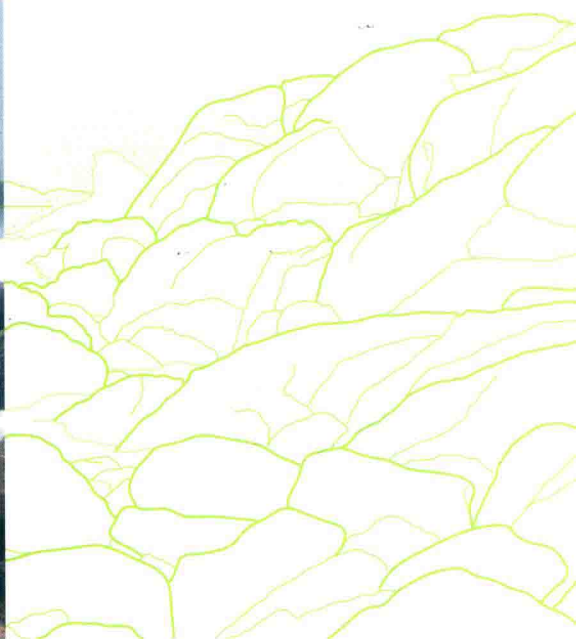
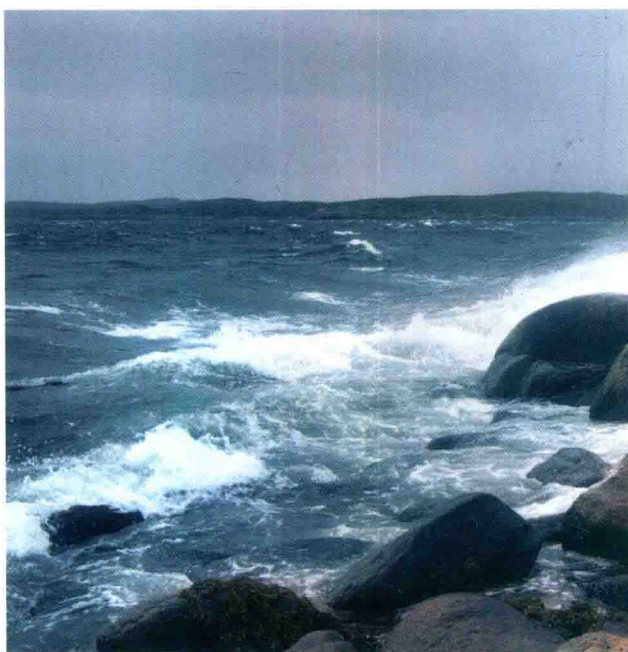


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# international law of the sea

current trends and controversial issues

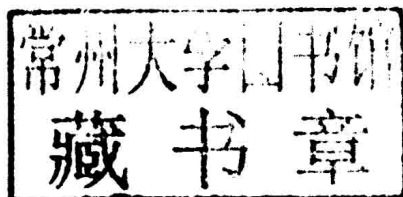


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# INTERNATIONAL LAW OF THE SEA

*CURRENT TRENDS AND CONTROVERSIAL ISSUES*

ANGELA DEL VECCHIO (ED.)



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## International Law of the Sea

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# INTRODUCTION

*Law of the Sea and New Interests of the International Community*

Angela Del Vecchio\*

Since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), it has become evident that the intent to establish a legal order for the seas and oceans that would facilitate international communication, the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the protection and preservation of the marine environment has seemingly not been fully achieved.

The law of the sea has been very much affected not only by the processes of globalization that have changed the key interests of the international community but also by natural phenomena such as climate change that have made areas of the sea previously covered by ice more accessible and by increased violence at sea in a form not envisioned by UNCLOS. Moreover, those who drafted UNCLOS could not have foreseen the increase in the illegal trafficking of immigrants, new forms of piracy or the frequent threats of terrorist attacks at sea or in ports. Neither could they have imagined the technological advances that have opened up new opportunities to exploit marine resources and to produce energy and that make the sea in itself a resource.

