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REINFORCING THE *LAW OF THE SEA*
CONVENTION OF 1982 THROUGH CLARIFICATION
AND IMPLEMENTATION

Rob McLaughlin

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REINFORCING THE *LAW OF THE SEA*
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Rob McLaughlin¹

Abstract

That the Law of the Sea Convention faces implementation challenges is nothing new; it is, as many have noted, a framework and a scaffold - a constitution for the oceans - which necessarily left many matters of detail to future negotiation, associated instruments, and state practice. What has emerged over the last two decades, however, is an increasing reluctance on the part of states to pursue implantation via new, more detailed, treaty commitments. This article explores alternative options for enhancing Law of the Sea Convention compliance - options that do not necessarily require the 'more law' path to granularity and implementation. The analysis begins by describing the amenability of the LOSC to refinement processes, focusing upon its flexibility (including its 'constructive ambiguity') and conduciveness (the significant allowance built into the LOSC for domestic contextualization, interpretation, and implementation). With this background established, the analysis then explores four alternative pathways to facilitating and reinforcing compliance - pathways that do not involve the negotiation of additional hard law or mixed hard/soft law instruments, nor the establishment of new governance institutions. The first alternative is to employ a 'process' approach, noting the relative success of this option in the maritime domain as represented by the Proliferation Security Initiative (PSI) and the Contact Group on Piracy off the Coast of Somalia (CGPCS). The second alternative approach is the adaptable employment of existing rules to meet an evolving governance challenge - the issue of privately contracted armed security personnel (PCASP) being a case study on point. The third option is to apply refined interpretive endeavors to existing

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authorizations which have hitherto been subject to relatively superficial analysis and application – for example, in relation to vessels without nationality (VWON) and counter-drug interdictions at sea. The fourth option is the employment of existing but under-utilized LOSC-based or LOSC-leveraged mechanisms and authorizations - such as Article 17 of the *Vienna Convention on Traffic of Narcotic Drugs and Psychotropic Substances* 1988 - in new or expanded ways.

I. INTRODUCTION

When faced with a seemingly difficult governance problem, the international community has often resorted to the logical, formal, and contextually sensible approach of filling the identified gap with new, legally binding obligations. This is often accompanied by bespoke institutions designed to facilitate these new obligations, and (in many cases) to provide an independent clearing house for ongoing implementation, record keeping, and in some cases dispute resolution. Thus, for example, when space exploration and exploitation became a technological reality, concerned states acted quickly to create a governance regime that would preserve this newly accessible global commons from sovereignty claims. Thus, Article 2 of the Outer Space Treaty of 1967², and Article 1 of the Moon Treaty of 1979³ provide that (to quote the Outer Space Treaty): “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Similarly, although it is small and under-resourced compared to many national and regional space agencies, the United Nations (U.N.) Office for Outer Space Affairs (UNOOSA) was created as a vehicle to ‘promote international cooperation in the peaceful use and exploration of space, and in the utilization of space science and technology for sustainable economic and social development’.⁴ This use of a ‘more law’ solution—often, but not

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S., 205.

³ G.A. 34/68, annex, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Dec. 5, 1979).

⁴ United Nations Office for Outer Space Affairs, *About Us*, <http://www.unoosa.org/oosa/en/aboutus/index.html>, [https://perma.cc/K32M-YQYK] (last visited 23 Aug 2019); the UNOOSA was originally created to support the U.N. Committee on the Peaceful Uses of Outer Space, established by General Assembly Resolution 1348 (XIII) (Dec. 13, 1958). Amongst its other roles, UNOOSA maintains the U.N. Register of Objects Launched into Outer Space, is the U.N. focal point for the United Nations Platform for Space-based Information for Disaster Management and Emergency Response (UN-SPIDER), and is the secretariat for the International Committee on Global Navigation Satellite Systems. Citations?

invariably, accompanied by the concurrent creation of an international institution to foster and support the principles enunciated and obligations created—is thus a well-trod path in dealing with multilateral governance challenges. The original global commons governance challenge was the sea, and it is therefore little surprise that the *Law of the Sea Convention* 1982 (*LOSC*), its predecessor instruments, and its many associated institutions⁵ reflect this particularly state-centric and state-managed governance response. However, there are recent indications of push-back against this more law approach in the new “global commons” of cyberspace,⁶ and to some extent this hesitancy is also being reflected in the original global commons of the oceans.

There are many reasons for this evolving tendency. One consequence of the ‘more law’ approach can be a form of legal overload or even paralysis—particularly for smaller or less agile states—such that the implementation of new obligations is at best superficial, and at worst ignored.⁷ Another risk is ‘treaty congestion’ – a phenomenon often remarked upon in the area of international

⁵ For example, The Deep Seabed Authority, the Commission on the Limits of the Continental Shelf, the International Tribunal for the Law of the Sea, and the roles and mandates bequeathed by components of the *LOSC* 1982 to other existing and separate institutions such as the International Maritime Organization. Citation?

⁶ See, e.g., Rob McLaughlin and Michael Schmitt, *The need for clarity in international cyber law: International law implications of the lack of consensus*, ASIA AND THE PACIFIC POLICY FORUM, (Sept. 18, 2017), <https://www.policyforum.net/the-need-for-clarity-in-international-cyber-law/>, [https://perma.cc/VBE9-JP85]; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 2-6 (Michael Schmitt ed., Cambridge University Press 2017); Michael Schmitt and Liis Vihul, THE NATURE OF INTERNATIONAL LAW CYBER NORMS 12 (Tallinn Papers No. 5), NATO Cooperative Cyber Defense Centre of Excellence (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543520, [https://perma.cc/P82J-JBBZ]; Mary Ellen O’Connell, *Cyber Security without Cyber War* 17:2 *J. of Conflict and Security L.* 187, 206 (2012).

⁷ See, e.g., Manisuli Ssenyonjo, *Reflections on state obligations with respect to economic, social and cultural rights in international human rights law* 16:6 *Int’l J. of Human Rights* 969 (2011).

environmental laws – which leads to lack of coordination, delayed or piecemeal implementation, and often debilitating capacity challenges. It is the central thesis of this short article that the best way to remedy implementation gaps is not always to overlay an existing governance regime with further layers of formal treaty law or institutions, but rather to better employ the powers, authorizations, and structures already available under that regime in order to facilitate improved understanding, implementation, and response. That is, legal lacunae – obligation or governance gaps – must be distinguished from implementation gaps. This is because whilst the most appropriate response to obligation gaps may indeed be the creation of new and more detailed legal obligations, the better response to governance gaps is often more effective reinforcement of existing law.

A. Outline

This article will begin with an outline of the amenability of the LOSC to refinement processes, focusing upon two interlinked factors: Flexibility – particularly in the form of ‘constructive ambiguity’; and conduciveness - the significant allowance built into the LOSC for domestic contextualization, interpretation, and implementation. These are not the only factors that inform the LOSC’s particular adaptability – the ability to renegotiate or refine via additional agreements such as (respectively) on Part XI,⁹ and on straddling stocks,¹⁰ for example, is equally important. However, it is the LOSC’s internal flexibility and external conduciveness that are most relevant to the purposes of this article. Following this setting of the scene, with respect to the windows into alternative

⁸ See, e.g., Don Anton, “Treaty Congestion” in Contemporary International Environmental Law, in Routledge Handbook of International Environmental Law, 651 (Erika Techera et.al. eds., 2012).

⁹ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, Jul. 28, 1994, 1836 U.N.T.S 3.

