

# Interception of Human Beings on the High Seas under the Law of the Sea Convention

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## I. Introductory Remarks

“And the Sea will grant each new hope as sleep brings dreams of home”

Christopher Columbus

For hundreds of years the high seas have furnished a way to safety for those in fear of their lives, and a gateway for others desperately in search of a better life. In the last century alone, the world witnessed the plight of Jewish refugees fleeing Nazi persecution before World War II,<sup>1</sup> the famous ‘boat people’ from Indo-China during the 1970’s<sup>2</sup> and, more recently, the thousands of Haitians and Cubans travelling to the United States<sup>3</sup> and many of diverse nationalities heading to South Europe through the Mediterranean Sea.<sup>4</sup> Episodes like the *Tampa*<sup>5</sup> or the *Monica*,<sup>6</sup> which involved asylum

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<sup>1</sup> See M. Witts, *The Voyage of the Damned* (1976). Famous was the *St. Luis* episode, where over 900 Jews fleeing Nazi Germany *en route* to Cuba were not allowed disembark in that country and were summarily rejected by a number of the Latin American Governments and the USA and Canada. The passengers returned to Europe, where most did not survive the war; see J. van Selm, & Cooper, B, *The New ‘Boat People’: Ensuring Safety and Determining Status* (2006), 91.

<sup>2</sup> See *inter alia* B. Grant, *The Boat People* (1980)

<sup>3</sup> For the last quarter of century, the US shores have been the target destination of thousands of undocumented migrants or asylum seekers coming mostly from Cuba, Haiti and Dominican Republic. In response to discrete episodes of mass irregular migration, the US Government has authorised various maritime interdiction programmes, which have evolved into standing boarder enforcement. See van Selm/Cooper, *supra* note 1, 79.

<sup>4</sup> Migrant and refugee flows have long been a challenge to the States bordering the Mediterranean Sea. All Mediterranean States are affected by these maritime movements to a greater or lesser degree. See for further information: Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean (Madrid, 23-24 May 2006), available at <http://www.unhcr.org>. (last visited 20 July 2007)

<sup>5</sup> In August 2001, the Norwegian-flag cargo vessel *M/V Tampa* rescued 440 people from an Indonesian ferry that was sinking about 75 nm northwest of Christmas Island, Australia. When Tampa sought to offload its passengers in Australia, the latter, concerned with an influx of immigrants, refused to accept them and subsequently sent on board SAS troops to provide humanitarian assistance to the refugees. Following lengthy negotiations, New Zealand and Nauru eventually accepted the refugees. For the facts, see D. Rothwell, ‘The Law of the Sea and the M/V Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty’, 13 *Public Law Review* (2002), 118.

<sup>6</sup> On 17 March 2002, the merchant vessel *Monica*, a 75 meters long cargo ship, flying the flag of Tonga, and with more than 900 Kurdish refugees on board was detected and subsequently intercepted in Eastern Mediterranean by the French Navy, which proceeded to verify the identity of the ship after a signal of the Italian authorities. On the next day, Italian authorities boarded the ship and the vessel was escorted to the port of Catania, Sicily. See I.Thomas, ‘L’affaire du ‘*Monica*’’, *Chronique des faits internationaux*, 106 *Revue Generale de Droit International Public* (2002), 391.

seekers at sea, have attracted notable media coverage and triggered serious academic and political debate.<sup>7</sup> Similarly, the oceans have facilitated the ‘commerce’ of human being, traded like commodities from one country or continent to another. From the slave trade of the past centuries to the smuggling and trafficking of today, this movement or commerce has always been a very profitable business and source of income and has engaged the concern of the international community since its inception.<sup>8</sup>

In the contemporary era, the focus of the majority of States has predominantly shifted to preventing asylum seekers<sup>9</sup> or illicit migrants from ever reaching their territory.<sup>10</sup> Amongst the ‘non-arrival’ policies employed to this end, primary role is attributed to interception, a term which aptly describes ‘measures applied by States outside their national boundaries which prevent, interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by land, sea or air’.<sup>11</sup> The latter definition encapsulates only one side of the coin, or the ‘negative’ aspect of such policy, namely the utilization of interception to effectively entrench the borders of the States concerned. On the other side of the coin, however, stands the ‘positive’ aspect of interception, i.e. its adoption in order to cope effectively with the problem of human trafficking and other similar practices, which is, nevertheless, hardly reflected in the relevant State practice.

In the maritime context, interception of this kind has attained even more vigour recently in the light of the adoption of the Protocol against the Smuggling of Migrants

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<sup>7</sup> See *inter alia*: X. Hinrichs, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue Belge de Droit International* (2003), 413, P. Mathew, ‘Australian Refugee Protection in the Wake of *Tampa*’, 96 *American Journal of International Law* (2002), 661, N. Ronzitti, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in N. Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda*, (2002), 1271.

<sup>8</sup> See e.g. A.Y. Rassam, ‘Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law’, 39 *Virginia Journal of International Law* (1999), 303.

<sup>9</sup> The term ‘asylum-seekers’, a term of art rather than of law, has come to denote a broader notion than ‘refugees’ *simpliciter* and to be used interchangeably for people in search of asylum. The latter aptly describes the status of a person accorded refugee status and permanent residence in a State other than that of his nationality. See for the definition of refugee: article 1A (2) Convention relating to the Status of Refugees (1951), 189 *UNTS* 150, 606.

<sup>10</sup> The usual measures employed in order to tackle with this problem, besides interception, are pre-inspection, visa requirements, carrier sanctions, ‘safe third country’ concepts, security zones, international zones etc.; see G. Goodwin-Gill and J. Mc Adam, *The Refugee in International Law* (3<sup>rd</sup> edn) (2007), 374.

<sup>11</sup> See Executive Committee Standing Committee (18<sup>th</sup> Meeting), *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendation for a Comprehensive Approach*, UN doc. EC/50/SC/CRP.17, (9 June 2000), para 10.

(2000),<sup>12</sup> as well as of the relevant practice of States in Australia,<sup>13</sup> Haiti<sup>14</sup> and particularly in the Mediterranean.<sup>15</sup> In the latter region, special reference should be made to the recent activity of the European Union and more specifically of the European Agency for the Management of External Borders (FRONTEX), which was established in 2004 to help Member States in implementing community legislation on the control and surveillance of EU borders, including maritime borders, and to coordinate their operational cooperation.<sup>16</sup> FRONTEX has launched and coordinated several joint maritime operations in the Atlantic and Mediterranean regions, most of them on the high seas or even further in the territorial waters of Northern African States.<sup>17</sup>

The purpose of this short paper is to assess the legal bases for the interception of human beings on board foreign-flagged vessels on the high seas against the background of the law of the sea and more specifically against the Law of the Sea Convention (1982).<sup>18</sup> This issue certainly invites discussion, since not only does it concern human beings in need of protection, but it also strikes at the heart of the sacrosanct freedom of navigation and the concomitant principle of the exclusive jurisdiction of the flag State on the high seas.<sup>19</sup>

## II. Interception of Human Beings under the LOSC.

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<sup>12</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by GA Res. 55/25 of 15 November 2000

<sup>13</sup> Following the *Tampa* incident in 2001, the Howard Government passed a series of laws -commonly referred to as 'Pacific Strategy' (previously, 'Solution') - 'excising' various islands and coastal ports from the migration zone. See in this regard, A. Schloenhardt (ed.), *Migrant Smuggling, Illegal Migration and Organized Crime in Australia and Asia Pacific Region* (2003).

