

**Round Table Session 4,
Reinforcing International Law in the Indian Ocean: UNCLOS and Emerging Issues¹**

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1. The Place of UNCLOS in Indian Ocean Governance

The UN Convention on the Law of the Sea (UNCLOS or Convention) is often referred to as the ‘constitution of the oceans.’ The Convention seeks to delineate all ocean space into different maritime zones and it sets forth the rights and duties of states in relation to their activities within each of those maritime zones. Its importance is underscored by the fact it has close to 170 states parties, including 25 Indian Ocean states (see Annex A). Many of its provisions are otherwise considered as reflecting customary international law.

The negotiation of UNCLOS was a long, complex process that resulted in many compromises. Consequently, the text of the Convention reflects a careful balance between the different demands of states. One such balance is found between the exclusive rights of the coastal State, particularly for the exploitation of the ocean’s natural resources, and the inclusive, or shared, rights of other states that coexist with coastal states’ rights within some maritime zones and that are also protected on the high seas. For example, the freedom of navigation exists for other states in the Exclusive Economic Zone (EEZ) of the coastal State but must be exercised with due regard for the rights of the coastal State. The freedom of navigation is also recognised as a right enjoyed by all states on the high seas, an area over which no State exercises sovereignty.

The Convention was intended ‘to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea.’¹ Yet questions arise of whether UNCLOS is a perfectly worded and comprehensive instrument, given the compromises that had to be reached over nine years of negotiation. Moreover, in drafting and adopting UNCLOS, states had to acknowledge that there were existing international agreements — including treaties developed for the safety of shipping at the International Maritime Organisation (IMO) as well as some treaties dealing with species protection or management — that had a bearing on ocean matters and needed to sit within this new legal framework. UNCLOS accommodates these existing agreements within its terms, noting in the Preamble that ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law.’

¹ Prepared by the Lakshman Kadirgamar Institute of International Relations and Strategic Studies, Sri Lanka.

While UNCLOS remains the bedrock of ocean governance, new challenges require reflection on how a rules-based approach to international relations may be brought to bear — so as to strengthen the security, safety and sustainability of activities in and around the Indian Ocean. In these circumstances, the ongoing interpretation and application of UNCLOS has raised issues in its operation, even though the Convention continues to serve as an indispensable instrument in ocean governance to ensure maritime safety and security into the future. Resolving outstanding issues through cooperation has the potential to advance prosperity, sustainability and stability in the Indian Ocean region within a rules-based approach.

2. Emerging Issues on the High Seas

The high seas comprise the maritime areas beyond national jurisdiction. The freedoms of the high seas recognised in Article 87 of UNCLOS include the freedoms of navigation, overflight, etc. These freedoms are essential in preserving sea lanes of communication between states to ensure the free movement of people and goods around the world. They are to be exercised with due regard for the interests of other states and with respect to activities on the deep seabed (the Area).

The freedoms of the high seas have been modified by agreement between states, including within the Convention, as evident in obligations relating to the conservation and management of marine living resources under Articles 116-119 and in the right of visit under Article 110. Other international agreements have further delineated the obligations and rights of states in respect of specific activities on the high seas.² Yet at the core of these developments remains the concept that the high seas are a maritime domain of shared space over which no State exercise sovereignty;³ State powers are restricted to those vessels flying its flag and states must exercise effective jurisdiction and control over those vessels flying its flag.

Under UNCLOS, Article 94 sets out the duties of the flag State over its vessels. Article 94 requires every State to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’ States do not always fully or rigorously implement these requirements, so as to attract registration fees from vessel owners (sometimes referred to as open registries or flags of convenience).