¹⁰ The 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, Aug. 4, 1995, 2167 U.N.T.S 3.

mechanisms that these organic characteristics of the LOSC ensure, the analysis will briefly describe the hard law/soft law context within which such alternative pathways for reinforcing the LOSC must be placed. Focusing upon ‘more law’ options such as Incidents at Sea Agreements, and mixed hard/soft law instruments such as ‘codes of conduct.’ Following this, I will outline four alternative pathways to facilitating and reinforcing compliance - pathways that do not involve the negotiation of additional hard law or mixed hard/soft law instruments, nor the establishment of new governance institutions. The first alternative is to employ a ‘process’ approach, noting the relative success of this option in the maritime domain as represented by the Proliferation Security Initiative (PSI) and the Contact Group on Piracy off the Coast of Somalia (CGPCS). The second alternative approach is the adaptable employment of existing rules to meet an evolving governance challenge. To this end I shall briefly note the issue of privately contracted armed security personnel (PCASP) as a case study illustrating how the practically focused and contextually sensible application of existing rules to emerging concerns can alleviate the need for new law and new institutions. The third option is to apply refined interpretive endeavors to existing authorizations which have hitherto been subject to relatively superficial analysis and application. The issue of vessels without nationality (VWON) and counter-drug interdictions at sea offers a case study in point. The fourth option is the employment of existing but under-utilized LOSC-based or LOSC-leveraged mechanisms and authorizations - such as Article 17 of the *Vienna Convention on Traffic of Narcotic Drugs and Psychotropic Substances* 1988 - in new or expanded ways. This can then create the confidence and experience necessary for deeper engagement and cooperation, without the need to negotiate and create new obligations or new institutions.

II. KEY FACILITATIVE CHARACTERISTICS OF THE LOSC: FLEXIBILITY AND CONDUCTIVENESS

Despite an almost 100 year absence of piracy prosecutions, LOSC-based international and domestic responses to piracy off the Horn of Africa beginning in the mid-2000s were characterized by an evolutionary and increasingly robust – but relatively non-

contentious and historically well-grounded – approach to seeking legal rather than simply operational (‘catch and release’) finishes to at-sea interdictions. Indeed, the deterrent effects (and challenges) of piracy prosecutions and apprehensions - even as the economic costs of piracy continued to rise¹¹ - ultimately played an important role, in conjunction with other development and security projects ashore in relation to prisons and improved security,¹² in reducing the incidence of Somali piracy. This outcome was underpinned by the fact that the LOSC is very tolerant of iterative refinement in implementation - the product of, *inter alia*, its flexibility and the significant allowances built into the LOSC for domestic contextualization, interpretation, and implementation – its conduciveness. These two fundamental strengths in turn facilitate the amenability of the LOSC to clarification and implementation through the alternative mechanisms analyzed in section four below. It is thus important at the outset to briefly outline why, and furnish some examples of how, each of these inbuilt facilitative attributes can operate.

¹¹ See Oceans Beyond Piracy, *The Economic Cost of Somali Piracy* (2012), http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_1.pdf, [<https://perma.cc/7RB7-2MFP>]; See also *The State of Maritime Piracy* (2013), http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital_0.pdf, [<https://perma.cc/NB7F-25FA>].

¹² See The Economist Explains, *What happened to Somalia’s pirates?*, THE ECONOMIST, (May 19, 2013), <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-11>, [<https://perma.cc/B9W8-XDGS>]. This was certainly the case for Seychelles and Mauritius, smaller states in which the introduction of multiple cadres of Somali pirate suspects and convicted pirates (given that apprehensions are often of components of, or the whole of, Pirate Action Groups, which generally number 5-12 people) had a significant consequence on local prison capacity. By late 2011, for example, Somali pirates already comprised 20% of the Seychelles prison population. See UNODC, *Counter Piracy Programme: Issue 7, September/October 2011* at p6 – available at http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_7_WV.pdf, [<https://perma.cc/8KBC-Q4HJ>].

A. Flexibility in the face of inconsistency

The LOSC 1982 is noted for its flexibility – an attribute built-in at the time of negotiation via the well-analyzed consensus approach to drafting, and the universalist intentions of the “package-deal” outcome. There is no doubt that individual instances of this flexibility are often contentious – two examples will be noted immediately below; but it is also clear that the very fact that these interpretive differences are enduring but not debilitating also indicates a conscious and consistent acknowledgement of the benefits of this flexibility. By facilitating “constructive ambiguity” – amongst other mechanisms – the LOSC has sought to privilege superficial reconciliation of otherwise irreconcilable interpretive differences in the name of the universalist aspirations of the instrument. Two examples will demonstrate this flexibility in the face of inconsistency: The issue of warship innocent passage;¹³ and the inherent flexibility built into the right of a Coastal State to “require” a delinquent warship to depart the Territorial Sea.¹⁴

In relation to warship innocent passage, on one reading there is little room for reconciliation between – as avatars for this divergence – the interpretations of the US and the Peoples’ Republic of China (PRC) in relation to the issue of prior notification or permission for warship innocent passage. The long-held PRC view – reiterated often during the UNCLOS III negotiations and maintained assiduously since – is that warships may not engage in innocent passage through the PRC territorial sea without prior authorization from the Chinese government.¹⁵ This view has been highly consistent since the PRC’s 1973 *Position Paper*, and its 1982

¹³ LOSC arts 17-20.

¹⁴ United Nations Convention on the Law of the Sea, art. 30, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁵ Working paper on Sea Area Within the Limits of National Jurisdiction, submitted by the Chinese Delegation, Comm. on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of Nat’l Jurisdiction, Subcomm. II, ¶ 1(8), U.N. Doc. A/AC.138/SC.II/L.34 (July 16, 1973).

Declaration.¹⁶ In its 1996 *Declaration upon Ratification* of the LOSC, China specifically reiterated this interpretation:

4. The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.¹⁷

Current PRC legislation enshrines this view: the *Law on the Territorial Sea and the Contiguous Zone of 25 February 1992* specifically provides, *inter alia*, that “[n]on-military foreign ships enjoy the right of innocent passage through the territorial sea of the People's Republic of China according to law. To enter the territorial sea of the People's Republic of China, foreign military ships must obtain permission from the Government of the People's Republic of China.”¹⁸

¹⁶ Third United Nations Conference on the Law of the Sea, *191st Plenary Meeting*, ¶ 23, U.N. Doc. A/CONF.62/SR191 (Dec. 9, 1982).

¹⁷United Nations Convention on the Law of the Sea, Declarations and Reservations, Dec. 10, 1982, 1833 U.N.T.S. 397, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec, [<https://perma.cc/3V23-GA3R>].

¹⁸ PRC, *Law on the Territorial Sea and the Contiguous Zone of 25 February 1992*, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf, [<https://perma.cc/8RPH-QSV9>]; see generally Hungdah Chiu, *China and the Law of the Sea Conference*, in CHINA IN THE GLOBAL COMMUNITY, 187-215 (James Hsjung & Samuel Kim eds., 1980); Zou Keyuan, *Innocent passage for warships: The Chinese doctrine and practice* 29:3 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 195 (1998).