<sup>14</sup> Interception operations have been recently launched also by US in relation to Haiti; see Bill Frelick, "'Abundantly Clear': *Refoulement*," 19 *Georgetown Immigration Law Review* (2005), 245.

<sup>15</sup> From time to time, European States, such as Italy or Spain have engaged in interception at sea. See *inter alia* UNHCR, Selected Reference Materials, Rescue at Sea, Maritime Interception and Stowaways (November 2006), available at [http://www.unhcr.bg/other/law\\_of\\_the\\_sea.pdf](http://www.unhcr.bg/other/law_of_the_sea.pdf) (last visited 17 May 2007).

<sup>16</sup> See for further information at <http://www.frontex.europa.eu/> (last visited 1 November 2007).

<sup>17</sup> These operations have included, *inter alia*: 'Operation HERA II, which established patrols on the open sea near Senegal and Mauritania to reduce the departure of vessels from these shores; Operation HERA III, which was targeted at border surveillance and interception of migrants in the territorial waters of Mauritania, Senegal and the Cape Verde and Operation NAUTILUS in the central Mediterranean. See *ibid* and also FRONTEX Annual Report 2006, 12; available at [http://www.frontex.europa.eu/annual\\_report](http://www.frontex.europa.eu/annual_report) (last visited 1/11/2007).

<sup>18</sup> United Nations Convention on the Law of the Sea, 1833 *UNTS* 397; entered into force 16 November 1994 [hereinafter referred to as LOSC].

<sup>19</sup> Article 92 (1) of the LOSC, which stipulates that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

In accordance with the law of the sea, interception is solely conceived as the right of visit,<sup>20</sup> enshrined in article 110 of LOSC and is granted to warships against only those vessels, reasonably suspected of having engaged in some proscribed activity, which under customary or conventional law would permit the warship to proceed against the suspect vessel.<sup>21</sup> These activities are: a) piracy, b) slave trading, c) unauthorised broadcasting d) absence of nationality of the ship or e) though flying a foreign flag or refusing to show its flag, the ship is in reality of the same nationality with the warship.<sup>22</sup> Article 110, further, recognizes that other forms of interference can be conferred by treaty on a variety of subjects.<sup>23</sup>

On the face of this provision, it is evident that trafficking and transporting of illegal migrants or refugees are not contemplated by the Convention as a specific ground for the right to visit of a foreign vessel. It follows that the requisite legal basis for the latter should be either extrapolated from the above-mentioned grounds for interference, or should be sought in another legal framework. The present paper will focus solely on the former alternative, i.e. whether article 110 can afford any legal basis for the interception of human beings.

First of all, it goes without saying that the piracy and the unauthorised broadcasting grounds are completely irrelevant to the present survey. Moreover, the ‘same nationality’ ground seems not to raise any particular problems, since in this case the vessel will be susceptible to the full jurisdiction of the flag State pursuant to article 92 of LOSC. Contrary to the foregoing grounds, ‘the absence of nationality’ as well as the ‘slave trade’ merit a closer scrutiny, since, on the one hand, the transportation of the persons in question is often carried out using non-registered small vessels, without name or flag,<sup>24</sup> and on the other hand, in the view of the author,

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<sup>20</sup> The right of visit (*le droit de visite*) can be divided to *le droit d'enquête du pavillon*, i.e. the right of investigation of the flag or the right of approach and more importantly the right of search. When boarding is justified, a warship may visit the vessel to investigate the right to fly its flag. This includes the examination of the documents of the suspected ship by an officer of the warship, an operation, which requires the former to be brought to, and a boat to be sent alongside by the latter. See D. Momtaz, ‘The High Seas’, in R.-J. Dupuy, D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol. I (1991), 420.

<sup>21</sup> See: article 110 (1) LOSC, which reiterated almost *verbatim* the provision of article 22 of the High Seas Convention (1958).

<sup>22</sup> See R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3<sup>rd</sup> edn), (1999), p. 203

<sup>23</sup> Both the 1958 and 1982 Conventions contain the exception ‘where acts of interference derive from powers conferred by treaty’. These treaties may regard a variety of subjects, like illegal fishing, liquor or narcotic drugs smuggling and of course migrant smuggling.

<sup>24</sup> Reports to IMO recount unimaginable means of transportation such as a small inflated raft for children of two metres length, carrying two migrants, a windsurfer with two migrants, an improvised raft (wooden door with plastic bottles tied to it) with two migrants; see Second Biannual Report, IMO

there is room for the application of the slave trade provision to certain cases of human trafficking. Before discussing both of these grounds, it is apt to underscore that it is regrettable that there is a considerable paucity of information about the boarding of such vessels, especially with respect to the legal bases used by the States involved.<sup>25</sup>

### A. The Question of Stateless Vessels

There is certainly truth in the allegation that on the basis of the pertinent reports and literature, the ‘absence of nationality’ is the most relevant ground for intercepting vessels carrying migrants and asylum seekers on board.<sup>26</sup> Stateless vessels are the vessels, which, as a matter of international law, have no nationality.<sup>27</sup> By virtue of the provision of article 110 (1) (d) of LOSC, warships or other duly authorised vessels of any State may exercise the right of visit on these vessels.<sup>28</sup>

Furthermore, according to one strand of legal doctrine, the boarding States may also completely subject stateless vessels to their laws.<sup>29</sup> This follows from the premise that every ship is required to have a nationality and this is a prerequisite for the right to enjoy protection of the law. The ships without nationality lose this protection of the law with respect to boarding and seizure on the high seas, because otherwise these ships would be immune from interference on the high seas.<sup>30</sup> Therefore, as *quasi res*

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doc. MSC.3/Circ.2 of 31 October 2001. See *supra* note 25.

<sup>25</sup> It should be mentioned, in this regard, that in Resolution A.867 (20) of 2000, the IMO Maritime Safety Committee established a biannual reporting procedure to keep track of incidents involving unsafe practices associated with the trafficking in or transport of migrants at sea. Nevertheless, the Member States have hardly availed of this opportunity to record the relevant traffic of migrants. See: [www.imo.org](http://www.imo.org).

<sup>26</sup> See e.g. cases like the ones reported to the IMO, *supra* note 24 and also N. Ronzitti, *supra* note 7, 1274.

<sup>27</sup> To such ships are assimilated those that sail under two or more flags, using them according to convenience (art. 92 (2) LOSC). See also R. Churchill and A.V. Lowe, *supra* note 10, 213 and in general H. Meyers, *The Nationality of Ships* (1967)

<sup>28</sup> The relevant provision was inserted for the first time in 1976 in the Revised Single Negotiating Text (A/CONF.62/WP.8/Part II, article 96, IV *Official Records*, 166), after the proposal of the informative consultative group on the high seas, at its third session (1975) (C.2/Blue Paper No. 5, 14 April 1975). For the drafting historie see also M. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (1993), 240.