Therefore, it was felt worthwhile to dwell on those aspects of the law of the sea to identify, where possible, various solutions to the new problems. To this end, research on *Law of the Sea: New Interests of the International Community* was undertaken and sponsored by five Italian universities, namely, LUISS Guido Carli, 'Tor Vergata' University of Rome, University of Pisa, Second University of Naples and University of Sannio, with funding provided by the Ministry of Education, University and Research (MIUR).

Bearing in mind that not all areas of the law of the sea have been affected in equal measure by the above-mentioned developments, the research concentrated only on the sectors in which the transformations taking place seem to be more significant: migration by sea; the security of navigation and the fight against piracy, safety of navigation, protection of maritime labour, the legal framework governing the polar regions and some special issues relating to the harnessing of marine resources.

It is those themes that are the focus of this collection of works, divided into five parts.

The first part of the book concerns immigration by sea. Indeed, during the last two decades the cases of illegal immigration by sea have increased both in the Mediterranean and in other geographic areas. This has involved both an increasing militarization of migration

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controls and the need to strengthen cooperation among states, and to that end several multilateral and bilateral agreements have been concluded and new rules introduced in the domestic law of the countries concerned.

In relation to the special problems posed by the illegal trafficking of migrants in Southern Europe, that phenomenon and its consequences in the Mediterranean area are analysed, and also studied in particular are the policies adopted by Italy and Malta (Di Filippo), Greece and Spain (Marinai) and the Canary Islands (Gutiérrez Castillo). To complete the picture, the activities of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) in the EU's fight against illegal immigration are examined too (Rijpma).

But the traffic of illegal migrants by sea engaged in by organized criminal groups, often on a transnational basis, also has an impact on the security of maritime navigation, which in some areas can be put at risk owing to terrorist attacks and, above all, nowadays to piracy. In fact, as more and more terrorist networks operating on a global level and modern forms of piracy make navigation extremely vulnerable, especially in some areas, it seemed appropriate to devote the second part of the book to developments in the fight against maritime piracy and terrorism at sea.

Multiple aspects of security in maritime traffic are taken into consideration, and the analysis focuses particularly on violence perpetrated against a ship, its passengers or the crew, which can be classified as acts of terrorism or piracy, depending on the circumstances. Terrorist attacks are similar to those committed by pirates, but terrorists, even though they can also use a ship as a logistic base for their attacks or as a means of transporting weapons for their attacks, are driven by goals different from those underlying piracy. In fact, piracy consists of any act of depredation or violence committed for private ends by a private ship on the high seas against another ship or against persons or property on board such ships. As regards terrorism at sea, the main conventions governing the matter are studied (Caracciolo and Leanza), and special attention is paid to the provisions of the Hamburg Convention of 1979 and the establishment of search and rescue areas (also called SAR zones), whose boundaries can at times be difficult to delimit as is the case with the SAR between Italy and Malta (Leanza).

As regards the fight against piracy, the importance of EU action in preventing and combating piracy in Somalia is highlighted (Panella), and likewise the steps taken by the United Nations, especially through the UN Security Council resolutions, and the few advantages and the many drawbacks of international cooperation in Somalia (Graziani). Again in the second part of the book, there is a detailed analysis of the policies adopted by Italy against piracy through the use of contractors or military units to protect ships (Caffio) and the resort to domestic courts to bring pirates to justice (Stuppia).

In addition to the problems connected with the security of navigation and the struggle against piracy, in an international community that is becoming ever more globalized, it

is becoming increasingly important to guarantee the safety of navigation in all of the seas and oceans around the world and to protect the environment. The growth in world maritime traffic and the increase in the number of serious accidents involving oil tankers causing frequent environmental disasters have led to the evolution of international standards and domestic rules. Protection of the environment is a matter of global dimensions and must be governed not only by countries' domestic laws but also and above all by world-wide or regional rules applied by all actors in the current international community – be they states, international organizations or shipowners, etc. – that play a role in the sector. In this context, the third part of the book checks whether or not the new solutions contained in international instruments adequately respond to the needs of the international community to improve the safety of navigation, to protect the lives of persons on board and to reduce accidents during navigation that might cause serious damage to the marine environment.