By contrast, and despite a contrary view being expressed during codification conferences in 1930,¹⁹ the consistent US view during and since UNCLOS III has been that warships enjoy the right of innocent passage in the same way as merchant vessels; there is no requirement for warships to seek prior authorization for, or give advance notice of, innocent passage through another state's territorial sea: "[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."²⁰

Yet the LOSC and its associated procedures are also flexible enough to take account of and reflect customary practice that, to some extent, mitigates the dialectical force of this dichotomy in certain otherwise highly contentious situations. The key example of this is the fact that for a warship to visit another State's port, it must first secure diplomatic clearance. This process is in all normal circumstances completed well in advance of the warship appearing at the outer limit of the port State's territorial sea. Thus – in the situation, for example, of a US warship visiting a PRC port – both states are able to maintain their otherwise diametrically opposed interpretations of the broader regime for warship innocent passage by virtue of flexible appreciations of the purposes achieved through

¹⁹ See, e.g., *Reply of the United States to the Questionnaire of the Preparatory Committee*, League of Nations Doc C.74.M.39.1929.V, at 66, 73 (1929); *Sixth Meeting of the Second Committee on Territorial Waters of the Conference for the Codification of International Law*, League of Nations Doc C.351(b).1930.V, at 59 (1930); see generally William Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81:2 AMERICAN JOURNAL OF INTERNATIONAL LAW 331 (1987); Erik Franckx, *Innocent passage of warships: recent developments in US-Soviet relations*, 14:6 MARINE POLICY 467, 484 (1990).

²⁰ See, e.g., 1989 USA-USSR Joint Statement On The Uniform Interpretation Of Rules Of International Law Governing Innocent Passage, ¶ 2, U.S.-U.S.S.R., Sept. 23, 1989.

utilization of the associated DIPCLEAR process.²¹ The US can rightly claim that it has not given prior notification as to warship innocent passage through the PRC territorial sea, but rather it has merely sought and received port entry DIPCLEAR in accordance with long-standing customary law of the sea. The PRC, on the other hand, is able to dress the DIPCLEAR as simultaneous prior permission to the visiting warship to engage in innocent passage through the territorial sea whilst inbound to the relevant port.

The second example is the inherent flexibility of the coastal State's right to require a delinquent warship to leave the territorial sea. For some states, "require" carries with it implications parallel with diplomatic protests and demarches – that is, the scope of the right to "require" is essentially declaratory and bound by the obligation to resolve disputes by peaceful means.²² For other states, "require" carries with it permission to use force, as a last resort, to effect the warship's removal from the territorial sea. During the Cold War, for example, Sweden consistently argued for, and employed, the right to use depth charges as a means of "requiring" dived Soviet submarines (a breach of Article 20) to depart the Swedish Territorial Sea.²³ These interpretations – diplomatic note through to depth charge – are incompatible in relation to each other,

²¹ *E.g.*, Australia – <https://dfat.gov.au/about-us/foreign-embassies/protocol/Pages/diplomatic-clearances-aircraft-and-ships.aspx>, [<https://perma.cc/EYZ8-8P27>]; Latvia – <https://www.mfa.gov.lv/en/about-the-ministry/state-protocol/naval-vessels>, [<https://perma.cc/SS7L-VK4X>]; Seychelles – http://www.mfa.gov.sc/uploads/files/filepath_25.pdf, [<https://perma.cc/YX8X-PQ4K>].

²² *See, e.g.*, David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea* 21 *San Diego L. Rev.* 625 (1983); Bernard Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea* 24:4 *Va. J. Int'l L.* 809, 816-19 (1984).

²³ *See, e.g.*, Roma Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm* 10:1 *Yale J. Int'l L.* 34 (1984); Sebastien Roblin, *How a Whiskey on the Rocks Nearly Started a War Between Russia and Sweden (Date?)*; *A Whiskey-class Submarine, that is The Buzz* (June 30, 2018) <https://nationalinterest.org/blog/buzz/how-whiskey-rocks-nearly-started-war-between-russia-and-sweden-24687>, [<https://perma.cc/9NFF-47BF>].

but manageable if not reconcilable as alternatives predicated upon the flexibility inherent in the single word “require.”

B. Conduciveness: A clear space for domestic contextualization, interpretation, and implementation

Closely associated with this inherent, consciously internalized flexibility in the name of universality when confronted by inconsistency, is the LOSC’s allowance for - and high tolerance of - particularized and contextualized domestic implementation. This is evident, for example, in the variable domestic treatment of the crime of piracy. The LOSC 1982 provides the international anchor point for coherence and consistency as to the minimum elements of the crime,²⁴ and the conditions under which universal jurisdiction applies,²⁵ but does not strictly mandate how domestication of the offence must be achieved. To this end it is important to consider the implied prescriptive jurisdiction requirements that attend the crystallization of the law on piracy in the LOSC 1982.²⁶ With its many nuances (such as the “two ship

²⁴ LOSC, art 101.

²⁵ LOSC, art 105. On the concept of universal jurisdiction, see inter alia, *Trial of Wilhelm List and Others (Hostages Trial)* (1948) (Case NO. 47) *Law Reports of Trials of War Criminals: Vol VIII* (1949) 34 at 54 – available at http://www.loc.gov/r/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf, [<https://perma.cc/F5QV-JZQV>]. Some scholars have noted that the origins of ‘universal jurisdiction’ in relation to piracy might lend themselves to more accurate description as universal concurrent municipal jurisdiction. However, this does not in any way mitigate or attenuate the raw authority that resides in appropriately authorized state vessels (such as warships) to take initial action against suspect pirates and pirate vessels. See, T. Paige, *The Role of the Law in the Rise and Fall of Piracy* (Master of Philosophy Thesis, Australian National University, 2013).

²⁶ For an as yet unparalleled general history of piracy as a legal concept, see Alfred Rubin, *The Law of Piracy* (1988) 63 *International Law Studies*. For an analysis of how one important jurisprudential actor – the US Supreme Court under Chief Justice Marshall – played an important role in developing and defining the law of piracy in a domestic context, but with international law consequences, see White, ‘The Marshall Court and International Law: The Piracy Cases’ (1989) 83 *American Journal of International Law* 727.

rule”²⁷) and its organic uncertainties (such as whether shore based facilitation also comes under universal jurisdiction²⁸) it is important to recognize that the LOSC offers an anchor-point for coherent national implementation and international cooperation rather than a necessarily strict and limiting elaboration of the crime. Indeed, domestic jurisdictions have understandably taken a variety of paths to criminalizing the offence of piracy within their national laws, and this has created a range of variations upon the central theme. This is not a failure of the LOSC, but rather a strength. For example, piracy is one of the very few crimes specifically mentioned in the *Constitution of the United States*, itself highly indicative of the long international provenance of the issue as one of global concern requiring high levels of conduciveness given its transnational and extra-national nature: The Congress shall have Power ...To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations...²⁹

Australian law, adopting a different approach, simply criminalizes piracy as follows:

Section 51: *act of piracy* means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

²⁷ This constituent element is one reason that the *Achille Lauro* incident (which involved acts of violence, detention, and depredation being perpetrated by individuals who had already embarked upon the ship in port, emerging to commit their acts once she had sailed) was not generally characterisable as ‘piracy’ in accordance with the LOSC definition. The issue of ‘private ends’ – the perpetrators being members of the Palestine Liberation Front, and having made demands regarding the release of 50 Palestinian prisoners by Israel – was also debated. See generally Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am. J. of Int’l L. 269 (1988); See also Jose Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 Int’l J. Marine & Coastal L. 363, 376-379 (2003).

²⁸ See *United States v. Shibin*, 722 F.3d 233 (4th Cir. 1986); See also Tamsin Paige, *Piracy and Universal Jurisdiction*, 12 Macquarie L. J. 131 (2013).

²⁹ U.S. CONST. art. I., §8.