<sup>29</sup> This is in accord with the practice by the US and UK, that a stateless vessel may be seized by any State as it enjoys the protection of none; see: H. Lauterpacht, *L. Oppenheim's International Law* (7<sup>th</sup> edn) (1948), 546. According to the recent US Commander's Handbook, '[stateless vessels] are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations; see US *Commander's Handbook on the Law of Naval Operations* (Edition: July 2007) (on file with the author), at para. 3.11.2.4 [hereinafter: Commander's Handbook].

<sup>30</sup> See I. Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn.), (OUP, 2003), p. 235. This was also the opinion of the Special Rapporteur of ILC, François, in his initial Report on the Regime of the

*nullius*, they fall under the full jurisdictional scope of the boarding States.<sup>31</sup> This line of reasoning is supported by a number of judicial pronouncements with regard to stateless vessels in general.<sup>32</sup> Similarly, in the only case, to the knowledge of the author, that the issue of illicit migrants on board of stateless vessel came before a national court, namely before an Italian Court in *Pamuk and others* case in 2001, the latter considered the stateless vessel ground as sufficient for the arrest and trial of illegal migrants on the high seas bound for the coast of Italy.<sup>33</sup>

Notwithstanding these judicial opinions, on stronger legal footing seems to be the contrary assertion, namely that, in general, the right to visit such vessels does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding States. This rests in part upon the simple contemplation that, on the face of the pertinent provision, the right of visit in question is not actually different from the right of visit accorded in all the other circumstances provided in the article 110 of LOSC, i.e. the right of approach for the purpose of verifying the ‘no nationality’ of the vessel and in case of further suspicion, the right of search of the vessel. Nowhere does the Convention provide for any further assertion of jurisdiction with regard to these vessels<sup>34</sup>. This realisation forces to the surface questions concerning, on the one hand, the *ratio juris* of this provision and on the other, the powers of the boarding States *vis-à-vis* stateless vessels under general international law.

As far as the former is concerned, it lies in the premise that it is dangerous to have ships sailing on high seas which are not subject to the jurisdiction of any State, and being law unto them, need not comply with any generally accepted international regulations to ensure the minimum public order at sea.<sup>35</sup> From this supposition it

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High Seas; see *Yearbook of ILC* (1950-II), p. 39. See generally A. Anderson, ‘Jurisdiction over Stateless Vessels on the High Seas: an Appraisal under Domestic and International law’ 13 *Journal of Maritime Law and Commerce* (1982), 335.

<sup>31</sup> See also A. Watts, ‘The Protection of Merchant Vessels’ 33 *British Yearbook of International Law* (1957), 67

<sup>32</sup> See e.g. the decision of the Privy Council in the case *Molván v. Attorney-General for Palestine* [1948] AC 351. In that case the Council found that no breach of international law resulted when a British destroyer intercepted a ship carrying illegal immigrants bound for Palestine on the high seas and escorted into port where the vessel was forfeited. Some US courts have also asserted a general jurisdiction over stateless vessels: see *US v. Marino-Garcia* 679 F. 2d 1373 (1982), *cert. denied* 459 US 1114 (1983) and *United States v Cortes* (1979) 588 F.2d 106, 110.

<sup>33</sup> Italian custom officers had arrested on the high seas a flagless vessel transporting illegal immigrants who had been transferred, on the high seas, to another vessel directed to the Italian coast and had subsequently entered the Italian territorial waters. See the decision of Tribunale di Crotone, 27 September 2001, *Pamuk et al.* cited in *Rivista di Diritto Internazionale* (2001), p. 1155.

<sup>34</sup> See: M.Nordquist, *supra* note 28, 127.

<sup>35</sup> See L.B. Sohn., ‘International Law of the Sea and Human Rights Issues’ in Clingan (ed.) *The Law of the Sea: What Lies Ahead?* (1988), 58.

flows logically that the powers conferred upon the boarding States are solely for the following purpose, i.e. the maintenance of a minimum public order at sea. What these States are actually called to do, is to substitute the flag States in ensuring that these vessels abide by these international regulations, which constitute this order and which can be mainly conceived as the duties enshrined in article 94 of LOSC.<sup>36</sup> To discharge this function, it is submitted that the stateless vessels can be brought to a port and be subjected to further investigation in this respect.<sup>37</sup> However, the jurisdiction accrued thereby would be always limited to the purpose of inquiring the status of the vessel and of the persons on board and should not substitute the full scope of the jurisdiction of the flag State. Furthermore, under no circumstances, should the vessels in question be equated to *res nullius* and thus be susceptible to appropriation or other enforcement measures. Hence, it seems reasonable to postulate that, in principle, the boarding States would have to rely on some positive basis of jurisdiction to exercise jurisdiction over persons on a stateless vessels, since the statelessness of the vessel as such falls short of according them such jurisdiction.

This argument is in line with the more general observation that the right to visit on the high seas as an exception to the freedom of the high seas and the assertion of enforcement jurisdiction in relation to persons or property on board of the vessel are two distinct legal issues and the one does not presuppose the other. For example, the right to board a pirate vessel on the high seas is provided by article 110 of LOSC, whereas the jurisdictional basis for the seizure of the latter is accorded by article 105 of LOSC.<sup>38</sup> Similarly, in order to exert enforcement jurisdiction over persons on board of stateless vessels, it is required to have an analogous to article 105 treaty provisions<sup>39</sup> or a customary rule, most likely in the form of a jurisdictional principle, such as the protective or the objective territorial principles.<sup>40</sup> While the consideration

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<sup>36</sup> See for the text and commentary on this provision M. Nordquist, *supra* note 28, 135.

<sup>37</sup> See e.g. the opinion of François that: 'les autres navires peuvent exercer à l'égard du navire sans nationalité le droit de visite et de perquisition, ils peuvent l'amener dans un de leurs ports. Par ailleurs les Etats peuvent refuser d'admettre de pareils navires dans leurs ports à des fins de commerce, mais ils n'auraient pas le droit de les traiter comme pirates. Cette dernière opinion nous semble justifiée' *supra* note 30, 39.

<sup>38</sup> See also Churchill and Lowe, who are in favour of this thesis, writing that '[t]he better view appears to be that there is a need of some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them, see *supra* note 10, 214.

<sup>39</sup> Such provision *par excellence* is, indubitably, article 8 (7) of the Smuggling Protocol; see *supra* note

<sup>40</sup> On the one hand, the objective territorial principle is applicable when the act in question is initiated outside the State asserting jurisdiction, but has a negative effect within that nation. On the other hand, under the protective principle, a State claims jurisdiction over crimes, which are injurious to its national

of these jurisdictional principles is beyond the compass of the present paper, it suffices to note, however, for the present purposes, that the latter principles are far from uncontroversial and legally certain; especially as far as immigration matters are concerned.

