LAW REFORM COMMISSION

Review Paper on *"Compliance of Laws with UNCLOS and Miscellaneous IMO (International Maritime Organization) Conventions and Related Protocols"*

[LRC_ R&P 195, November 2025]

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EXECUTIVE SUMMARY

Review Paper on "Compliance of Laws with UNCLOS and Miscellaneous IMO (International Maritime Organization) Conventions and Related Protocols"
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This Review Paper was prepared with a view to undertaking a comprehensive and critical assessment of the national legal framework regulating maritime affairs, measured against the yardstick of the United Nations Convention on the Law of the Sea (UNCLOS) and a series of binding and non-binding instruments adopted under the aegis of the International Maritime Organization (IMO). While Mauritius ratified UNCLOS in 1994, the extent to which it has been effectively incorporated into national law—and harmonised with ancillary conventions—remains a matter of ongoing scrutiny and refinement.

The Review focuses on several core themes: (i) the legality and precision of maritime baselines as currently defined under the Maritime Zones Act and its Regulations; (ii) the compatibility of domestic legislation with UNCLOS obligations in regard to territorial seas, archipelagic waters, exclusive economic zones (EEZ), and continental shelves; (iii) the robustness of Mauritius' legal tools to address piracy, maritime crime, and illicit trafficking; and (iv) the sufficiency of national frameworks for environmental protection in marine contexts, including oil pollution and MARPOL enforcement.

Particular attention is given to the drawing of straight and archipelagic baselines, including potential non-conformities with Articles 7 and 47 of UNCLOS, and the consequences of such inconsistencies on Mauritius' international claims to internal waters and jurisdiction over maritime zones. The analysis also critically interrogates the classification of Mathurin Bay as a "historic bay", raising concerns over whether the criteria of long-standing sovereign authority and international acquiescence under customary law are met.

In the domain of environmental protection, the Review evaluates the implementation of MARPOL 73/78 and its annexes, the legal status of port State control under the Indian Ocean Memorandum of Understanding (IOMOU), and comparative legal models from Australia and South Africa.

Most significantly, the Review incorporates a series of forward-looking recommendations informed by consultations with the United Nations Office on Drugs and Crime (UNODC) Maritime Crime Programme, particularly in relation to transnational organised crime, maritime security, and the criminal justice response to seaborne offences.

The paper also recommends a general review of penalties in customs and maritime law, proposes enhanced inter-agency SOPs, and calls for the institution of a National Technical Legal Committee to oversee UNCLOS and IMO compliance.

This Review reaffirms Mauritius' commitment to being a responsible maritime State, governed by the rule of law and anchored in the principle of sustainable development. It seeks to ensure that the national legal corpus is fit-for-purpose in the face of rising maritime threats, while simultaneously fulfilling international legal obligations and safeguarding Mauritian sovereignty at sea.

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INTRODUCTION

1. According to Grotius, "(...) the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries".[1] The sea occupies two third of the global space. The vast majority of activities at sea, such as trade and commerce, including extraction of minerals, power generation and voyage require to be regulated. Likewise, disputes may arise from issues pertaining to the delimitation of maritime boundaries between coastal States, the commission of crimes in the territorial boundaries of another State or exploitation of maritime resources. Those issues also require to be regulated within certain legal parameters. The United Nations Convention on the Law of the Sea[2] (UNCLOS) is the main universal instrument that sets out those legal parameters.

2. Part I of this Review Paper will provide an overview of the historical, political and legal background of the codification process of the law of the sea. It has to be stated that Mauritius was a participant in the negotiations leading to the adoption of this international instrument, referred in the present paper under the acronym "UNCLOS".

3. Part II will consist of a discussion and analysis of baselines[3] under UNCLOS and their application for measuring the different maritime zones which are internationally recognised. The purpose of carrying out the analysis is to ascertain whether the current legislations are in conformity with UNCLOS, bearing in mind that the convention has been ratified by Mauritius during its early implementation[4]. Hence, the main Mauritian legislation dealing with the application of UNCLOS, namely the MZA will be analysed

[1] H. Grotius, *The Freedom of the Seas*, p. 28.
[2] United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 397.
[3] A baseline, as defined by the United Nations Convention on the Law of the Sea, is the line along the coast from which the seaward limits of a state's territorial sea and certain other maritime zones of jurisdiction are measured, such as a state's exclusive economic zone. Normally, a sea baseline follows the low-water line of a coastal state. When the coast is deeply indented, has fringing islands or is highly unstable, straight baselines may be used.
[4] Mauritius ratified the UN Convention on the Law of the Sea (UNCLOS) and the Maritime Zones Act has been enacted in 2005 to give effect to the provisions of UNCLOS.

thoroughly in view of determining the extent to which Mauritius has been compliant with its obligations under the international convention.

4. In Part III, the Commission will analyse the main rights and duties of Mauritius in the different maritime zones recognised internationally under UNCLOS. To understand the scope of the analysis, the obligations which a signatory of UNCLOS is bound to comply will also be examined. Thus, the necessity to analyse the area of the law of the sea dealing with matters relating to Internal Waters, Territorial Seas, Contiguous Zone, Exclusive Economic Zone (EEZ), High Seas and Continental Shelf while the Area[5] will not form part of the analysis. The reasons for excluding the Area are principally on the basis that the Area is beyond the limits of the national jurisdiction[6] and it is also considered as part of the high seas[7]. Moreover, any exploration and exploitation of the mineral resources of the Area, which are considered as *"the common heritage of mankind"* is subject to the International Seabed Authority. Additionally, other domestic legislations namely, National Coast Guard Act, Fisheries and Maritime Resources Act, and the Piracy and Maritime Violence Act will also be discussed in relation to particular issues, such as the right to hot pursuit and piracy.