- (a) if the act is done on the high seas or in the coastal sea of Australia—against another ship or aircraft or against persons or property on board another ship or aircraft; or
- (b) if the act is done in a place beyond the jurisdiction of any country—against a ship, aircraft, persons or property.

Section 52: Piracy

A person must not perform an act of piracy...

Section 53: Operating a pirate-controlled ship or aircraft

(1) A person must not voluntarily participate in the operation of a pirate-controlled ship or aircraft knowing that it is such a ship or aircraft.

Penalty: Imprisonment for 15 years.

(2) This section applies to acts performed on the high seas, in places beyond the jurisdiction of any country or in Australia...

Section 55: Written consent of Attorney-General required

(1) A prosecution for an offence against this Part requires the consent of the Attorney-General.

(2) Despite subsection (1):

(a) a person may be arrested for an offence referred to in subsection (1), and a warrant for such an arrest may be issued and executed; and

(b) a person may be charged with such an offence; and

(c) a person so charged may be remanded in custody or on bail;

but no further step in the proceedings referred to in subsection (1) is to be taken until the Attorney-General's consent has been given.

(3) Nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.³⁰

The international law definition (as encapsulated in the LOSC) is thus generally replicated, but an overlay of additional

³⁰ *Crimes Act 1914* (Austl.).

jurisdictional authorization is imposed. By contrast, the *Kenyan Penal Code* (until recently) criminalized piracy by reference to its ultimate source in international law, rather than through a recitation of strict elements. Amendments to the *Kenyan Merchant Shipping Act*³¹ have introduced a new offence of piracy couched in the same terms as LOSC Art 101, and the new Kenyan Constitution adopts a more (and for a common law State, unusual) monist approach to the incorporation of international law into Kenyan law.³² The now repealed section 69(1) of the *Kenyan Penal Code* criminalized piracy stating: “[a]ny person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.”³³

³¹ Merchant Shipping Act (2012) Cap. 371 § 369 (Kenya).

³² CONSTITUTION art. 1 §2 (2010) (Kenya) (“Supremacy of this Constitution

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government ...

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution ...”).

³³ See An Act of Parliament to establish a penal code (2014) Cap. 63 (Kenya) (referencing piracy as it stood prior to the repeal of s:61(1)). See also Republic v. Chief Magistrate Ct., Mombasa, *ex parte* Mohamud Mohamed Hashi & Eight Others, (2010) eKLR (H.C.K.) (Kenya) (dealing specifically with a jurisdictional issue related to the relationship between the definition of piracy *jure gentium*, the High Seas authorization, universal jurisdiction, and the territorial limitations contained within s:5 of the Kenyan Penal Code). . For a thorough analysis of the MV Courier Case see, e.g. Jon Bellish, *After a Brief Hiatus Kenya Once Again Has Universal Jurisdiction Over Pirates*, BLOG OF THE EUROPEAN JOURNAL FOR INTERNATIONAL LAW (October 24, 2012), <http://www.ejiltalk.org/after-a-brief-hiatus-kenya-once-again-has-universal-jurisdiction-over-pirates/>, [<https://perma.cc/5LPE-YY65>]; contra James Thou Gathii, *Piracy Prosecution: Kenya's Piracy Prosecution*, 104 A.J.I.L. 416 (2010) (analysing early Kenyan piracy cases); James Theu Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, LOY. L.A. INT'L. & COMP. L.R. 363 (2009) (analysing early Kenyan piracy cases).

Canada takes a not dissimilar approach, referring to the Law of Nations for a precise, elemental definition, but also criminalizing as “piratical acts” certain other conduct with a Canadian nexus, regardless of whether it takes place within Canada (including the Territorial Sea) or in international waters:

Piracy by law of nations

Section 74. (1) Everyone commits piracy who does any act that, by the law of nations, is piracy.

Punishment

(2) Everyone who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

Piratical acts

Section 75. Everyone who, while in or out of Canada

(a) steals a Canadian ship,

(b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(c) does or attempts to do a mutinous act on a Canadian ship, or

(d) counsels a person to do anything mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.³⁴

Thus, the *prima facie* unifying basis within the LOSC in relation to this crime of universal jurisdiction is in fact quite permissive and tolerant of variety when considered from the “next step” perspective of national implementation of the available jurisdiction.

³⁴ Canada Criminal Code, R.S.C. 1985, c. C-46.

This is not to say, however, that the domestication endeavor anticipated by and required of the LOSC's treatment of piracy is universally seamless, albeit varied. This is most evident in the scramble to domesticate laws criminalizing piracy in the wake of increases in piracy off the Horn of Africa in the mid to late 2000s. This was, and remains, an issue precisely because, for many states the existence of an international legal authority is explicitly only one part of the empowerment scheme. The other vital component is an adequate domestic implementation of the international authorization such that the agents of directly engaged states can take appropriate steps in support of any internationally agreed plan to tackle the problem. Yet despite the unparalleled scope of action available under universal jurisdiction, some states have in the past (and some still do) required a nexus to their territory (including in terms of effects), citizens, or vessels as a jurisdictional pre-condition for prosecuting piracy.³⁵ There are many case studies on point.³⁶

Denmark was an early contributor to counter piracy responses off the Horn of Africa, engaging in both World Food Program vessel escort, and broader counter piracy operations.³⁷

³⁵ See Douglas Guilfoyle, *Counter-piracy Law Enforcement and Human Rights*, 59 INT'L. & COMP. L.Q. 152-167 (2010) (discussing the most pressing domestic law issues that affect implementing domestic piracy jurisdiction either for national prosecutions or for transfers to third-party states for prosecution). See also Efthymios Papastavridis, II, *European Court of Human Rights Medvedev et al v. France (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010*, 59 INT'L. & COMP. L.Q. 867-882 (2010) (discussing issues surrounding counter piracy operations suggested by the European Court of Human Rights).

³⁶ Another useful case study is the 2011 decision in the Supreme Court of the Republic of Korea in relation to the *MV Samho Jewelry* case – a South Korean flagged vessel – but which ultimately endorsed the need for amendments to South Korean law so as to bring to bear the full scope and applicability of universal jurisdiction over the offence within South Korean jurisdiction: Seokwoo Lee & Kil Park, *Republic of Korea v Araye* 106 Am. J. of Int'l L. 630 (2012).

³⁷ See Dan B. Termansen, *Counter Piracy off Somalia; A Case for Applying the Comprehensive Approach Strategy?*, (Jan. 03, 2011), <https://www.hsdl.org/?view&did=706790>, [<https://perma.cc/TAT9-A3A7>];

However, on arriving in theatre, the Royal Danish Navy's presence was not initially backstopped by a Danish law criminalizing piracy to the full extent available.³⁸ As a consequence, an early apprehension of suspected Somali pirates in which there was solid evidence available for a prosecution (effectively, the detained suspects were caught in the act of attempting to pirate a merchant vessel), resulted in a transfer of the suspects to the Netherlands for prosecution.³⁹ In part, this transfer was at the request of the Dutch authorities, as the suspects had attacked a Dutch vessel; in part it was because (at that time) the offence of piracy in Danish law did not fully reflect universal jurisdiction, and effectively ruled out a Danish prosecution option.⁴⁰ Similarly, after another apprehension (September 2009), the narrower Danish law at the time - requiring a nexus to a Danish vessel or Danish nationals - coupled with issues of evidential transfer in terms of alternative prosecution venues, resulted in ten suspects being released to shore in Somalia.⁴¹ Even for states as committed to that particular coordinated counter piracy endeavor as Denmark, overcoming the challenges of "tactically" implementing the juridically unimpeachable "strategic" authority for universal jurisdiction have proven far from simple.