Moreover, the arrest of potential migrants or asylum seekers on the high seas, like, for example in the *Pamuk case* seems to beg the question that a crime has been really committed on the high seas, entailing concomitantly that the boarding State can exert its jurisdiction and *a fortiori* arrest and try persons on board. It may be fitting to stress here that the act of carrying migrants on the high seas is not an international crime as such; save in cases of ‘smuggling of migrants’ solely for the States parties to the respective Protocol. Therefore, in the absence of a similar treaty provision to this effect or without the explicit assertion of the above-mentioned jurisdictional principles, it is submitted that these persons should not be subjected to any detention or arrest, as long as they have not entered the territorial or contiguous zone of the coastal State and thus violate its immigration laws.

It is one thing that the boarding States should abstain from arresting persons on board of stateless vessels on the high seas and a quite different thing what procedure should be followed in respect of these persons. It is true that the States involved would be in a predicament in the real life of what should they do with the latter; and in cases the vessel is in distress or the persons on board are seeking for asylum, the answer would be easy: rescue and refugee status determination process respectively.<sup>41</sup> In all other cases, however, the solution advocated by François appears to be the most sound, namely, bringing the vessel to a port of the coastal State and detaining the persons on board until there is a full determination of their nationality, intentions etc.<sup>42</sup> In any event, the persons on board the ship should be treated in accordance with the internationally recognised human rights and unless they are stateless, they may be entitled the protection of the state of their nationality regardless of the fact that they are travelling on a stateless vessel.<sup>43</sup>

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security; see *inter alia*: M. Akehurst, ‘Jurisdiction in International Law’, 46 *BYBIL* (1972-3), 158.

<sup>41</sup> According to the prevailing view, States have a duty under international law not to obstruct the individual’s right to seek asylum and furthermore an obligation to a Refugee Status Determination (RSD), which is corollary to the norm of *non-refoulement*; see: R. Marx, ‘Non-Refoulement, Access to Procedures and Responsibility for Determining Refugee Claims’, 7 *International Journal of Refugee Law* (1995), 393

<sup>42</sup> This is the practice followed by most of the European States; especially in the joint maritime patrols undertaken in the framework of FRONTEX See *supra* note 16.

<sup>43</sup> See L. B. Sohn, *supra* note 35, 58 and Meyer, who admits that ‘such statelessness does not of course



## B. The 'Slave Trade' Argument in a Modern Perspective

The next possible legal basis afforded by LOSC is the slave trade exception. Before going into the merits of this argument, however, it must be noted that since it constitutes a novel proposition premised upon an evolutionary interpretation of the relevant texts, there is no actual State practice or any judicial decision to buttress it. According to article 110 (1) (b) of LOSC, vessels engaged in slave trade may be visited on the high seas<sup>44</sup> and by virtue of article 99 LOSC, any slave taking refuge on board of the ship shall *ipso facto* be free. Neither slavery nor slave trade, however, is defined in the LOSC. Therefore, absent any *de lege specialis* definition in the latter Convention, recourse should be made to the relevant international law, which is reflected, first and foremost, in the 1926 Slavery Convention, which defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised (art. 1 para. 1), while slave trade encompasses 'in general every act of trade and transport in slaves' (art. 1 para. 2).<sup>45</sup> These definitions were incorporated into article 7 of the 1956 Supplementary Slavery Convention, which also extended to persons of 'servile status' the international protection against 'institutions and practices similar to slavery', such as debt bondage, serfdom, bride-purchase, inheritance or sale of wives and child indenture (Preamble, articles 1 and 7 (b)).<sup>46</sup>

It is a truism that these forms of slavery, especially slaves *de jure* owned by their masters, do not correspond to the reality of the 21<sup>st</sup> century. Consequently, it is contended that it is rather difficult to equate, *prima facie*, any of the categories of our

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affect the nationality of the individuals using the ship in question'; see *supra* note 27, 309.

<sup>44</sup> The first decision to include slave trade as a justification for the right to approach 'on the same footing as in the case of piracy' was made by the I.L.C. in 1951; see Report of the International Commission to the General Assembly, 6 UN GAOR Supp. (No. 9) at 16, UN Doc. A/1858 (1951), reprinted in 2 *I.L.C. Yearbook* (1951), 139-40. For the relevant *travaux* during UNCLOS III, see *infra* note 83.

<sup>45</sup> Convention on Slavery, signed 25 September 1926, 60 *LNTS* (1927), 253. The first multilateral effort to call for suppression of slave trade generally was the Declaration of the Eight Courts relative to the Universal Abolition of Slave Trade, annexed as Act XV to the 1815 General Treaty of the Vienna Congress, done 8 February 1815, 63 *CTS* 473. Moreover, during the 19<sup>th</sup> century, a large number of bilateral treaties for the suppression of slave trade, as well as the Brussels Act of July 2, 1890, relative to the African Slave Trade had provided for the right to visit on the high seas but restricted the application to vessels of certain tonnage within a defined maritime area. See A.M. Trebilcock, 'Slavery' in *Encyclopedia of Public International Law* Vol. III (2000), 422.

<sup>46</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; 266 *UNTS* (1957), 3. For academic commentary see: M. Schreiber, 'Convention supplémentaire des Nations Unies relative à l'abolition de l'esclavage', *Annuaire Française de Droit International* (1956), 555

interest to slaves, since they are not the property of anybody and thus the requisite element of *de jure* ownership is absent.<sup>47</sup> Nevertheless, it seems to the writer that there is room for another proposition on the premise of a different chain of arguments. First of all, it is necessary to pinpoint that persons on board intercepted vessels might also be victims of human trafficking and other similar practices and not only migrants and refugees, which have left their country on their own free will.<sup>48</sup> Having said that, it is called into question, in the first place, whether such persons can qualify as slaves as such and in the second, whether the provision of article 110 (1) (b) LOSC can lend itself to such interpretation so as to include also these persons.

On the first question, what will be contested is the argument that ‘slavery’ exists only within the legal parameters of the 1926 Convention, which is predominantly a matter of hermeneutics of the latter Convention. In light of the pertinent canons of interpretation, set forth in articles 31-33 of the Vienna Convention on the Law of Treaties (1969), the primary rule of natural meaning of the text of the treaty, i.e., in our case, the ‘ownership’ requirement, will be the starting point to be applied, however, in the light of the context, the object and purposes of the treaty and a number of other considerations, like subsequent practice, treaties or relevant rules of international law which implies that an abstract natural meaning may be modified by any of these.<sup>49</sup> In this vein, it is acknowledged that the object and purpose, which is, in any case, an essential element of treaty interpretation, attains even more importance in the case of treaties of a humanitarian character.<sup>50</sup> The Slavery Convention is a treaty of the latter character *par excellence* and hence its *ratio juris* or, in other words, the goals, interests and values- at various levels of abstraction- that the drafters of the

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<sup>47</sup> See *per* this view N. Ronzitti, *supra* note 7, 1274. Also, it is mentioned by G. Bastid-Burdeau, ‘Migrations Clandestines et Droit de la Mer’, in *La Mer et Son Droit, Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, (2003), 59.

