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State Responsibility for Interferences with the Freedom of Navigation in Public International Law

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Abbreviations

A.C.	Law Reports: Appeal Cases
ADM	Annuaire du droit de la mer
ADMO	Annuaire de droit maritime et océanique
AFDI	Annuaire français de droit international
A.F. L. Rev.	Air Force Law Review
AJIL	American Journal of International Law
Asian Yb. Int'l L.	Asian Yearbook of International Law
ASIL	American Society of International Law
ASR	Articles on State Responsibility
ATS	Amphetamine-type stimulants
AVR	Archiv des Völkerrechts
Barn. & Ald.	Barnewall and Alderson
BGBI.	Bundesgesetzblatt
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BVerfG	Bundesverfassungsgericht
BYIL	British Yearbook of International Law
Can. Yb. Int'l L.	Canadian Yearbook of International Law
CFR	Code of Federal Regulations
Chinese J. of Int'l L.	Chinese Journal of International Law
Ch. Rob.	Christopher Robinson's Admiralty Reports
CHS	Convention on the High Seas
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
CSI	Container Security Initiative
CSO	Company Security Officer
CSR	Continuous Synopsis Record
Ct.Cl.	Court of Claims
C-TPAT	Customs-Trade Partnership against Terrorism
DADP	Draft Articles on Diplomatic Protection
Dods.	Dodson's Admiralty Reports
EC	European Community
ECJ	European Court of Justice
ECOMOG	Economic Monitoring Group
ECOWAS	Economic Community of West African States
E.C.R.	European Court Reports
ECT	Treaty Establishing the European Community
EEZ	Exclusive Economic Zone

Emory Int'l L. Rev.	Emory International Law Review
Eng. Rep.	English Reports
ETS	European Treaty Series
EU	European Union
EUV	Vertrag über die Europäische Union
FAO	Food and Agricultural Organization
FBI	Federal Bureau of Investigation
F.Cas.	Federal Cases
F.Supp.	Federal Supplement
FTCA	Federal Tort Claims Act
GYIL	German Yearbook of International Law
Harv. Int'l L. J.	Harvard International Law Journal
Hofstra L. Rev.	Hofstra Law Review
HVR	Humanitäres Völkerrecht
ICCPR	International Covenant on Civil and Political Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICS	International Chamber of Shipping
ICSID	International Centre for the Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMB	International Maritime Bureau
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
Ind. Int'l & Comp. L. Rev.	Indiana International and Comparative Law Review
Int'l J. Estuarine & Coast. L.	International Journal of Estuarine and Coastal Law
Int'l J. Mar. & Coast. L.	International Journal of Marine and Coastal Law
Iran-U.S.C.T.R.	Iran-United States Claims Tribunal Reports
ISPS	International Ship and Port Security
ISF	International Shipping Federation
ISSC	International Ship Security Certificate
Italian Yb. of Int'l L.	Italian Yearbook of International Law
ITF	International Transport Workers' Federation
ITLOS	International Tribunal for the Law of the Sea
ITLOS Pleadings	International Tribunal for the Law of the Sea, Pleadings, Minutes of Public Sitzings and Documents
J. Int'l L. & Politics	Journal of International Law and Politics
J. Int'l Maritime L.	Journal of International Maritime Law

J. Mar. L. & Com.	Journal of Maritime Law and Commerce
LLP	Lloyd's of London Press
LNTS	League of Nations Treaty Series
LOSC	Law of the Sea Convention
LRAD	Long Range Acoustic Device
MARPOL	International Convention for the Prevention of Pollution from Ships
MOU	Memorandum of Understanding
MT	Motor Tanker
MV	Motor Vessel
NATO	North-Atlantic Treaty Organization
Naval L. Rev.	Naval Law Review
Netherlands Ybk. Int'l L.	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
OECD	Organisation for Economic Cooperation and De- velopment
OJ	Official Journal of the European Communities
OPGE	Entscheidungen des Oberprisengerichts
P.	Probate Division (Law Reports)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSC	Port State Control
PSI	Proliferation Security Initiative
RdC	Recueil des Cours de l'Académie de Droit Interna- tional
REDI	Revista española de derecho internacional
Rev. Gén. Dr. Int'l Publ.	Revue Générale de Droit International Public
RFO	Regional Fisheries Organization
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RIAA	Reports of International Arbitral Awards
SDN	Société des Nations
SODA	Status of Force Agreement
SOLAS	International Convention on Safety of Life at Sea
SS	steamer
SSO	Ship Security Officer
SSP	Ship Security Plan
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
Sydney L. Rev.	Sydney Law Review
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Com- merce
TEU	Twenty foot equivalent unit
Tex. Int'l L. J.	Texas International Law Journal
Tul. Mar. L. J.	Tulane Maritime Law Journal
U.K.T.S.	United Kingdom Treaty Series
U. Miami Int.-Am. L. Rev.	University of Miami Inter-American Law Review