Thus, it is evident that within the piracy context (as an example), the glue that binds a diverse array of actors (States, the U.N. and other international organizations, NGOs, industry, etc.) in a jurisdictional sense is also the mechanism that facilitates

Government of Denmark, *Strategy for the Danish Counter Piracy Effort 2011-2014*, (2011), http://um.dk/~media/UM/English-site/Documents/Politics-and-diplomacy/Pirateristrategi_2011_ENG_WEB.PDF. See generally, M.D. Fink & R.J. Galvin, *Combating Pirates off the Coast of Somalia: Current Legal Challenge*, 56:3 Neth. Int'l L. R. 367 (2009).

³⁸ See Sebastien Gottlieb, 'Pirates tried under never used Dutch law,' *Radio Netherlands Worldwide*, (Jan. 16, 2009), <http://vorige.nrc.nl/article2122573.ece>, [<https://perma.cc/7FQN-FNJJ>]; Oliver Hawkins, 'What to do with a captured pirate', *BBC Radio 4*, (Mar. 10, 2009), <http://news.bbc.co.uk/2/hi/7932205.stm>, [<https://perma.cc/3KHP-GM2L>]; Tulia Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20:2 Eur. J. of Int'l L. 399 (2009).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

coordination and information sharing processes in the name of shared interests. The facilitative approach to allowing space for domestic contextualization and municipally-sensitive implementation⁴² — its flexibility and conduciveness — is central to this capacity. Combined, these features of the LOSC provide particularly strong evidence for the fact that discrete, ad hoc — and indeed, even dissonant — responses to implementation challenges is not necessarily a failure of the LOSC system, but rather an indicia of its strength. However, organic flexibility and conduciveness can often only facilitate implementation so far, and once that threshold is reached, alternative mechanisms, approaches, and processes become necessary. Some of these alternatives are traditional and formal (such as negotiating new law or instruments), whilst others are more informal and bespoke. It is to these that I now turn.

III. MORE HARD LAW, OR BETTER IMPLEMENTATION OF EXISTING LAW?

Before embarking upon a discussion of the hard and soft law approaches to addressing governance challenges in the maritime domain, it is apposite to briefly define these two concepts. Although the literature on this concept set is extensive and nuanced, for the purposes of this article a brief distinction will suffice. To this end, “hard law” is describable as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”⁴³ “Soft law,” by contrast, takes as its fundamental attribute its non-legally binding nature, regardless of its superficial appearance as “legal” or “non-legal” in terms of its instrumental nature. As Christine Chinkin has observed,

Soft law instruments range from treaties, but which include obligations (“legal soft law”), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by

⁴² See generally, Kate Jones, *Deportations with Assurances: Addressing Key Criticisms*, 57 Int'l & Comp. L.Q. 182 (2008) (U.K.).

⁴³ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 421 (2000).

international regional organizations (“non-legal soft law”), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.⁴⁴

A. Hard Law Options

When seeking to overcome a governance challenge there are often three significant initial hurdles to adopting a “more hard law” approach: State resistance to “more law;” identifying the “gaps;” and time. I shall briefly note each, simply in order to provide background context as to why other less formal and less binding options for addressing LOSC of 1982 implementation challenges may be more attractive to states.

Overcoming initial state reluctance to being bound by “more law” is not always a simple task when proposing initiatives that involve further and more detailed hard law instruments. This reluctance is sometimes, but not always, explained by the truism that states will often wish to be as unhindered by legal obligation as is possible, so that they are able to pursue national interests free of excessive or unnecessary legal constraints.⁴⁵ However, there are

⁴⁴ Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Comp. L.Q. 850, 851 (1989) (U.K.).

⁴⁵ For example, at the 32nd International Conference of the Red Cross and Red Crescent (IFRC), Geneva, 8-10 December 2015, an IFRC proposal (supported by a number of states) to progress better definition and refinement of the textually sparse but operationally important issue of detention during non-international armed conflicts met significant resistance from some other states, and was thus ‘parked’ whilst alternative ways forward on the issue were developed and discussed – see, for example, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty*, 32nd International Conference of the Red Cross and Red Crescent, Res. 32IC/15/R1, (Dec. 10, 2015) (recommending “the pursuit of further in-depth work, in accordance with this Resolution, with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC”).

often other factors at play in such reluctance, including treaty negotiation fatigue,⁴⁶ capacity constraints,⁴⁷ and principled concerns regarding the avoidance or exacerbation of emerging incoherence within and between legal regimes.⁴⁸

The second cause of evident reluctance among states to adopt a hard law solution to a governance challenge is that the negotiation of such a solution requires from the outset that there be some general agreement around the fact that there is a gap. Additionally, a determination as to what particular features or characteristics of that gap require the anticipated regulatory response. Third World approaches to international law, for example, often deconstruct the latent and sometimes unconscious imperialism that underpins even the choice and identification of which “gaps” require regulatory responses and which do not.⁴⁹ Disagreement as to the “gap” can also be particularly and obstinately granular. Progress towards finalization of the *Arms Trade Treaty* 2014, for example, was hampered by disagreement as to the scope of what, precisely, was to be covered by the regime – types of arms, types of

⁴⁶ E.g., Stacy D. VanDeveer, *Green Fatigue*, *Wilson Q.* 55 (2003); Adil Najam, *Unraveling of the Rio Bargain*, 21 *Pol. & the Life Sci.* 46 (2002).

⁴⁷ E.g., Beth Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes* 46(6) *J. of Conflict Resolution* 829 (2002); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court* 32(3) *Cornell Int'l L.J.* 443, 446 (1999).

⁴⁸ Martti Koskenniemi, Rept. of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* at ¶8, A/CN.4/L.682 (April, 13 2006) (“The fragmentation of the international social world has attained legal significance

especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.”).

⁴⁹ See, e.g., BS Chimni, *Third World Approaches to International Law: A Manifesto* 8 *Int'l Community L. Rev.* 3 (2006); Antony Anghie and BS Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts* 2 *Chinese J. of Int'l L.* 77 (2003).

ammunition, and so on.⁵⁰ Similarly, a key factor in the ultimate success of negotiations for the *Convention on Cluster Munitions (Oslo Convention)* 2008 was the agreed limitation of scope to a very particularized ordnance ambit.⁵¹

The third reservation states often have with respect to adopting a hard law solution to an emerging or urgent governance challenge is that the development of such instruments and arrangements often takes significant time - precisely because of the consequences that follow from being legally bound by the subsequently agreed treaty (should the state ratify that treaty). When urgency dictates, and where the parties to the negotiation are few, and share a common regulatory goal in relation to a jointly identified gap, hard law can follow swiftly. For example, the fact that there was a degree of operational urgency around reducing the potential for inadvertent conflict at sea between the US and Soviet navies when navigating and exercising in proximity to each other, was

⁵⁰E.g., Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, UNIDIR (Oct. 2007), <http://www.unidir.org/files/publications/pdfs/analysis-of-state-views-on-an-arms-trade-treaty-332.pdf>. UN Institute for Disarmament Research, Geneva, October 2007, §3.2.1; *Arms Trade Treaty* 2014, article 2(1).