Yet there is an increasing trend to place more emphasis on flag State responsibilities. Article 94 has an inclusive list of measures ‘to ensure safety at sea’⁴ to deal with issues of seaworthiness, crew, collisions and other related matters. The International Tribunal for the Law of the Sea (ITLOS) has considered that the ‘administrative’ matters over which flag states must exercise effective jurisdiction and control include those for the conservation and management of marine living resources.⁵ From Article 94(6), which requires a flag State to investigate and possibly remedy matters reflecting a failure to exercise effective jurisdiction and control, ITLOS considered this responsibility would also arise in relation to coastal State reports of illegal, unregulated and unreported (IUU) fishing activities.⁶

While Article 94 is seemingly only applicable to vessels when operating on the high seas pursuant to Article 86, flag State duties under Article 94 have also been held to apply within the territorial seas.⁷ Flag State responsibilities may also be augmented through other international instruments, including where the protection of human rights for those on board vessels has received greater scrutiny.⁸

In light of these developments, it may be timely to articulate the scope of flag State responsibilities under Article 94; setting out more fully what is included and what responsibilities are shared with other states. Setting out flag State monitoring and reporting duties in relation to specific activities may enhance efforts to improve maritime domain awareness in the Indian Ocean region.

Steps taken by flag States will only advance shared interests in the Indian Ocean to a limited extent, given that vessels flagged to many different states traverse these waters. Exclusive flag State authority over vessels has also had important implications in the fight against transnational crime at sea. While States have powers to investigate crimes committed within their territorial sea or in port, investigation and prosecution of crimes at sea may be important to interrupt trafficking routes and halt shipments of illicit substances (including drugs, weapons, or fish caught in violation of international obligations). If State authorities seek to take action against a vessel flagged to another State, they need the consent of the flag State. This consent may be pre-existing in an international agreement but must otherwise be obtained on an ad hoc basis. Policing activities may be hindered, or rendered ineffective, if timely consent is not obtained.

Improving mechanisms to obtain consent from flag State officials will enhance efforts to combat transnational crime. Developing procedures or guidelines for contacting relevant State officials to obtain consent for boarding, and for subsequent action as needed, may facilitate law enforcement operations in fighting transnational crime. A coordinated approach for policing Vessels Without Nationality could also be identified in terms of permissible steps to board, inspect and potentially arrest individuals on board, particularly if the nationals on board these vessels are from Indian Ocean littoral states.

3. Emerging Issues in relation to the Exclusive Economic Zone (EEZ)

In the EEZ, UNCLOS provides in Article 56 that the coastal State enjoys sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources in this maritime area, as well as exclusive jurisdiction over the protection and preservation of the marine environment, the establishment and use of artificial islands, installations and structures, and marine scientific research. These rights are to be exercised with due regard for the rights of other States. Article 58 provides that other States continue to enjoy the freedoms referred to in Article 87 and ‘other internationally lawful uses of the sea related to these freedoms.’ In the exercise of these rights, other States must also demonstrate due regard for the rights of the coastal State and comply

with the provisions of the Convention and other rules of international law that are compatible with the EEZ regime in UNCLOS.⁹

To ensure the sustainable development and use of resources within the Indian Ocean, coastal States will need to incorporate ecosystem-based management approaches to the conservation and management of fish resources. While littoral States are seeking to regulate fisheries within their jurisdiction, enforcing those laws can be challenging, especially where maritime zones are large and pose surveillance challenges for proper monitoring and control. This issue has already emerged in the Pacific Ocean and is coming under increasing scrutiny within the Indian Ocean.

Coastal State law enforcement, especially with regards to fishing, remains a critical concern. Coastal States may seek to coordinate efforts at monitoring, control and surveillance, especially for the conservation and management of straddling stock and highly migratory species. There is scope to build on inspection regimes anticipated under the 1995 Fish Stocks Agreement and under regional fisheries agreements (the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992 may be a model to consider). In addition, management efforts will be enhanced through sharing scientific data and information about the status of fish stocks, the marine environment, or in relation to suspected unlawful fishing activity. Procedures or guidelines may be needed to facilitate communication between relevant State authorities and develop coordinated approaches to this issue.