Apart from some specific aspects are then examined in relation to the safety of marine navigation and coastal State jurisdiction (Virzo), the important role played by Port State Control in ensuring compliance with safety rules (Turco Bulgherini) and the consequences of maritime environmental disasters and the CLC system consisting of the International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels on 29 November 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, adopted at Brussels, on 18 December 1971 (better known as the FUND Convention) (Comenale Pinto). Finally, and again on the topic of marine environmental disasters, the third part of the book concludes with an examination of the rules governing private actors' civil liability for damage caused by the accidental spilling of hydrocarbons transported by oil tankers into the sea following incidents like explosions, collisions or structural failure of a ship (Gallo).

Closely connected to the topic of the protection of the marine environment is undoubtedly the question of exploiting the resources of the sea, to which the fourth part of the book on marine resources and the sea as an energy source is devoted. As regards the system for exploiting offshore mining resources, it should be noted that very often the solution to their management is the delimitation of the maritime area where they are located. At times what is involved is an area subject to the overlapping jurisdiction of two or more coastal states or an area in which there are transboundary resources. Both are situations that frequently give rise to international disputes for the resolution of which various mechanisms such as the Commission on the Limits of the Continental Shelf (CLCS) under UNCLOS or joint development treaties (Mauro) have been adopted.

Ever apart from the exploitation of marine resources, in more recent times the international community has begun to consider the sea as a source of alternative energy, such as that generated by currents, tides and microalgae, not to mention offshore wind power. Research into these new sources of renewable energy production is, today, a hot topic,

worldwide. In particular, it has been demonstrated that the cultivation of plants containing substances with a high-energy content and their use (with or without pre-treatment) as fuels in so-called biomass power stations can produce electricity and heat (Imerito).

Indirectly linked to the exploitation of marine resources is also the issue of the protection of the work of fishermen under international law (Papanicolopulu). Indeed, an improvement in the working conditions of fishermen facilitates the carrying on of an activity that is still central in the life of the international community and for which international conventions exist, including the ILO Maritime Labour Convention, which recently entered into force (Pustorino).

The last issue covered by the fifth part of the book is the international law of the sea and polar regions. Before climate change, the international community was interested solely in Antarctica, its legal regime (governed by the Treaty of Washington and the Madrid Protocol), the regulation of the activities that could be carried out there by states and environmental protection. The research focuses on a comparative analysis of the legal regime applicable to Antarctica and the Arctic in order to highlight the differences in the rules governing the two polar regions and their evolution over time (Borgia). Also discussed is the issue of environmental liability under the 2005 Annex to the Madrid Protocol (Nicchia). Moreover, attention is dedicated to the increased possibility of exploiting the resources in the polar regions and the impact on the delicate environmental balance existing there (Ciciriello) in the event of any environmental disasters. In effect, especially in the Arctic, including the Arctic Ocean, climate change has the effect of exacerbating the already existing and interconnected problems related to both the environment and the economic and social development of the area in question.

In the general context of the polar regions, consideration is also given to two special issues: the delimitation of Arctic zones and the implementation of human rights in the very peculiar context of the polar regions. As regards the first issue, of key importance is the 2010 Treaty between Norway and the Russian Federation on the maritime delimitation of the border of the Barents Sea (Amirante), a treaty that put an end to a dispute that had lasted about forty years and ushered in a new era of potential cooperation between the two Arctic countries.