⁵¹ *Convention on Cluster Munitions*, May 30, 2008, 2688 U.N.T.S. 39. "Cluster munition" means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;
 - (ii) Each explosive submunition weighs more than four kilograms;
 - (iii) Each explosive submunition is designed to detect and engage a single target object;
 - (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
 - (v) Each explosive submunition is equipped with an electronic self-deactivating feature...'

instrumental in the *US-USSR INCSEA* being proposed in 1968 and quickly finalized by 1972.⁵² However, other NATO – USSR *INCSEAs* (of which there were ultimately twelve) were also proposed from the 1970s but were finalized over longer, less urgency-informed timelines: UK in 1986,⁵³ Germany in 1988,⁵⁴ France in 1989,⁵⁵ and so on.⁵⁶ Similarly, the *US – PRC Military Maritime Consultative Agreement* was proposed in 1995 and finalized in 1998,⁵⁷ but in the face of emerging geopolitical rivalry has since faced significant hurdles to modernization.⁵⁸

⁵² Agreement on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., May 25, 1972, 852 U.N.T.S 151; see e.g. Pete Pedrozo, *The US-China Incidents at Sea Agreement: A Recipe for Disaster* 6 J. Nat'l Security L. & Pol'y 207 at 2010-2011 (2012) (the description of the operational context for *INCSEA* 1972); David Winkler, 'The Evolution and Significance of the 1972 Incidents at Sea Agreement' (2005) 28:2 *Journal of Strategic Studies* 361.

⁵³ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Prevention of Incidents at Sea beyond the Territorial Sea*, 1986.

⁵⁴ *Agreement between the Government of the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics concerning the Prevention of Incidents at Sea Outside Territorial Waters*, 1988.

⁵⁵ *Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the French Republic concerning the Prevention of Incidents at Sea Outside Territorial Waters*, 1989.

⁵⁶ See, Bilateral military agreements between NATO member states and the Soviet Union on the prevention of incidents', European Leadership Network, <https://www.europeanleadershipnetwork.org/bilateral-military-agreements-between-nato-member-states-and-the-soviet-union-on-the-prevention-of-incidents/>.

⁵⁷ Agreement Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, PRC-U.S., Jan. 18, 1998.

⁵⁸ Steven Stashwick, *New US-China Military Agreement Won't Be Defusing Any Crises*, CHINA US Focus, Sept .11 2017, <https://www.chinausfocus.com/peace-security/why-the-china-us-mil-to-mil-framework-is-and-isnt>, [https://perma.cc/PF29-FMRC]; David Griffiths, *US-China Maritime Confidence Building: Paradigms, Precedents, and Prospects* 19-22, (US Naval War College, China Maritime Studies Institute 6th Ed. July 2010); Pete Pedrozo,

B. Soft Law/Mixed Hard and Soft Law Options

Although soft law options can offer a means of avoiding the disincentives inherent in the normative, resource, time, and diplomatic investment required for hard law solutions. However, soft law options are still subject to some of the constraints of hard law instruments. In part, this can depend upon the extent to which procedure – particularly the negotiating fora employed, and the multilateral interests engaged – tends to “formalize” and complicate such projects. Soft law instruments can be eminently flexible, but as they are expanded to cover less agreed and thus more divisive issues, the time required to negotiate amendments or annexes can dramatically increase. For example, the piracy focused *Djibouti Code of Conduct*⁵⁹ was settled after rapid negotiations in 2009; all parties agreed in common that the scourge of piracy warranted such attention and cooperation. However, the *Jeddah Amendment to the Djibouti Code of Conduct*,⁶⁰ settled in 2017, took longer to finalize – not least because it dealt with the less unifying, more fractious issue of deconflicting overlapping state interests in the “blue economy,” particularly concerning competing interests and perspectives in relation to fisheries.⁶¹

Another set of challenges to the utility of soft law responses to governance challenges is the degree to which hard law is present within ostensibly soft law instruments. This hard law shadow often

The US-China Incidents at Sea Agreement: A Recipe for Disaster 217-220 (2012) (citing apparently irreconcilable differences in interpretation of the *LOSC* 1982).

⁵⁹ The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, Jan. 29, 2009.

⁶⁰ Revised Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in the Western Indian Ocean and the Gulf of Aden Area, Jan. 2017.

⁶¹ *Ibid*, art. 2(1). “[C]alling upon the signatory states to ‘cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain, maritime terrorism, illegal, unregulated and unreported (IUU) fishing and other illegal activities at sea’”

manifests in two ways. The first is via the need to keep the outcome sufficiently “non-binding” so that signatories are willing to engage with the process and to adopt (in a political sense, as opposed to a strict legal sense) the obligations proposed. For example, the Western Pacific Naval Symposium (WPNS) *Code for Unplanned Encounters at Sea* (CUES)⁶² initial draft was presented to WPNS in 1998, but after some delay “revitalized” in 2014 in the face of consistent, particularly Chinese, pressure for it be clearly understood as ‘non-binding.’⁶³ Similarly, whilst it was agreed that CUES would apply to navies and naval units,⁶⁴ recent Singaporean and Philippine proposals that CUES be extended to Coast Guards have been met with inertia and even resistance.⁶⁵ The Centre for Humanitarian Dialogue has similarly been working on a set of common operating principles to guide coast guard vessel behavior at sea since 2015.⁶⁶ The proposed South China Sea “Code of Conduct” is similarly much discussed, but disagreement over (amongst other things) its “legally binding nature” (or otherwise) may militate against rapid progress in the near term.⁶⁷

⁶² Symposium, *Code for Unplanned Encounters at Sea*, Western Pac. Naval (2014).

⁶³ Sam Bateman, *CUES and Coast Guards*, E. Asia F. (Oct. 7, 2016), <http://www.eastasiaforum.org/2016/10/07/cues-and-coast-guards/>, [https://perma.cc/8KD7-RDPF].

⁶⁴ *Id.*, art 1.1.1, 1.3.3.

⁶⁵ See, e.g., Lee Ying Hui, *Expanding CUES: Singapore’s Timely Proposal*, *RSIS Commentary* (CO16063) (March 24, 2016), <https://www.rsis.edu.sg/rsis-publication/rsis/co16063-expanding-cues-singapores-timely-proposal/#.WzBij-QnaUk>, [https://perma.cc/27RC-9BG8].

⁶⁶ Centre for Humanitarian Dialogue, ‘South China Sea’ – available at <https://www.hdcentre.org/activities/south-china-sea/>, [https://perma.cc/PQ26-JBNN]; Michael Vatikiotis, ‘Calming the waters in the South China Sea: a win-win for China’, *The Strategist*, ASPI, 24 May 2017 – available at <https://www.aspistrategist.org.au/calming-waters-south-china-sea-win-win-china/>, [https://perma.cc/PC35-FEA4].

⁶⁷ Wei-chin Lee, ‘Cracking a Code of Conduct for the South China Sea’, *Asia Dialogue*, 19 February 2018 – available at <http://theasiadialogue.com/2018/02/19/cracking-a-code-of-conduct-for-the-south-china-sea/>, [https://perma.cc/6ETA-G7L5]; Teddy Ng and Liu Zhen, ‘Coastguard vessels in South China Sea need code of conduct amid increasing risk of clashes in contested waters, say analysts: Nations’ rival territorial claims in region hindering efforts to increase cooperation, say observers’, *South China Morning Post*, 08 May 2016 – available at

The second hard law shadow that can frustrate otherwise laudable attempts at soft law governance is the degree to which such instruments founder upon disagreements regarding the underpinning hard law, or rub up against contested hard law interpretations whilst attempting to agree less confronting soft law normative statements or guidance. As an instrument of hard law, the LOSC 1982 has several terminological “constructive ambiguities”⁶⁸ built into the text as means of facilitating universality of ratification. For example, the absence of any agreed parameters around what level of force a coastal state can use in “requiring” a delinquent warship to leave its territorial sea.⁶⁹ UN Security Council resolutions also often employ constructive ambiguity precisely to achieve sufficient consensus to allow a draft to pass by majority and avoid the veto by one of the P5.⁷⁰ A particular challenge for soft law “codes” can thus be the need to ensure that no party to the negotiations sees any textual reference as surreptitiously incorporating or endorsing a “hard law” interpretation with which it disagree. For example, as to the impermissibility or otherwise of requiring prior notification for warship innocent passage,⁷¹ or as to

<http://www.scmp.com/news/china/diplomacy-defence/article/1942543/south-china-sea-coastguard-code-still-stuck-choppy>, [<https://perma.cc/VNA8-ND94>].