Maintaining the freedom of navigation within the EEZ as enshrined in UNCLOS remains of critical economic importance to support the movement of international cargo. Military vessels also enjoy the freedom of navigation within the EEZ. Conflicting views have emerged as to what military activities are permissible by military vessels flagged to a third State within the EEZ of a coastal State. As noted, Article 58 refers to the freedom of navigation and ‘other internationally lawful uses of the sea related to these freedoms.’ Some States interpret this provision to allow all military activities, including surveillance and training exercises. Others take the position that not all military activities by another State are permissible within its EEZ. No authority is granted to the coastal State to regulate military activities under Article 56 of UNCLOS.

What is important to recall in this debate is that States are prohibited from the threat or use of force against the territorial integrity or political independence of another State. This obligation, enshrined in article 2(4) of the UN Charter, is also set out in UNCLOS in Article 301. Moreover, Article 88 preserves the high seas for peaceful purposes and this provision applies in the EEZ so far as it is not incompatible with the EEZ regime. Whether particular military activities arise to a threat or use of force in violation of Article 301 must then be assessed on a case-by-case basis depending on the particular activities and the relationship between the States concerned.

Given the ongoing debate as to whether foreign flagged vessels may undertake military activities within the EEZ, it is important to define and emphasise the limits on these activities in relation to the prohibition on the threat or use of force that is applied and recognised under UNCLOS.

4. Emerging Issues in the Territorial Sea

The territorial sea, which includes its bed, subsoil and the airspace above it, is subject to the sovereignty of the coastal State, with the exception of the right of innocent passage, other provisions of the Convention as well as ‘other rules of international law.’¹⁰ In the *Chagos Archipelago* arbitration, the Tribunal considered that ‘other rules of international law’ was intended to refer to general international law rather than specific bilateral commitments between states.¹¹ The *Chagos Archipelago* Tribunal determined that general international law required the United Kingdom to act in good faith in its relations with Mauritius with regard to the exercise of sovereignty over the territorial sea.

The right of innocent passage involves continuous and expeditious passage where the vessel does not enter the internal waters or ports of the coastal State.¹² To be innocent, the passage must not prejudice the peace, good order or security of the coastal State,¹³ and UNCLOS identifies a list of inclusive activities that may be considered prejudicial, including the loading or offloading of any commodity, fishing activities, or any research or survey activities.¹⁴ The coastal State, therefore, has a large measure of discretion in determining what is in violation of the peace, good order or security of its territory.

In the event the coastal State determines that a vessel is in violation of the right of innocent passage, the responses of the coastal State are limited under Article 25 to taking steps to prevent any passage that is not innocent.¹⁵ In addition, the coastal State may exercise criminal jurisdiction in accordance with Article 27 and limited civil jurisdiction under Article 28 over merchant vessels on commercial service. The coastal State must not otherwise hamper the innocent passage of foreign vessels through its territorial sea. Where the coastal State is not permitted to take action, the flag State instead has authority to respond to issues in relation to its vessels. Coastal State action against warships is limited to requiring the warship to leave the territorial sea immediately if the warship does not comply with the coastal State’s laws and regulations concerning passage through its territorial sea.¹⁶ Therefore, while the coastal State has sovereignty over its territorial sea, it is constrained in what actions it might take that limit the rights of passage of foreign-flagged vessels through its waters.

Moreover, the coastal State is only entitled to limit the right of innocent passage through a temporary suspension in specified areas of the territorial sea if essential for the protection of the coastal State’s security. This suspension must not discriminate in form or in fact among foreign ships.¹⁷ The coastal State is allowed to introduce some regulations over the passage of vessels, including traffic separation schemes,¹⁸ and must usually ensure that regulations relating to

navigation align with international agreements or standards.¹⁹ Any interference with passage must, therefore, be consistent with the requirements of UNCLOS, and the international agreements alluded to in its provisions.

The extent of protection afforded to navigational rights in the territorial sea is carefully defined within UNCLOS and must be respected to ensure the balance between the rights of the coastal States and the rights of third States are maintained. Coastal States should ensure that their bases for exercising jurisdiction against foreign-flagged vessels are clearly defined in domestic legislation and that the limitations on the exercise of jurisdiction as set out in UNCLOS continue to be respected to ensure unimpeded passage to facilitate international trade while still protecting the maritime safety and security of the coastal State.