<sup>48</sup> Human trafficking is defined as ‘the recruitment, transportation, transfer of persons, either by the threat or use of abduction, force, fraud, deception or coercion for the purpose of exploitation (including at minimum, the exploitation of the prostitution of the others, or other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, or servitude)’; see article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, supplementing the UN Convention on Transnational Organized Crime, UN Doc A/55/383 (2000).

<sup>49</sup> See: articles 31-33 of Vienna Convention on the Law of Treaties (1969), opened for signature May 23, 1969, 1155 *United Nations Treaty Series*, 331 [hereinafter referred to as VCLT]. For commentary see: M. Fitzmaurice, ‘The Practical Working of the Law of Treaties’, in M. Evans (ed.), *International Law*, (2<sup>nd</sup> edn., 2006), 187.

<sup>50</sup> The matter was addressed by the ICJ in its 1951 Advisory Opinion on *Reservations to the Genocide Convention* as follows: ‘[I]n such conventions, the contracting parties do not have any interest of their own; the merely have, one and all, a common interest, namely the accomplishment of these higher purposes which are the *raison d’être* of the Convention’; see *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 23.

Convention sought to actualise, should be primarily taken into account in its interpretation. *In casu*, the object and purpose of the Slavery Convention is indubitably to abolish slavery and slave trade in all its manifestations in all parts of the world. This is in consonance with the peremptory character of the prohibition of slavery and slave trade, as a norm of *jus cogens*, and with the obligations *erga omnes*, which are placed upon States, concerning ‘the basic rights of the human person, including protection from slavery’.<sup>51</sup>

Furthermore, drawing insights from a theory of purposive interpretation, the latter must also reflect a more objective component, i.e. the social values prevalent at the time the treaty is interpreted, including values of morality and justice, social goals and human rights<sup>52</sup>. The latter are furnished by the subsequent developments as well as by the international legal environment at the time of the application of the treaty. The relevance of subsequent developments in treaty interpretation is also explicitly affirmed in article 31 (3) of VCLT, which provides that any subsequent agreement or practice of the parties regarding the interpretation of the treaty must be taken into account as well as any relevant rules of international law applicable in the relations between the parties’. It is also inextricably linked with the problem of intertemporal law, i.e. whether a treaty is to be interpreted in light of the international law applicable at the time of the treaty’s conclusion or at the time of its interpretation.<sup>53</sup> While a detailed examination of this issue is beyond the compass of this paper, suffice to have regard, for our purposes, to the Advisory Opinion of the ICJ in the *Namibia* case (1971), where the Court placed particular emphasis on the importance of subsequent developments in the law for the interpretation of the League of Nations Covenant. According to the Court, ‘[the Covenant’s] interpretation cannot remain unaffected by the subsequent developments of the law, through the Charter of the United Nations and by way of customary law. Moreover, *an international instrument has to be*

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<sup>51</sup> See *Barcelona Traction Case*, ICJ Reports (1970), p. 32, para 34, which elevated the relevant prohibitions to the apex of the normative pyramid.

<sup>52</sup> According to its architect, Aharon Barak, purposive interpretation is a general system of interpretation, whose goal is to achieve the purpose that the legal text is designed to achieve. It is based on three components: language, purpose and discretion. As far as the second is concerned, the purpose is the values, goals, interests, and policies and aims that the text is designed to actualise. See A.Barak, *Purposive Interpretation in Law* (2005).

<sup>53</sup> The starting point for every analysis of the problem of intertemporal law is the formulation of Judge Huber in the *Las Palmas Case*; essentially that a treaty must be interpreted ‘...in the light of law in force at the time when the treaty was drawn up, [but] the *application* of a treaty shall be governed by the rules of international law applicable at the time [of application]’, see *Island of Palmas Case*, (The Netherlands/United States of America), Permanent Court of Arbitration, Award of 4 April 1928, UNRIIAA, Vol.II, p. 845.

*interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*'.<sup>54</sup> This pronouncement in conjunction with other congruent judicial and scholar opinions<sup>55</sup> bolsters our thesis that the notion of 'slavery' should not remain static, but, in contrast, is evolutionary and should be informed by the subsequent treaty and customary developments as well as by the exigencies of slavery in the 21<sup>st</sup> century.

What springs next to mind is the question, namely is there slavery in the contemporary era? Although every nation on earth has outlawed 'slavery' and 'slave trade', it is sad but true that chattel-slavery in the traditional sense still persists in isolated cases and regions of the world, like in Mauritania and Sudan,<sup>56</sup> while slavery-like practices or modern forms of slavery, including debt bondage,<sup>57</sup> forced labour,<sup>58</sup> trafficking in people for purposes of prostitution, exploitation of immigrant workers as domestic servants or slaves<sup>59</sup> are prevalent in many parts of the world.<sup>60</sup> Reflecting this reality, the UN established the Working Group on Contemporary Forms of Slavery in 1988, which has included in its agenda since then all the aforementioned

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<sup>54</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at para 53 (emphasis added).

<sup>55</sup> See *inter alia*: the Dissenting Opinion of Judge Tanaka in the 1966 *South West Africa* cases, who observed that developments in customary international law were relevant to the interpretation of a treaty concluded 40 years previously, particularly in view of the ethical and humanitarian purposes of the instrument in question (ICJ Reports, 1966, p. 6, at 293). This assessment was echoed more recently by Judge Weeramantry in the 1997 *Gabcikovo-Nagymaros* case in respect of human rights treaties general; see *Gabcikovo-Nagymaros Project* (Hungary-Slovakia), Judgment, ICJ Reports 1997, p. 7, at 114. See also *Aegean Sea Continental Shelf Case* (Greece/Turkey), ICJ Reports 1978, p. 3 as well as H. Thirlway, 'The Law and Procedure of International Court of Justice, 1960-89, (Part Three)', 62 *BYBIL* (1992), 47.

<sup>56</sup> See: Report of the Working Group on Contemporary Forms of Slavery 1996, UN ESCOR [48<sup>th</sup> Session], at paras. 96-100, U.N. Doc. E/CN.4/Sub.2/1996/24 (1996) and S.P. Menefee, 'The Maritime Slave Trade in 21<sup>st</sup> Century' 7 *ILSA Journal of International and Comparative Law* (2001), 508.

<sup>57</sup> Debt bondage is defined in the 1956 Supplementary Convention as the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined (art. 1 (b)). Today is the most common form of slavery in the world and it is practiced more often in the Indian subcontinent; see Bales, *infra* Note 60 p.

<sup>58</sup> Forced labour is defined by the 1930 Forced Labour Convention and the 1957 Abolition of Forced Labour Convention as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

<sup>59</sup> The Parliamentary Assembly of the Council of Europe in its Recommendation No. 1663 (adopted on 22 June 2004) described domestic slavery as follows: [t]oday's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers, au pairs or 'mail-order brides'. See also Recommendation No. 1523 (2001), adopted on 26 June 2001 available at <http://www.echr.coe.int> (last visited 1 June 2007).

