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MIGRANT SMUGGLING BY SEA

Combating a Current Threat
to Maritime Security through
the Creation of a Cooperative
Framework

Patricia Mallia

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By

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Foreword

The freedom of the high seas is probably the best known of all principles of international law, and certainly one of the oldest. The idea that ships on the high seas should be subject only to the jurisdiction of their flag State is seen as an essential corollary of that principle. In days when traders were thought benign, all governments accepted that there was open season on pirates, and naval power was in the hands of a self-selecting group of civilised Powers, this appeared (at least to those Powers) to work tolerably well. But is the principle worth retaining?

A ship encountered on the high seas may be carrying lawful commercial cargoes, illegal narcotics, lawful passengers, refugees and asylum seekers, components for weapons of mass destruction, people intent on avoiding immigration controls, or who knows what else. Should the default principle be that the ship must be left alone? Navies great and small, all around the world, are given responsibility for protecting coastal States from seaborne threats; but how can they know whether to treat a foreign ship outside their territorial seas as an innocent vessel going about its lawful business and entitled to be left alone, or as the carrier of distressed people in need of humanitarian assistance, or as a threat to the coastal State? And how should they handle whatever situation they may find on board? These are pressing problems; and they require carefully crafted legal responses, because a naval vessel visiting a foreign ship is at the centre of a web of national and international legal obligations that both limit its scope for action and require that it follow correct legal procedures if subsequent law-enforcement measures, such as criminal trials, are not to be jeopardized.

This excellent study grapples with those problems in the particular context of migrant smuggling at sea. It examines the range of legal responses to the problems and the practical steps that are being taken, both nationally and through international cooperation, to create a legal framework that goes some way towards reconciling the exigencies of twenty-first century policing with the antique legal principles that we have inherited and still (for the moment at least) appear to cherish. Dr Mallia has amassed a wealth of material on state practice, and subjected it to an incisive legal analysis. She has produced a fine monograph, and a model of the kind of critical analysis of contemporary problems that is of real value to scholars and governments alike. I watched the study grow in its original form as a doctoral thesis, and now have both the supervisor's delight in seeing a first-class thesis emerge as a

first-class monograph, and the lawyer's gratitude and relief in having at my disposal a massive compilation of material assembled by someone else's untiring and intelligent labours.

Vaughan Lowe

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Grateful mention must also be made of the University of Malta for providing the necessary funding for me to carry out my research degree.

Lastly, I would never have been able to write this book had it not been for the unwavering belief, support and understanding of my parents. I thank them with all my heart for their encouragement and patience, always.

Patricia Mallia
Malta, September 2009

Abbreviations

ADF	Australian Defence Force
AIS	Automatic Identification System
<i>AJHR</i>	<i>Australian Journal of Human Rights</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
AMIS	Australian Maritime Identification System
Aruba Agreement	Agreement concerning cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area
<i>Aust LJ</i>	<i>Australian Law Journal</i>
BHRC	Butterworths Human Rights Cases
BIMCO	Baltic and International Maritime Council
CATOC	United Nations Convention on Transnational Organised Crime
CETS	Council of Europe Treaty Series
CICAD	Inter-American Drug Abuse Control Commission
CIRM	<i>Comité International Radio-Maritime</i>
CMI	<i>Comité Maritime Internationale</i>
CND	Commission on Narcotic Drugs
COMSAR	Sub-Committee on Radiocommunications and Search and Rescue (IMO)
<i>Cornell Intl L J</i>	<i>Cornell International Law Journal</i>
Council of Europe Agreement	Agreement on Illicit Traffic by Sea, implementing Art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which establishes a foundation for cooperation between the parties to the Agreement
CSI	Container Security Initiative
C-TPAT	Customs–Trade Partnership against Terrorism
DIAC	Department of Immigration and Citizenship
DIMIA	Department of Immigration and Multicultural Indigenous Affairs
DUSPIL	Digest of United States Practice in International Law
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council of the United Nations
ECRE	European Council on Refugees and Exiles
EEOC	Equal Employment Opportunity Commission
EEZ	Exclusive Economic Zone
EHRR	European Human Rights Reports
<i>EJIL</i>	<i>European Journal of International Law</i>

EU	European Union
ExCom	Executive Committee
FAL	Facilitation Committee (IMO)
FAL Convention	International Convention for the Facilitation of Maritime Traffic
<i>Georgetown Immigration L J</i>	<i>Georgetown Immigration Law Journal</i>
GMDSS	Global Maritime Distress and Safety System
Hague Convention	Convention for the Suppression of the Unlawful Seizure of Aircraft
<i>Harv LR</i>	<i>Harvard Law Review</i>
HSC	Convention on the High Seas
IADC	International Association of Drilling Contractors
IAEA	International Atomic Energy Agency
IALA	International Association of Marine Aids to Navigation and Lighthouse Authorities
IAPH	International Association of Ports and Harbours
IARLJ	International Association of Refugee Law Judges
IAS	Immigration Advisory Service
ICCL	International Council of Cruise Lines
ICCPR	International Covenant on Civil and Political Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICJ Rep	ICJ Reports
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICS	International Chamber of Shipping
IFHR	International Federation for Human Rights
IFSMA	International Federation of Shipmasters' Associations
ILC	International Law Commission
<i>IJMLC</i>	<i>International Journal of Marine and Coastal Law</i>
<i>IJRL</i>	<i>International Journal of Refugee Law</i>
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMB	International Maritime Bureau
IMB-PRC	International Maritime Bureau's Piracy Reporting Centre
IMO	International Maritime Organization
IMSO	International Mobile Satellite Organization
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service (US)
INTERCARGO	International Association of Dry Cargo Shipowners
INTERTANKO	International Association of Independent Tanker Owners
IOM	International Organization for Migration
IPTA	International Parcel Tanker Association
ISF	International Shipping Federation