U. Miami L. Rev.	University of Miami Law Review
UN	United Nations Organization
UNCLOS	United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
U.S.	United States
U.S.C.	United States Code
USCG	United States Coast Guard
USD	United States Dollar
Va. J. Int'l L.	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties
VN	Vereinte Nationen
WEU	Western European Union
Wm. & Mary L. Rev.	William and Mary Law Review
WMD	Weapons of Mass Destruction
WMU	World Maritime University
WMU J. of Maritime Affairs	WMU Journal of Maritime Affairs
WTO	World Trade Organization
Yale J. Int'l L.	Yale Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZeusS	Zeitschrift für europarechtliche Studien

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Introduction

In August 2005, the Pacific Area commander of the U.S. Coast Guard on a maritime security conference in Copenhagen proclaimed that the United States intended to push back its sea borders for searches as much as possible, maybe even by 2,000 nautical miles.¹ According to him, such a step would significantly limit the terror threat the United States is facing. This statement is characteristic for a new attitude concerning the policing of the oceans, an attitude not only of the United States, but also of many of its partners.

The traditional Law of the Sea with its principles of freedom of navigation and exclusive flag State jurisdiction is increasingly considered to be an obstacle for the fight against terror and other security concerns. Consequently, interferences on the high seas have within recent years become quite common.

The maritime industry was confronted with similar scenarios in the past when States tried to combat international crimes like piracy, slave trading, drug smuggling or pirate broadcasting. In fact, the United Kingdom and the United States even faced the so-called “visitation crisis” in the 1850’s when the United Kingdom asserted a right to check the papers of foreign vessels in order to prevent the trade of slaves. At the time, the United Kingdom backed down due to U.S. diplomatic pressure. But today, the multipolar system seems to have faded and unilateral abuse of power meets little control mechanisms.

While sometimes, interferences can lead to greater security for navigation as in the prosecution of pirate ships, other interferences may expose shipowners and their partners to new risks and make them incur severe damages. The challenge for States policing the oceans is therefore to find an equitable balance between the need to prevent and repress international crimes and the protection of maritime trade.

The Law of the Sea is a part of public international law which disposes of a particularly sophisticated regulation by international conventions in comparison to some other areas. The Law of the Sea Convention, deemed to be the “Constitution of the Oceans”, represents the cornerstone of the whole Law of the Sea, even though it has not yet been ratified by the whole international community. The United Nations and the International Maritime Organization have developed further important treaties for the Law of the Sea. Many of these conventions permit interferences on the high seas by a State other than the flag State. A great part of them attempts to balance the introduction of new boarding authorizations by provisions on the issue of compensation.

¹ Reuters, 12 October 2005.

However, these provisions have rarely ever been applied in a dispute between the interested States and/or private individuals. An analysis what the reasons for this omission are is not exempt from speculation. It is nevertheless submitted that most States know very little about the relevant provisions. Sometimes, they do not know about their mere existence, but more often they are unsure about the requirements for an obligation to compensate to arise and the exact contents of such an obligation. Among the shipowners and other private actors in maritime trade, knowledge of public international law is even less prevalent. In fact, many of them rely exclusively on maritime law in any dispute. This body of law will definitely predominate in relations between private actors, but in order to complain against the conduct of a State and to find redress in this respect, reliance on public and in particular public international law is essential. While traditionally, public international law only assigned an almost negligible role to the individual, its relevance has recently gained importance. This study will show that this is particularly true for the compensation provisions of the Law of the Sea.

