
126 UNTS 350

Article 6 273-4

1950

Convention for the Suppression of the Traffic in Persons and the
Exploitation of the Prostitution of Others, 96 UNTS 271 227
European Convention for the Protection of Human Rights and
Fundamental Freedoms, CETS no. 005 268, 270-1, 337

Article 5(1) 267-8

Article 5(3) 267-8

1951

Agreement Between the Parties to the North Atlantic Treaty
Regarding the Status of Their Forces, 199 UNTS 67 307

Article 2 283

Article 7 310-13

Article 7(1) 311

Article 7(2) 311

Article 7(3) 312