ISPS Code	International Ship and Port Facility Security Code
ISWG No. 1	First Meeting of the Intersessional Working Group
ISWG No. 2	Second Meeting of the Intersessional Working Group
ITLOS	International Tribunal for the Law of the Sea
IUMI	International Union of Marine Insurance
<i>J. Int Marit Law</i>	<i>Journal of International Maritime Law</i>
<i>JLE</i>	<i>Journal of Law and Equality</i>
LEG	Legal Committee (IMO)
LNTS	League of Nations Treaty Series
LOSC	United Nations Law of the Sea Convention
LRIT	Long-range Identification and Tracking System
Maritime Ports Convention	Convention on the International Regime of Maritime Ports
MARPOL	International Convention for the Prevention of Pollution from Ships
<i>Melb JIL</i>	<i>Melbourne Journal of International Law</i>
MPI	Migration Policy Institute
MRCC	Maritime Rescue Coordination Centre
MSC	Maritime Safety Committee (IMO)
nm	nautical miles
OAS	Organization of American States
ODCCP	Office for Drug Control and Crime Prevention (UN)
ODIL	Ocean Development and International Law
OHCHR	Office of the High Commissioner for Human Rights (UN)
OJ	Official Journal (EU)
<i>Pac Rim L & Pol'y J</i>	<i>Pacific Rim Law and Policy Journal</i>
PCA	Permanent Court of Arbitration
PFSP	Port Facility Security Plan
Prum Convention	Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration
PSI	Proliferation Security Initiative
<i>Pub LR</i>	<i>Public Law Review</i>
Refugee Convention	Convention Relating to the Status of Refugees
Refugee Protocol	Protocol relating to the Status of Refugees
RHIB	Rigid Hull Inflatable Boat
Salvage Convention 1910	International Convention for the Unification of Certain Rules relating to Assistance and Salvage at Sea
Salvage Convention 1989	International Convention on Salvage
SAR Convention	International Convention on Maritime Search and

	Rescue
SAR zone	Search and Rescue zone
SIEV	Suspected Illegal Entry Vessel
SIGTTO	Society of International Gas Tanker and Terminal Operators
Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime
SOLAS	International Convention for the Safety of Life at Sea
SPI	Ship/Port Interface
SSAS	Ship Security Alert System
<i>SJCRCCL</i>	<i>Stanford Journal of Civil Rights and Civil Liberties</i>
Stat	Statutes-at-Large
STW	Sub-Committee on Standards of Training and Watchkeeping (IMO)
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
SUA Protocol	Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
TIAS	Treaties and other International Acts Series
Tokyo Convention	Convention on Offences and Certain other Acts committed on board Aircraft
Torture Convention	Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime
TSC	Convention on the Territorial Sea and Contiguous Zone
TSO	The Stationery Office
UDHR	Universal Declaration of Human Rights
UKTS	United Kingdom Treaty Series
UNCTAD Convention	Convention on Conditions for Registration of Ships
UNDCP	United Nations International Drug Control Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICRI	United National Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USC	United States Code
USCG	United States Coast Guard

USCIS	United States Citizenship and Immigration Service
US-Haiti Agreement	Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Certain Haitian Migrants and Vessels Involved in Illegal Transport of Persons coming from Haiti
UST	United States Treaties and other International Agreements
VCLT	Vienna Convention on the Law of Treaties
Vienna Drugs Convention	Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
<i>Va. J. Int'l Law</i>	<i>Virginia Journal of International Law</i>
WCO	World Customs Organization
WMD	Weapons of Mass Destruction
WNTI	World Nuclear Transport Institute

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- Agreement between the Government of the United States of America and the Government of Barbados concerning cooperation in the suppressing illicit maritime drug trafficking (Bridgetown, 25 June 1997, entered into force 11 October 1998) 1997 UST LEXIS 5 [p. 148, 152]
- Agreement between the Government of the United States of America and the Government of Belize concerning cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (Washington, 4 August 2005, entered into force 19 October 2005), available at www.state.gov/t/isn/trty/50809.htm [p. 154, 158]
- Agreement between the Government of the United States of America and the Government of Belize concerning maritime counter-drug operations (Belmopan, 23 December 1992, entered into force 23 December 1992; amended by a Protocol adopted at Belmopan 25 April 2000, entered into force April 25 2000) TIAS 11914 [p. 55, 148, 150, 151]
- Agreement between the Government of the United States of America and the Government of Colombia to suppress illicit traffic by sea (Bogota, 20 February 1997, entered into force 20 February 1997) Copy provided by US Coast Guard. [p. 148, 152]
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- tol adopted at San Jose 2 July 1999, entered into force 19 November 1999) Copy provided by US Coast Guard. [p. 55, 148, 150, 151]
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- Convention Relating to the Status of Refugees (Geneva, 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) [p. 17, 79, 82, 83, 85–90, 92, 93, 119, 149, 164, 171, 179, 180, 182, 183, 187, 189, 190, 194, 196, 197, 201, 203, 206, 215, 216, 228]
- Declaration on Territorial Asylum (14 December 1967) UN Doc A/67/16 [p. 88, 92]
- European Convention on Extradition (Paris, 13 December 1957, entered into force 18 April 1960) CETs No. 024 [p. 92]
- Implementing Agreement between the United States of America and the Republic of Honduras concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances (Tegucigalpa, 29 March 2000, entered into force 30 January 2001) 2000 UST LEXIS 159 [p. 55, 148, 150–152]
- Inter-American Convention on Extradition (Caracas, 25 February 1981, entered into force 28 March 1992) OAS Treaty Series No. 60, p. 45 [p. 92]
- International Convention for the Prevention of Pollution from Ships (London, 2