As regards the second issue, the human rights of the populations in the polar regions were considered even though there is no native and almost no permanent human population in Antarctica and the resident population in the Arctic Circle is relatively small. But it is not so much the number of individuals that enjoy rights that is important but rather the rights protected. In this regard a specific analysis was conducted on the very fragile balances that need to be safeguarded in such extreme conditions between the survival and cultural needs of specific human communities through the recognition of traditional fishing/hunting rights and the protection of animal species at the poles, and especially marine mammals (Mucci).

Therefore, the writings in this book intend to offer a contribution to the study of the evolution of the law of the sea through an analysis of the sectors that have undergone significant change. As mentioned above, the focus has been on the aspects that are best suited to enabling one to adequately interpret the new needs that have emerged in international society and that in some cases, for example, piracy, echo the past although in a modern form. In short, the book seeks to furnish an overall picture of the new and complex issues relating to the law of the sea. International Law of the Sea



**PART I**  
**MIGRATION BY SEA**



# 1 IRREGULAR MIGRATION AND SAFEGUARD OF LIFE AT SEA. INTERNATIONAL RULES AND RECENT DEVELOPMENTS IN THE MEDITERRANEAN SEA

Marcello Di Filippo\*

## 1.1 THE PECULIAR ISSUES RAISED BY IRREGULAR MIGRATION BY SEA

In recent years, migration flows by sea towards southern European Union (EU) Member States have increased significantly.<sup>1</sup> Contrast actions by coastal states, both unilateral or coordinated through the Frontex agency, and the relevance of international rules concerning various subjects – law of the sea, safeguard of life at sea, human rights, *non-refoulement* of persons in need of international protection – raise a set of problematic issues, about which the European Commission admitted in 2006 the need to carry out an in-depth legal and technical analysis.<sup>2</sup> Recently, the main international organizations dealt with irregular migration and the need to contrast it, underlining alternatively the related threat to security (together with terrorism and organized crime)<sup>3</sup> or the need to conciliate control

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1 See (with further references) X. Hinrichs, 'Measures Against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective', *Revue belge de droit international*, Vol. 36, 2003, p. 413, at pp. 413-414, 421, 446-447; T. Spijkerboer, *Trends in the Different Legislations of the Member States Concerning Asylum in the EU: The Human Costs of Border Control*, study prepared on behalf of the Commission 'Civil Liberties, Justice and Home Affairs' of the European Parliament, July 2006, Doc. IPOL/C/LIBE/FWC/2005-23-SC1, PE 378.25, at pp. 1-2; United Nations Office on Drugs and Crime, *Organized Crime and Irregular Migration From Africa to Europe*, July 2006 <[www.unodc.org/pdf/research/Migration\\_Africa.pdf](http://www.unodc.org/pdf/research/Migration_Africa.pdf)>; L. Coslovi, *Brevi note sull'immigrazione via mare in Italia e Spagna*, January 2007 <[www.cespi.it/PDF/mig-mare.pdf](http://www.cespi.it/PDF/mig-mare.pdf)>; H. de Haas, *The Myth of Invasion. Irregular Migration From West Africa to the Maghreb and the European Union*, IMI research report, University of Oxford, October 2007; R. Weinzierl & U. Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea*, German Institute for Human Rights, December 2007 <[www.institut-fuer-menschenrechte.de](http://www.institut-fuer-menschenrechte.de)>, at p. 18.

2 See the Communication 'Reinforcing the Management of the European Union's Southern Maritime Borders', Doc. COM(2006) 733, 30 November 2006; the subsequent Commission Staff Working Document 'Study on the International Law Instruments in Relation to Illegal Immigration by Sea', Doc. SEC (2007) 691, 15 May 2007 (hereinafter, the Commission Working Document).