⁶⁸ The US Institute of Peace defines ‘constructive ambiguity’ as follows: ‘If two parties to a negotiation cannot agree on an issue, they may be able to paper over their disagreement by using ambiguous language. The negotiation can then proceed, in the hope that the issue will be resolved at a later time or cease to be a concern...’ – available at <https://www.usip.org/glossary/constructive-ambiguity>.

⁶⁹ U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 art. 30 (entered into force Nov. 16, 1994): ‘If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.’

⁷⁰ See e.g. Dapo Akande & Marko Milanovic, *The constructive Ambiguity of the Security Council’s ISIS Resolution*, EJIL: Talk!, www.ejiltalk.org/the-constructive-ambiguity-of-the-security-council’s-isis-resolution/, [<https://perma.cc/2HMU-HHRL>].

⁷¹ Law on the Territorial Sea and the Contiguous Zone, Feb. 25, 1992, 1,1 (China).

the proper characterization of the right for third states to conduct military exercises in other states' Exclusive Economic Zones.⁷²

IV. ALTERNATIVE PATHWAYS TO IMPROVED CLARITY AND COMPLIANCE

A. Processes

Multilateral processes serve a number of functions. Often, they are specifically designed to achieve a particular instrumental outcome - such as the IMO facilitated *Best Management Practices for Protection Against Somalia Based Piracy (BMP4 – 2011)*,⁷³ and (for West Africa in particular) the *Guidelines for Owners, Operators and Masters for Protection Against Piracy in the Gulf of Guinea Region (Version 2, June 2016)*.⁷⁴ However, processes can also serve other vital functions, for example, by providing fora for, *inter alia*, expert track 1.5 engagement,⁷⁵ information sharing,⁷⁶ norm

⁷² United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter, Dec. 10, 1982, 1883 U.N.T.S. 397 (“...(b) The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State”).

⁷³ *Best Management Practices for Protection Against Somalia Based Piracy*, 4 INTERNATIONAL MARITIME ORGANIZATION, 1 (Aug. 2011).

⁷⁴ *Guidelines for Owners, Operators and Masters for Protection Against Piracy in the Gulf of Guinea Region*, 2 INTERNATIONAL MARITIME ORGANIZATION, 1 (2016).

⁷⁵ See David Atwood, *NGOs and Multilateral Disarmament Diplomacy: Limits and Possibilities* in THINKING OUTSIDE THE BOX MULTILATERAL DISARMAMENT AND ARMS CONTROL NEGOTIATIONS, 33-54 (John Borrie and Vanessa Martin Randin, eds., UNIDIR 2006).

⁷⁶ See Rob McLaughlin & Tamsin Paige, *The Role of Information Sharing in Counter-Piracy in the Horn of Africa Region: A Model for Transnational Criminal Enforcement Operations*, 12 J. OF INT'L LAW & INT'L REL. 82 (2016).

building,⁷⁷ consensus building,⁷⁸ managing complexity,⁷⁹ and operational deconfliction.⁸⁰ Two examples of successful process approaches to implementation in the maritime domain are the Proliferation Security Initiative (PSI), and the Contact Group on Piracy off the Coast of Somalia (CGPCS). Both processes focused upon promoting implementation of existing obligations, including in relation to the LOSC 1982, the *Suppression of Unlawful Activities at Sea Convention* 1988, and a range of counter-terrorism treaties and UNSC resolutions. However, these processes also acted as conduits and clearing houses for information sharing, coordination, and exercise management.⁸¹ There is no irremediable reason why a

⁷⁷ See Keith Krause, *Multilateral Diplomacy, Norm Building, and UN Conferences: The Case of Small Arms and Light Weapons*, 8 GLOBAL GOVERNANCE 247 (2002).

⁷⁸ See Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56:2 INT'L ORGANIZATION 339 (2002).

⁷⁹ I William Zartman, *Two's Company and More's a Crowd: The Complexities of Multilateral Negotiation* International Multilateral Negotiation: Approaches to the Management of Complexity, Joy Bass Publishers, 1994)

⁸⁰ See, for example, the Shared Awareness and Deconfliction (SHADE) process for 'coordinating and de-conflicting activities between the countries and coalitions involved in military counter-piracy operations in the Gulf of Aden and the western Indian Ocean', which now involves representatives from 33 states, 15 international organizations, and the maritime industry - <http://oceansbeyondpiracy.org/matrix/shared-awareness-and-deconfliction-shade>; Andrew Erickson & Austin Strange, *China and the International Antipiracy Effort*, *The Diplomat*, November, 1 2013: 'the PLAN has actively engaged with other navies whom it perceives as being "in the same boat" with regard to contemporary maritime piracy. The Shared Awareness and Deconfliction (SHADE) mechanism, which meets quarterly in Bahrain, has been the primary interface for that engagement. All naval ships or convoys fighting piracy are considered affiliated members. SHADE is not an organization but a facilitating venue...' <https://thediplomat.com/2013/11/china-and-the-international-antipiracy-effort/>, [<https://perma.cc/LMY8-AEBN>].

⁸¹ There is an extensive literature on both the PSI and the CGPCS - see, for example (and as indicative only): Douglas Guilfoyle, *Prosecuting Pirates: The Contact Group on Piracy off the Coast of Somalia, Governance and International Law*, 4:1 *Global Policy* 73 (2013); Danielle Zach, D Conor Seyle, & Jens Vestergaard Madsen, *Burden-sharing Multi-level Governance: A Study of the Contact Group on Piracy off the Coast of Somalia*, *Oceans Beyond*

“process” based approach to reinforcing, clarifying, and implementing existing LOSC 1982 (and associated) obligations and authorities would not work as well in any given regional context as it has worked in both global (BMP4; PSI) and some specific regional (Gulf of Guinea Guidelines; CGPCS) contexts.