<sup>60</sup> Estimations with regard to the numbers of people subject to contemporary forms of slavery differ from 27 million to 200 million. See with regard to the scourge of modern slavery: K. Bales, *Disposable People-New Slavery in the Global Economy* (1999).

practices, *qua* ‘manifestations of contemporary forms of slavery’<sup>61</sup> with the addition of the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict.<sup>62</sup> It has also explicitly qualified forced labour as a contemporary form of slavery.<sup>63</sup>

In addition to the Slavery Convention and its Supplementary Convention, prohibitions against slavery or other similar forms can be found in numerous universal and regional human rights treaties as well as in Statutes of international criminal tribunals. These include *inter alia* article 8 of the International Covenant on Civil and Political Rights (1966),<sup>64</sup> article 4 of the European Convention on Human Rights (1950)<sup>65</sup> and article 6 of the American Convention on Human Rights (1969), which contains also in the pertinent proscription the traffic in women.<sup>66</sup> Furthermore, enslavement in general is explicitly prohibited and punished as crime against humanity, pursuant to article 5 (c) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), article 3 (c) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and last but not least article 7 (2) (c) of the Rome Statute of International Criminal Court (ICC), which very interestingly provides that ‘enslavement means the exercise of any or all the powers attaching to the right of ownership over a person and *includes the exercise of such power in the course of trafficking in persons, in particular women and children*’.<sup>67</sup>

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<sup>61</sup> See ‘Contemporary Forms of Slavery’, Commission on Human Rights Res. 1999/46, available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-1999-46.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1999-46.doc) (last visited 30/5/2007) and the latest Report of the Working Group on Contemporary Forms of Slavery, E/CN.4/2006/2, E/CN.4/Sub.2/2005/44, available at [http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN\\_4-SUB\\_2-RES-2005-29.doc](http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2005-29.doc) (last visited 30/5/2007).

<sup>62</sup> See UN Docs. E/CN.4/Sub.2/1995/51 and E/CN.4/1996/2.

<sup>63</sup> See the first reference in 1994/5 Report of the Working Group on Contemporary Forms of Slavery, available at [http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN\\_4-SUB\\_2-RES-1994-5.doc](http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-1994-5.doc) (last visited 30/5/2007). The Sub-Commission on Prevention of Discrimination and Protection of Minorities drew the same conclusion also at its 49<sup>th</sup> session, 1997 cited in Rassam, *supra* note 8, 341.

<sup>64</sup> It sets forth that ‘[n]o one shall be held in slavery or servitude; slavery and the slave-trade in all their forms shall be prohibited; no one should be held in servitude. No one shall be required to perform forced and compulsory labour’; see International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 *UNTS* 171.

<sup>65</sup> ‘No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour’; see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 *UNTS*, 221.

<sup>66</sup> ‘No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women’; see American Convention on Human Rights, Nov. 22, 1969, *UNTS* 123.

<sup>67</sup> See article 7 (2) (c) Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998) (emphasis added). In addition, according to the relevant Elements of Crime, ‘such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status...It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’; see R.S. Lee (ed.), *The International Criminal Court, Elements of*

The majority of these treaties concerning slavery or enslavement provide for a certain supervisory mechanism, contrary to the two Slavery Conventions, which conspicuously failed to do the same.<sup>68</sup> Therefore, these treaty bodies have supplied us with their own valuable understanding of the matter and to some extent with authoritative statements in this regard.<sup>69</sup> Reference should be made, first of all, to the case *Pohl and Others*, where a US Military Tribunal linked forced labour, even though it was not included in the Nuremberg Charter, to enslavement in the following statement: '[s]lavery may exist without torture. Slaves may be well fed and well clothed and comfortably housed, but they are slaves if without lawful process they are deprived of their freedom by forceful restraint'.<sup>70</sup> More recently, the ICTY had the opportunity to pronounce on the issue of enslavement in the cases of *Kunarac* and *Foca*. In more detail, in the former, the Trial Chamber held that enslavement as a crime against humanity included trafficking of human beings,<sup>71</sup> while, in the latter, Stankovic and others were accused by the ICTY Prosecutor of enslavement for the detention of their victims in a house against their will.<sup>72</sup> Moving to the human rights context, the very recent case of *Siliadin v. France* (2005) before the European Court of Human Rights<sup>73</sup> is of particular interest to our enquiry, since it pertains to the problem of domestic servitude, which is very acute in modern societies. In this case, the applicant was a Togolese citizen, who arrived in France in 1994, at the age of 15 and worked as a domestic servant for several years in a household in Paris under appalling working conditions. The Court found that the applicant was held in servitude, which 'in the light of the case-law on this issue...means an obligation to provide one's services that is imposed by the use of coercion, and is *to be linked with the concept of "slavery"*'.<sup>74</sup>

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*Crimes and Rules of Procedure and Evidence* (2001), 84.

<sup>68</sup> The failure to provide for any corresponding machinery is characterised as the major weakness of both the 1926 and 1956 Slavery Conventions; see Trebilcock, *supra* note 45, 425.

<sup>69</sup> However, it may be fitting to underline here that these Courts or Tribunals have treated 'slavery' and slavery-like practices within their own setting and not as a general matter of international law and thus there must be due regard to what conclusions are drawn from these pronouncements.

<sup>70</sup> *Trial of Oswald Pohl and Others*, US Military Tribunal, Nuremberg, Germany, 3 November 1947, TWC, (1950), 958, quoted in M.M. Whiteman, *Digest of International Law* (US Dept. of State, 1968), 905.

<sup>71</sup> The accused was convicted of enslavement for the detention of women for one to three months during which the women were forced to perform household chores before some of them were sold to other Serb soldiers; see *Prosecutor v. Kunarac* (Trial Judgement) IT-96-23 (22 Feb 2001), 542.

<sup>72</sup> See *Gagovic and Others*, Case No. IT-96-23 (Indictment of 26 June 1996), paras. 10.6-10.8.

<sup>73</sup> See *Case of Siliadin v. France* (Application no. 73316/01), Judgment of 26 July 2005, available at <http://www.echr.coe.int/echr/> (last visited 1 June 2007)

<sup>74</sup> *Ibid.*, para. 124 (emphasis added). In reaching this conclusion, the Court stressed that 'although the

It is thus apparent that ‘slavery’ in its contemporary forms still persists in the world. The common denominator between the old and the new slavery is markedly that people are enslaved by violence and held against their wills for purposes of exploitation. Even though modern slaves do not phase a *de jure* control of their lives – not ownership in the classic sense-, they certainly do a *de facto* control- a deprivation of part or all of their juridical personality-, which very often engenders the same opprobrious result. It follows that at least certain severe aspects of the above-mentioned practices are analogous to slavery, like debt bondage, which was also included in the 1956 Convention, domestic servitude and forced labour, may qualify as slavery.<sup>75</sup> Also, the same holds true for the case of trafficking or even smuggling of human beings, when the traffickers not only smuggle but also subsequently exploit their victims to the aforementioned extent of forced labour or domestic servitude.<sup>76</sup> The traditional concept of slavery seems to be at the top end of the pyramid, while trafficking, bonded or forced labour and domestic servitude are the consecutive steps to reach this end; however, they all constitute intrinsic components of the edifice of contemporary slavery.