The ignorance about the relevant law on State responsibility may also be due to the fact that most compensation provisions differ from each other slightly or even profoundly in their wording. Furthermore, there has been an extensive and very controversial debate for decades about the general law on State responsibility during the work of the International Law Commission on the topic which only recently led to the adoption the “Articles on Responsibility of States for Internationally Wrongful Acts” (Articles on State Responsibility). A certain degree of uncertainty concerning the applicable rules of State responsibility remains even after the adoption of these articles.

One also has to admit that the lack of application of the relevant compensation provisions was partially due to the fact that States generally show a great reluctance to submit a dispute to the jurisdiction of an international tribunal. They are even more unwilling if these disputes concern some questions of state responsibility. A State simply would not like to be held “responsible” and often regards an obligation to compensate as a kind of humiliation. Reasons of diplomacy have even led States to waive their rights to claim compensation.² As far as it concerns domestic remedies, public international law grants immunity to States from the national jurisdiction of any other States.

Hence, there are many obstacles for a compensation provision to find application. This thesis intends to bring these provisions to light from their so far idle and stagnant existence. In a first and less legal chapter, the importance of unhindered maritime trade will be contrasted to the relevance of international crimes in international waters and the measures to combat them. Then, in the main part of this thesis (Chapter II), the existing material public international law on compensation for interferences on the high seas will be analyzed. The analysis will focus on an interpretation of the relevant provisions in international treaties, but it will also include some remarks on the state of the customary international law on state

² Cf. Nakatani, Kazuhiro, “Diplomacy and State Responsibility”, in *Ragazzi*, Maurizio (ed.), “International Responsibility Today – Essays in Memory of Oscar Schachter” (Leiden: Nijhoff, 2005), pp. 36 *et seq.*, at 42-46.

responsibility. In a third chapter, the U.S. strategy concerning interdictions on the high seas will be analyzed in particular regarding a potential liability of the United States for these interdictions. Finally, this study will deal with the rather unregulated cases where States interfere with the navigation of foreign vessels in situations of war or under a mandate of the United Nations Security Council (Chapter IV).

The insights gained from these studies will enable the author and the reader to estimate whether the international legal system is able to strike a fair balance between freedom of navigation and the combat against international crimes. This may also lead to some modest suggestions of how to improve the existing material international law on the issue in the future.

Chapter I: The perpetual conflict between freedom and security in the Law of the Sea

Research in the existent public international law cannot and must not be isolated from factual matters and policy concerns. In fact, it is very likely that respect of public international law will increase if international lawyers are well aware of these factual matters while applying international law. Furthermore, public international law seems to be more flexible than other legal systems because custom plays a great role as one of its sources and because the analysis of State practice constitutes a major part of the interpretation of treaties.

This thesis will therefore start by confronting the two overriding concerns involved in any interference on the seas. First, the freedom of navigation and its importance for the modern, world-wide economy will be presented. Secondly, this thesis will analyze all major security concerns and outline in how far interferences with navigation on the high seas would be able to alleviate these concerns. As one can presume, the management of these contradicting goals cannot be “sink or swim”, but instead a reasonable balance between them should be the goal. Therefore, in a third part, potential legal limits to abusive interferences including an efficient liability¹ regime will be presented.

A. The freedom of navigation – cornerstone of the Law of the Sea

The freedom of navigation represents the overriding principle of the Law of the Sea and has traditionally been one of the most important principles in the law of the sea and in public international law in general. Its content can be described in two parts. First, the freedom of navigation includes the right to enter upon the oceans and to pass them unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among

¹ The terms liability and responsibility, generally and for the sake of this study, have the same meaning, the former rather used in domestic legal systems, the latter for the regime of State responsibility under public international law, *cf. Amerasinghe, Chitharanjan F.*, “The Essence of the Structure of International Responsibility”, in *Ragazzi, Maurizio* (ed.), “International Responsibility Today – Essays in Memory of Oscar Schachter” (Leiden: Nijhoff, 2005), pp. 3 *et seq.*, at 4.