B. Address Evolving Challenges Through Use of Well-Suited Existing Rules

Another option for clarifying and closing implementation gaps is to ascertain whether there is, in fact, a legal gap. This is a particularly useful approach where there is law applicable to an issue in general, but the detail as to how that law applies in the maritime domain is less well-understood. A case in point in the maritime context is the legal framework and limitations that attend the employment of privately contracted armed security personnel (PCASP) in ship protection roles in high risk transit areas. Thus, whilst there is clear law on jurisdiction as applicable to the deployment of private security personnel ashore, the challenge for PCASP at sea is not the absence of a correlative legal framework, but rather accounting for and incorporating the additional jurisdictional framework that applies at sea. That is, there is no “gap” in the law for PCASP, but rather an additional analytical step or legal overlay. The fact that issues such as the “default” jurisdiction of flag states regarding the carriage of weapons on board vessels must therefore be analyzed in light of the strengthening jurisdiction of coastal states with respect to carriage of weapons in vessels intending to enter their internal waters, does not indicate a shortfall in regulation. Rather, this merely points to the need for more nuanced legal assessment. Similarly, legal regulation of use of force by PCASP is not a lacunae in the law. Any assessment simply requires additional contextualized legal analysis in order to establish

Piracy, (One Earth Future Foundation 2013); David Cooper, *Challenging Contemporary Notions of Middle Power Influence: Implications of the Proliferation Security Initiative for “Middle Power Theory”* 7:3 Foreign Pol’y Analysis 317 (2011); Jack Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10:2 J. of Conflict and Sec. L. 125 (2015).

how existing laws on use of force and self-defense dovetail - in the maritime domain - with flag state law, extraterritorially applicable nationality-based jurisdiction, and so on. The point is that whilst there is now a kernel of soft law instruments and other guidance that assists with understanding how law regulates PCASP,⁸² and this analysis has identified failures and gaps in domestic implementation, there are no “ship-stopper” gaps in the international legal framework as such. Again, there is no immediate reason why an identified regulatory or governance gap that is believed to be particularly acute in, for example, the Indian Ocean and West African regions should not and could not be subject – as a first step – to a similar process of assessment and application of existing law to establish if there is, in fact, any legal gap.

C. Refined Interpretation

As noted previously, one consequence of the need to generate as close to universal ratification as possible for international constitutional instruments such as the LOSC 1982 is the use of constructive ambiguity as a means of achieving the negotiated balances required for consensus. However, quite apart

⁸² For example: Academic and NGO sponsored publications such as Phillip Drew & Rob McLaughlin, *Handbook on the Use of Force for Private Security Companies*, (Oceans Beyond Piracy 2016); commercial instruments such as the BIMCO GUARDCON (*Standard Contract for the Employment of Security Guards on Vessels*) https://www.bimco.org/news/press-releases/20161101_updates-to-guardcon-guidance, and BIMCO’s *Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)* http://psm.du.edu/media/documents/industry_initiatives/bimco/bimco_guidance_on_rules_for_use_of_force.pdf; and international organization guidance and standards documents such as IMO Circulars <http://www.imo.org/en/ourwork/security/piracyarmedrobbery/pages/private-armed-security.aspx>, [<https://perma.cc/QP36-9BMJ>], and ISO Standards <https://www.iso.org/standard/42146.html>, [<https://perma.cc/2CJ8-YHY4>]; and national guidance such as that developed by the UK Dept. of Transport’s *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480863/use-of-armed-guards-to-defend-against-piracy.pdf, [<https://perma.cc/QD2Z-MXEW>].

from facilitating consensus, such practical concessions to reality can also create interpretive space that is ultimately beneficial to achieving (albeit sometimes delayed) implementation outcomes. Indeed, postponing further discussion of a contentious issue until there is more scope for agreement as to the required granularity or nuance is not always a negative outcome. One example is the scope of boarding state jurisdiction over VWON. Whilst the LOSC 1982 provides a level of detail around the “statelessness” implications of certain VWON (for example Article 92(2)), other provisions regarding VWON (such as Article 101(1)(d)) provide much less clarity – and thus wider scope for interpretive differences. This is the case, for example, with respect to the nature and persistence of boarding state jurisdiction over VWON. However, the desire to attain greater precision as to the application of jurisdiction over VWON has recently been enlivened by the catalytic effect of increased traffic in illicit drugs by sea in the West and Mid-Indian Ocean, which has made refined interpretation of this opaque issue an operational, legal, and diplomatic priority.⁸³ So long as such approaches are appropriately calibrated to deal with an existing and agreed concern, or are focused upon remedying a generally agreed ill such as the traffic in illicit drugs by sea, there is no immediate reason why they cannot prove effective across other regional contexts.

D. Use Existing but Under-employed Mechanisms

The fourth option for achieving better implementation of LOSC 1982 obligations – one which does not rely upon the negotiation of new hard law, nor mixed hard and soft law-based codes of conduct – is to employ existing but under-utilized mechanisms and obligations in new ways. Indeed, it is in almost all circumstances easier to build a consistent and coherent soft law extension on top of an existing hard law obligation, than it is to agree

⁸³ See generally: Rob McLaughlin, *Towards a More Effective Counter-drugs Regime in the Indian Ocean*, 12:1 J. of the Indian Ocean Region 24 (2016); Angeline Lewis, *Flag Verification on the High Seas: Understanding Requirements for Masters and Commanders*, 30:2 Int'l. J. of Marine and Coastal L. 335 (2015).

to ambitious, widely scoped, but contextually disconnected soft and/or hard law instruments. To this end, one example of a nuanced, useful, and well-calibrated existing mechanism is the rule set to counter-drug trafficking by sea established by LOSC 1982 article 108 and amplified by article 17 of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)* 1988.⁸⁴ Many states have ratified both instruments⁸⁵, and thus have already adopted the consultation, cooperation, and information-sharing obligations that are built into *Vienna Convention* Article 17 in particular. That is, there is a clear, unambiguous, and uncontentious existing obligation and mechanism designed to facilitate asking for and communicating consent to board vessels suspected of illicit drug trafficking in international waters. It is thus less confronting to seek to employ this accepted mechanism and its associated obligations as the baseline or template for developing additional communications linkages for other maritime crimes of shared concern, than it is to propose new binding obligations of uncertain utility.

V. CONCLUSION

As the experience of the three UN Conferences on the Law of the Sea well illustrates, developing new hard law in the maritime domain takes an inordinate amount of time – twelve years in the case of the LOSC 1982. Recognition of this fact organically within the LOSC is well attested by its consciously fostered and in-built features of flexibility and conduciveness. But these features can take implementation only so far, and concerns over making contested obligations legally binding, and the challenges of deconflicting multilateral concerns regarding rights and obligations in the "commons" add further layers of complication to the traditional

⁸⁴ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) 1988 at https://www.unodc.org/pdf/convention_1988_en.pdf, [<https://perma.cc/37UR-P5TZ>].

⁸⁵ Treaty against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Narcotic Drugs and Psychotropic Substances, art. 29, Dec. 20, 1988, 1582 U.N.T.S. 95.

response of generating hard law and mixed hard/soft law responses to oceans governance challenges. However, there are other ways to pursue improved implementation, enforcement, and cooperation outcomes that send equally significant diplomatic signals about commitment and intention. Process, for example, can highlight existing obligations and principles of governance by publicizing their utility, and promoting their deployment. Explicit reference to existing law that is capable of solving an evolving challenge or pointing the way to a resolution – as with PCASP, for example – can likewise relocate that challenge from the realm of novelty and "gaps," and place it more manageably within an existing framework. Similarly, refined interpretation - digging deeper into the existing law, so to speak – can provide a sound basis for dealing with implementation challenges, and carries with it the benefits of a "just in time" approach to solving problems when solutions become necessary, and thus are more likely to be cooperatively negotiated. This is the state of play now, for example, with respect to the underdeveloped interpretation of jurisdiction over VWON. And finally, the capacity to use already agreed mechanisms – such as the LOSC 1982 and *Vienna Convention* 1988 rule set around combating the traffic of illicit drugs by sea – in order to achieve other maritime confidence building or governance outcomes should not be ignored. And although these options are often shaped by the attributes and concerns of specific maritime regions, there is no reason why any or all of these alternative measures for increasing implementation of, and informing compliance with, *LOSC* 1982 obligations could not at least be considered more universally as possible solutions for implementation gaps.