The soundness of this thesis derives support from a number of sources: on the one hand, from the perusal of the pertinent Resolutions of UN Working Group on Contemporary Slavery and of the other international bodies<sup>77</sup> and, on the other, from the aforementioned treaty provisions and the relevant case-law. In addition, this reading is in keeping with, firstly, the object and purpose of these Conventions, which is to abolish slavery in all its manifestations, and secondly with the subsequent agreements, practice and the relevant law applicable to the parties, which shed light

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Convention did not define the terms servitude or “forced or compulsory labour”, reference should be made to the relevant international conventions in this field [...] for identifying modern forms of slavery and servitude, which were closely linked to trafficking in human beings, and to the internationally recognised necessity of affording children special protection on account of their age and vulnerability; *ibid.*, para. 91.

<sup>75</sup> The same cannot be argued for other cases, which have been included in the agenda of the UN Working Group on Contemporary Slavery, like sex tourism or use of children in armed conflicts, which even though are prohibited by international law, they are distinct from slavery as such.

<sup>76</sup> This view is not without support in the academic literature; see e.g. C. Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (200) from a Refugee Protection Perspective’, 14 *IJRL* (2002), 579 and also J. Morrison and B. Crosland, who contend that ‘in extreme cases, transportation may amount to slavery, in that the agent exerts powers of ownership over the victim...’ in ‘The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy?, *New Issues in Refugee Research*, Working Paper No. 39, p. 62; available at <http://www.unhcr.org/research/RESEARCH/3af66c9b4.pdf> (last visited 1/6/2007).

<sup>77</sup> These Resolutions of the UN Working Group or the Council of Europe’s Parliamentary Assembly are not binding as such, yet they attain importance as manifestations of an *opinio juris* to that effect.

on the contemporary parameters of the term in question. This proposition also draws support from the text of the 1956 Supplementary Convention, in the sense that this Convention does not exclude the possibility that the practices and institutions stipulated therein can be assimilated to the definition of slavery itself,<sup>78</sup> as well as from the *travaux préparatoires* of the latter, which lend credence to the view that slavery is a very flexible notion, which must be adjusted to the exigencies of each and every period.<sup>79</sup> As a result, it is warranted to assert that slavery, as prescribed in the relevant Conventions, must be construed so as to encompass all the aforesaid forms of modern slavery. Concomitantly, people that are subject to bonded or forced labour or domestic servitude can be clothed in the legal form of slaves, provided that they do experience the requisite element of *de facto* control, and more importantly, the trade of the latter can equally be identified with slave trade. Lastly, it will be well within reason to propound that these practices are not only proscribed in the respective treaties, but also prohibited by customary international law.<sup>80</sup>

Having addressed the first and the most important question, that is, whether victims of human trafficking or of similar practices can be equated to slaves, the next question, which comes to the fore, is whether the traffic of the latter can come within the purview of the boarding provision of article 110 (1) (b) of LOSC. To respond in the affirmative, it must be substantiated that the traffic in question is included in the interpretation of the term ‘slave trade’ in article 110. Such interpretative approach, apart from the other requirements of article 31 (1) VCLT, would inevitably have to take into account the ‘relevant rules of international law applicable in the relations between the parties’, that is, all the treaties and customary law that deal with slavery and slave trade, which even though they are not part of the LOSC *per se*, yet they are imported to its interpretation, in line with the provision of article 31 (3) (c) VCLT.<sup>81</sup>

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<sup>78</sup> The provision of article 1 calls upon the States to ‘take all practicable and necessary legislative and other measures to bring about...the complete abolition...of institutions and practices, where they still exist and *whether or not they are covered by the [1926 Convention’s] definition of slavery*; see *supra* n. (emphasis added)

<sup>79</sup> It is noteworthy in this regard that the Ad Hoc Committee of Experts on Slavery in its Report to ECOSOC in 1951 underscored that the slavery undertook so many diverse forms that it was very difficult to give a definition, for the purposes of the Supplementary Convention, so precise and comprehensive as to encompass all the forms of servitude in all societies and this was the ground on which the title of the Convention was preferred; see Schreiber, *supra* note 46, 554 (fn. 11).

<sup>80</sup> See also in this respect Rassam, *supra* note 8, 342. It would be also tenable to maintain that slavery, in all its contemporary forms, is a crime against humanity, in line especially with the above-mentioned findings of the ICTY.

<sup>81</sup> It is taken for granted that the requirement of the said provision, namely the relevant rules to be ‘applicable in the relations between the parties’ does not raise any particular problem, since either the



This reflects the approach of the International Law Commission as well as of the negotiating States at UNCLOS I in drafting the High Seas Convention *in abstracto* and the article on the prohibition of slave trade *in concreto*.<sup>82</sup> It is noteworthy in this regard that the States involved espoused almost verbatim the draft article proposed by the Commission.<sup>83</sup> The latter, during its workings, made allusion to an array of treaties prohibiting slavery and slave trade, in order to conceive and frame the pertinent provision.<sup>84</sup> Also, it is a subtle yet very important detail that in the final report, the Special Rapporteur mentions only the 1890 Brussels Act, which granted boarding powers to the State Parties, and not the Slavery Convention, which was silent on the latter point.<sup>85</sup> The conclusion to be drawn accordingly is that all the ‘relevant international law’ and not only the latter Convention conduced to the elaboration of the provision in question; *ergo* equally should be the case in its interpretation.

To substantiate this further, it suffices to note that, during the meetings of ILC in 1956, the Special Rapporteur explicitly referred to the- then- Commission’s articles on the Supplementary Convention as ‘in conformity with the relevant parts of the draft to be submitted to the Conference’.<sup>86</sup> Hence, the ILC was mindful of the existence of other institutions and practices analogous to slavery, whose trade might be subjected to the boarding powers of the parties to the Geneva Convention. Also, in the context of the First UNCLOS, there was a proposal of Philippines to ‘bring [draft] article 37 in line with the Convention on the Abolition of Forced Labour’, since the

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States concerned would be parties to the LOSC as well as to the Slavery Conventions, both of them having attracted universal acceptance or, in any case, the ‘relevant law’ would attain also the status of customary law, thence would be *ipso facto* applicable between the parties.

<sup>82</sup> This allusion to both the work of the ILC and the First UNCLOS does not purport to equate them *qua* the relevant *travaux préparatoires*. To the contrary, it is the prerogative of the latter to be called as *travaux* proper; however, the plain fact that the negotiating States took as point of reference the proposed text of the ILC, to which they made slight modifications, gives an increased weight to the latter. See also M.Nordquist, *supra* note 28, 239.

<sup>83</sup> The ILC addressed the prohibition of the transport of slaves in draft article 37; see Report of the International Law Commission to the General Assembly, UN Doc. A/3159 (1956), reprinted in *Yearbook of the International Law Commission*, Vol. II (1956), 37. For the discussion at UNCLOS I, who brought about slight modifications to the above draft article, see: Report of the Second Committee, A/CONF.13/L.17 (1958), paras. 33 and 34 in II [First] UNCLOS *Official Records* (1958), 96.