5. Emerging Issues in relation to Ports

Article 11 of UNCLOS does not specifically define ports, but to the extent they are to be utilised for delimiting the territorial sea, ports are considered as ‘permanent harbour works’ and are regarded as forming part of the coast. As part of the coast, States have sovereignty over ports located within their territory,²⁰ and may control what vessels enter their ports and under what conditions.

Ports are largely unregulated under UNCLOS, with the exception of indicating the relevance of ports for the purposes of delimiting the territorial sea,²¹ and providing for the exercise of port State jurisdiction for the purposes of enforcing requirements relating to the protection and preservation of the marine environment.²²

Access to ports is predominantly a matter of customary international law or is otherwise regulated by a separate agreement.²³ In prescribing conditions for entry, States are entitled to regulate their ports in consistency with their national interests. For example, the International Ship and Port Facility Security (ISPS) Code allows States to put in place notice requirements regarding the entry of a vessel into a port as part of a suite of measures to reduce the likelihood of a terrorist attack against a port.²⁴ The Port State Measures Agreement allows states to set requirements and restrictions on fishing vessels seeking entry into port so as to prevent, deter and eliminate IUU fishing.²⁵

If access of a vessel to a port is restricted because of environmental risks associated with that vessel, different IMO treaties may be at issue but Article 211(3) of UNCLOS may also be invoked. This provision anticipates that states will ‘establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals.’ In doing so, a State is required to give due publicity to any such requirements and communicate them to the IMO, as the relevant competent intergovernmental organisation.²⁶ Article 218 of UNCLOS permits the exercise of port State jurisdiction over polluting vessels.

In relation to the rights and obligations that a State may exercise over any vessels that enter its ports, this legal authority is also governed by customary international law and treaties other than UNCLOS. To this end, McDougal and Burke have noted:

It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.²⁷

Exceptions to this authority apply in relation to vessels that have entered the port in distress,²⁸ vessels subject to sovereign immunity,²⁹ and in relation to the inapplicability of local labour laws.³⁰

It is the right of the coastal State, as a corollary of the principle of State sovereignty,³¹ to close a port to foreign shipping. Ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend 'vital interests.'³² To the extent a foreign company is operating a port, the coastal State retains its sovereignty over the port and it would be incumbent on a coastal State to maintain or establish its regulatory powers over a port to ensure that it is able to adhere to its international obligations and preserve its rights to control access to its ports consistent with those obligations or otherwise in exercise of its sovereignty.

The sovereignty of a coastal State over its ports as a matter of customary international law may be affirmed. The sovereignty of the coastal State may be limited by international agreements promoting transit for the purposes of international trade, but the authority of the coastal State has been recognised for matters relating to maritime safety and security, specific law enforcement operations and marine environmental protection.

6. Potential Questions for Discussion

1. To what extent is freedom of navigation under threat in the Indian Ocean?
2. What are the emerging legal issues in the maritime order of the Indian Ocean?
3. How might states improve the efficacy of UNCLOS in addressing such a threat or issues?
4. In what other ways can states address such a threat or issues; is there a role for soft law?

Annex A - Indian Ocean State Parties to UNCLOS*

<i>Country</i>	<i>Date of Signature</i>	<i>Date of Ratification</i>
Australia	10-Dec-82	5-Oct-1994
Bangladesh	10-Dec-82	27-Jul-01
Brunei	5-Dec-84	5-Nov-96
Cambodia	1-Jul-83	-
Comoros	6-Dec-84	21-Jun-94
India	10-Dec-82	29-Jun-95
Indonesia	10-Dec-82	3-Feb-86
Iran	10-Dec-82	-
Kenya	10-Dec-82	2-Mar-89
Madagascar	25-Feb-83	22-Aug-01
Malaysia	10-Dec-82	14-Oct-96
The Maldives	10-Dec-82	7-Sep-00
Mauritius	10-Dec-82	4-Nov-94
Mozambique	10-Dec-82	13-Mar-97
Myanmar	10-Dec-82	21-May-96
Oman	1-Jul-83	17-Aug-89
Pakistan	10-Dec-82	26-Feb-97
Seychelles	10-Dec-82	16-Sep-91
Singapore	10-Dec-82	17-Nov-94
Somalia	10-Dec-82	24-Jul-89
South Africa	5-Dec-84	23-Dec-97
Sri Lanka	10-Dec-82	19-Jul-94
Tanzania	10-Dec-82	30-Sep-85
Thailand	10-Dec-82	15-May-11
Timor-Leste	-	8-Jan-13 (Accession)