3 See the Berlin Declaration, signed on 25 March 2007 by the Presidency of the Council, the President of the Commission, the President of the European Parliament, on conclusion of the informal meeting of the Heads of State or Government, held in Berlin on 24 and 25 March 2007: see point II, where the undersigned undertake to jointly fight against "terrorism, organized crime and illegal immigration."

of borders and migration policy choices with respect to aliens' human rights and other international provisions.<sup>4</sup>

Specific issues arise when irregular migration by sea is at stake. Recent experience shows a significant variety of techniques: hiding of stowaways in ferries or cargoes in regular service<sup>5</sup>; arrivals on board old ships in bad condition and overloaded; use of small boats driven by the migrants themselves and completely unsuited for long journeys (being usually devoted to short-term fishing); employment of speed rubber dinghies and quick unloading of migrants, often before reaching dry land and with brutal modalities, if necessary, in order to avoid interception by the coast guard<sup>6</sup> and, lastly, carrying out the major part of the journey by means of a medium- or large-sized boat that stops at the limit of territorial waters, disembarking migrants with light launches that go back and forth between the coast and the 'mother' boat.<sup>7</sup>

Practice highlights the dangerous nature of such movements and the occurrence of tragic outcomes, about which precise statistics are inherently unavailable.<sup>8</sup> In addition, such flows are very often mixed, in the sense that persons attempting irregular entry may be, at the same time, ordinary migrants, individuals in need of international protection (either from the departure state or their own state, when different<sup>9</sup>) or other vulnerable persons (unaccompanied minors, sick persons, victims of trafficking, pregnant women).

The issue at stake proves difficult because an *ad hoc* international regulation does not exist and destination countries may find themselves in the uncomfortable position of tolerating arrivals without being able to effectively contrast them if genuine adherence to human rights

4 See the amendments to the SOLAS and SAR Conventions, approved in 2004 by the International Maritime Organization (hereinafter, IMO), about which *see infra*, Section 4; the UN GA Resolution of 23 February 2007, Doc. A/RES/61/165, entitled 'Protection of Migrants', in particular §§ 6-7. See also the leaflet, co-authored in 2006 by IMO and the UN High Commissioner for Refugees (hereinafter, IMO & UNHCR), entitled *Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees*, at <[www.unhcr.org/publ/PUBL/450037d34.pdf](http://www.unhcr.org/publ/PUBL/450037d34.pdf)>.

5 This issue will not be treated here, the attention being focused on journeys and boats entirely devoted to irregular migration: for a discussion of problems raised by stowaways, *see* among others G. Bastid-Burdeau, 'Migrations clandestines et droit de la mer', in *La mer et son droit. Melanges offerts a Laurent Lucchini et Jean-Pierre Quénedec*, A. Pedone, Paris, 2003, p. 5, at pp. 60-64.

6 From Albania and Montenegro to Italy in the 1990s, from Somalia and other countries to Yemen in the Aden Gulf nowadays.

7 See the cases described in IMO Circular MSC/Circ. 896, Rev. 1.

8 *See, for instance*, the data reported in Spijkerboer 2006, pp. 6-7; Weinzierl & Lisson 2007, p. 18; Parliamentary Assembly of the Council of Europe, *Lives Lost in the Mediterranean Sea: Who Is Responsible?*, report presented by T. Strik to the Committee on Migration, Refugees and Displaced Persons, Doc. 12895, 5 April 2012. Additionally, *see* three sources, very different in nature but converging in drawing attention to the same problem: the UNHCR website section on mixed migration flows <[www.unhcr.org/cgi-bin/texis/vtx/asylum](http://www.unhcr.org/cgi-bin/texis/vtx/asylum)>; the biannual circulars issued by the IMO Maritime Safety Committee on 'Unsafe practices associated with the trafficking or transport of illegal migrants by sea' <[www.imo.org](http://www.imo.org)>; the data reported on the website Fortress Europe <<http://fortresseurope.blogspot.com>>.

9 Among the various sources on this subject, reference can be made to the web page <[www.unhcr.org/cgi-bin/texis/vtx/asylum](http://www.unhcr.org/cgi-bin/texis/vtx/asylum)> and to the special issue of the UNHCR review *Refugee*, entitled 'Refugee or Migrant. Why It Matters', Vol. 148, 2007, No. 4.