<sup>84</sup> See e.g. the preliminary Report of the Special Rapporteur in 1950, which invoked the pertinent provisions of the 1890 Brussels Act, of the Convention of Saint-Germain (1919), as well as of the 1926 Convention; see *Yearbook of the International Law Commission* (1950), Vol. II, p. 41.

<sup>85</sup> It is patent from both the 1926 and 1956 Conventions that neither of them contained a boarding provision, even though there were relevant proposals to this end, mainly by the crusader against slave trade, Great Britain See the pertinent remarks by L.B. Sohn, *Cases and Materials on the Law of the Sea* (Transnational Pub., 2004), 187

<sup>86</sup> See: Report of the International Law Commission (1956), *supra* note 83, 37.

latter reflected ‘a very real danger at the present time’.<sup>87</sup> Notwithstanding that this proposal was rejected, it lends credence, in conjunction with the previous statement of the Special Rapporteur, to the view that the Commission and the participating States were receptive of an evolutionary notion of slavery and slave trade and were ready to have regard to a wide variety of sources in this respect.

In addition, it is recorded that before UNCLOS III, there was a working paper proposed by Malta at the 1971 session of the Sea-Bed Committee, which contained a new draft article, with a reference, among many others, to the presence of ‘slaves or persons in conditions akin to slavery in the vessel’.<sup>88</sup> Nevertheless, this proposal was not accepted, perhaps due to the general reticence of the pertinent Committee to bring about many changes to the corpus of the 1958 High Seas Convention.<sup>89</sup>

It follows from the foregoing analysis that there is certainly merit in suggesting that the provisions of the LOSC should be informed also by the contemporary evolution of the terms in question. In addition, this is warranted by the application of the provision of article 31 (3) (c) of VCLT by a series of recent judicial decisions,<sup>90</sup> which reflects a conscious choice of the respective judicial organs to promote a systemic integration of international law rather than an unlimited fragmentation.<sup>91</sup> Suffice to note, for our purposes, the decision of the ICJ in the *Oil Platforms Case* (2003), where it interpreted the provision of article XX of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran in light of the law on use of force, as it has been currently moulded, i.e. almost 50 years after the latter treaty.<sup>92</sup>

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<sup>87</sup> See: [First] UNCLOS *Official Records*, Vol. IV, 21.

<sup>88</sup> See A/AC.138/53, article 25, reproduced in SBC Report 1971, at 105, 125 (Malta).

<sup>89</sup> See M. Nordquist, *supra* note 28, 239.

<sup>90</sup> Such cases are *inter alia*:(a) the *Mox Plant* litigation between Ireland and the United Kingdom; (c) The *Shrimp-Turtle* and *Beef Hormones* decisions of the WTO Appellate Body;(d) The trio of decisions on the relationship between the right of fair trial and state immunity (*Al-Adsani*, *Fogarty*, and *McElhinney*) decided by the European Court of Human Rights and finally (e) *Oil Platforms* in the International Court of Justice.

<sup>91</sup> This very critical issue is beyond the compass of the present paper; see however, C.A. Mc Lachlan, ‘The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention’ 54 *ICLQ* (2005), 279.

<sup>92</sup> The Court’s reasoning was the following: ‘[t]he Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force [...] the application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by ... the 1955 Treaty’; see *Case concerning Oil Platforms* (Iran v United States of America) 42 *ILM* 1334 (2003), para 79.

It seems reasonable to infer from this case that the LOSC should be interpreted in the light of the contemporary legal meaning of the terms slavery and slave trade and not only in the light of the meaning when the LOSC was drafted. Therefore, the above remarks with regard to the subsequent developments in law and the current legal parameters of slavery and slave trade become germane to the interpretation of this provision. This is also in keeping with another principle of treaty interpretation, namely the principle of effectiveness (*'ut res magis valeat quam pereat'*),<sup>93</sup> which entails that the interpreter of any treaty provision, *in casu* of article 110 (1) (b), should aim at this interpretation, which would give full effect to the provision concerned, *ergo* at the interpretation that will most effectively suppress slave trade on the high seas. Since slave trade in the traditional sense is almost extinct, this provision can, thus, apparently be characterised as *quasi-desuetude* or obsolete.<sup>94</sup> However, the principle of effectiveness comes to reinvigorate and reinstate its importance for the suppression of the scourge of slavery to the international community, albeit in different and more contemporary manifestations.

To conclude, the provision of article 110 (1) (b) of LOSC may afford the requisite legal basis for the right to visit on the high seas vessels reasonably suspected of transporting slaves in the contemporary meaning of the term. However, it should be underlined that due to the lack of the ownership trait of traditional slavery in its contemporary forms, it might be difficult in reality to board the suspected vessels without solid information about the future of these persons in the destination country, since at this point they are only smuggled or trafficked to the latter. It is in this regard that any boarding on this basis should be the outcome of concrete information, beyond the standard of mere suspicion, that the people on board will definitely be exploited as modern slaves. This may happen, apart from the isolated cases of chattel slavery, when there is a corroborated pattern of sea borne transportation of people from one place to another to work under conditions of servitude and be exploited by criminal

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<sup>93</sup> Here the principle of effectiveness is more intertwined with *'la règle de l'efficacité'*, i.e., the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end and that an interpretation which would make the text ineffective to achieve the object in view is *prima facie* suspect. See: Thirlway *supra* note 55, 44

<sup>94</sup> The characterization of the provision in question as obsolete or 'desuetude' does not purport to denote that it has ceased to have legal effects; rather it denotes the ineffectiveness of this provision if the concept of slavery remains frozen to the 1926 *status quo ante*. See on desuetude: Mc Nair, *Law of Treaties* (1961) 516.

organisations, against which there are proofs that they profit from these heinous activities.<sup>95</sup>

### **III. Conclusion**

To synopsise the canvass with regard to maritime interception under the rubric of the LOSC, it has been argued that even though the smuggling of migrants or human trafficking were not included *ipso facto* within the purview of the provision of article 110 of LOSC, the latter may, nevertheless, afford, in certain aspects, the legal basis for the interception of human beings on the high seas. It goes without saying that the grounds of piracy or unauthorised broadcasting, not to say, vessels of the same nationality are not germane to our discussion. On the contrary, the case of ‘stateless vessel’, when accompanied by a positive assertion of enforcement jurisdiction as well as the ‘slave trade’, under certain circumstances, do afford the requisite bases for such operations by virtue of the central provision of article 110 LOSC. Both of these grounds reflect the negative and positive aspect of interception, i.e. the former to avert people from reaching the shores of the States involved and the latter to liberate people from exploitation. It is regrettable, however, that on the basis of the information being publicized, the former is the rule and the latter the exception.

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<sup>95</sup> Further information on such kind of patterned trade and exploitation of people in sweat shops and other venues can be found in Bales, *supra* n. and also at <[www.antislavery.org](http://www.antislavery.org)> (last visited 2 June 2007).