UAE	10-Dec-82	-
Vietnam	10-Dec-82	25-Jul-94
Yemen	10-Dec-82	21-Jul-87
<i>*Signature and Ratification of UNCLOS by major users of Indian Ocean</i>		
China	10-Dec-82	7-Jun-96
Japan	7-Feb-83	20-Jun-96
United States	-	-

Source: United Nations Division for Ocean Affairs and the Law of the Sea, available online at: <https://bit.ly/2QgKvSK>

[1] UNCLOS, Preamble.

[2] See eg 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, 4 August 1995, 2275 UNTS 43 (entry into force 11 December 2001).

[3] UNCLOS, Art 89.

[4] UNCLOS, Art 94(2) and (3).

[5] Request for an Advisory Opinion from the Sub-Regional Fisheries Commission, 2 April 2015, ITLOS Reports 2015, p. 4, para. 119.

[6] Ibid, para. 139.

[7] As evident in the application of the COLREGS to an incident occurring in the territorial sea as discussed in the *South China Sea Arbitration*.

[8] Such as the 2006 Maritime Labour Convention, 23 February 2006, 2952 UNTS __; 45 ILM 792 (2006) (entry into force 20 August 2013).

[9] UNCLOS, Art 58(3).

[10] UNCLOS, Art. 2.

[11] Chagos Marine Protected Area Arbitration, Mauritius v United Kingdom, Final Award, ICGJ 486 (PCA 2015), 18th March 2015, para. 516. Judges Kateka and Wolfrum dissented on this limitation to Article 2(3). See *ibid*, Dissenting and Concurring Opinion, para. 94.

[12] UNCLOS, Art 18.

[13] UNCLOS, Art 19(1).

[14] UNCLOS, Art 19(2).

[15] UNCLOS, Art 25(1).

[16] UNCLOS, Art. 30

[17] UNCLOS, Art. 25(3).

[18] See UNCLOS, Art 22.

[19] UNCLOS, Art 21.

[20] Robin R Churchill & A Vaughn Lowe, *The Law of the Sea* (3rd ed, 1999) 61.

[21] UNCLOS, Art 11.

[22] UNCLOS, Art 218 and 211(3). Article 98(1)(c) refers to ports in the context of the duty to render assistance and provision of information as to the journey of a ship involved in a collision.

[23] Note in this regard that Article V of the GATT (1994, Freedom of Transit) provides for freedom of transit of goods, vessels and other means of transport across the territory of WTO members via the routes most convenient for international transit.

[24] See Natalie Klein, *Maritime Security and the Law of the Sea* (OUP, 2011), 158-162 (discussing the ISPS Code).

[25] Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, signed 22 November 2009, entered into force 5 June 2016, UNTS Registration No. I-54133. See discussion in Klein, *Maritime Security*, above n 24, 72.

[26] UNCLOS, Art 211(3).

[27] Myres S McDougal & William T Burke, *The Public Order of the Oceans* (1962) 156.

[28] Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain; (2005) 35 *Israel Yearbook of Human Rights* 205, 210-211.

[29] See UNCLOS, Art 32 and Art 95.

[30] Kaye, above n 28, 210-211.

[31] Justin S.C. Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 *American University International Law Review* 341, 393. See also A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *San Diego Law Review* 597, 607.

[32] See Klein, *Maritime Security*, above n 24, 67.