5. Part IV will focus on the safeguards provided in the Mauritian legislation to establish whether the requirements of the international conventions are being respected in the wake of the particular issue of pollutions which have emerged as a major concern to the socio-economic and political stability of the country. Thus, the Merchant Shipping Act will be analysed having regard to marine pollution. Conventions and Related Protocols of the International Maritime Organisation will also form part of the analysis in relation to the protection of the marine environment. The legislative policies adopted in other jurisdictions such as Australia and South Africa will also be considered. Finally, recommendations will be made in Part V of this Review Paper.

[5] In the context of the United Nations Convention on the Law of the Sea, the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. 'The Area' boundaries are different from High Seas boundaries, which start at 200 nm where Exclusive Economic Zones have been claimed (e.g., at 12 nm in the Mediterranean).
[6] See Article 1(1) of UNCLOS
[7] Kingsley Ekwere, 'Submarine Cables and the Marine Environment: Enhancing Sustainable and Harmonious Interactions', (Vol. 2016 No. 1) *China Oceans Law Review*, 168.

PART I: THE LAW OF THE SEA AND THE EMERGENCE OF UNCLOS

The Historical, Political and Legal Perspective of the Law of the Sea: The Assertion of the Interests of States

6. The idea of *"freedom of the seas"* was advanced and encapsulated by the Dutch Jurist, Hugo Grotius,[8] in his book *Mare Liberum* (The Free Sea) in 1609. The famous book of Hugo Grotius has been considered as inspiring the modern law of the sea.[9] It is about the interests of a State to assert its rights against those of another State.

7. Interests may differ from one State to another, for example, most of the naval powers insist on the free and unimpeded passage through straits as well as the interest in other areas of the sea, including the free overflight of straits[10] and hence their insistence to prevent any encroachment of the freedom of the sea. The other States insist on their rights to the natural resources of the sea. Thus, each State appears to attempt to preserve its individual interests.[11] The Conventions dealing with the issues related to the sea, including UNCLOS, may be said to consider all the interests of States with a view to strike a right balance between those cutting interests.

The Adoption of UNCLOS and Cross-Cutting Interests of States.

8. The process of adopting a convention concerning the law of the sea started with The Hague Codification Conference in 1930, followed by the 1958 Geneva Conference on the Law of the Sea (UNCLOS I) and the 1960 Geneva Conference on the Law of the Sea (UNCLOS II) and finally the Third United Nations Conference on the Law of the Sea 1982[12] (UNCLOS III). The Hague Conference in 1930 did not yield any agreed text as

[8] Hugo Grotius was the advocate of the Dutch East India Company whose ship was captured and put on sale. It was on the basis of preparing the defence of the Dutch in respect of its rights to navigate in the Indian Ocean and other Eastern seas against the asserted commercial and political domination of the Spanish Empire that the book was written.
[9] R P Anand, '*Origin and Development of the Law of the Sea*', (The Hague, Martinus Nijhoff, 1983), 2.
[10] Alan G. Friedman and Cynthia A. Williams, '*The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*', 568.
[11] Alan G. Friedman and Cynthia A. Williams, above n 6, 569.
[12] David Freestone, Richard Barnes and David Ong, 'The Law of the Sea, Progress and Prospects', 28.

the parties could not reach an agreement on the extent of the limit of the territorial waters.[13] However, the 1958 Geneva Conference was able to adopt the four Geneva Conventions[14] which entered into force at different dates between 1962 and 1964.[15]

9. Unfortunately, the 1958 Geneva Conventions[16] failed to receive unanimous support from all States and left several issues unsettled.[17] The four Conventions have been stated to have gaps, deficiencies and imprecisions.[18] Furthermore, several newly independent States in Asia, Africa and the other Latin-American States did not ratify the 1958 Conventions[19] and even criticised them as being unfavourable to their interests,[20] particularly in respect of their economic development.[21]

10. As a result of major disagreements[22] on issues which could not be resolved in the four Geneva Conventions between the maritime power from the west and the newly independent States from Asia and Africa and several Latin American States, it became imperative to review the law of the sea to address those *'cross-cutting interests'*,[23] namely those related to the deep seabed, the transit through straits and coastal waters and marine scientific research.[24]

11. It has been stated that the finalisation of UNCLOS was a matter of "back-scratching" concept prevailing at the time of its negotiation and the trade-offs were determinative to

[13] Dr. Bjarni Már Magnússon and Helgi Bergmann, '*Straight baselines across Icelandic bays and fjords*', 4.
[14] The Four Geneva Conventions are the Convention on the Territorial Sea and the Contiguous Zone (CTS); the Convention on the High Seas (CHS); the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR); the Convention on the Continental Shelf (CCS). The CTS entered into force on 10 September 1964; the CHS on 30 September 1962; the CFCLR on 20 March 1966; and the CCS on 10 June. States bound by the Conventions and the Protocol, are, as at 23 July 2008, respectively: for the CTS, 52; for the CHS, 63; for the CFCLR, 38; for the CCS, 58; and for the OPSD, 38.
[15] https://legal.un.org/avl/ha/gclos/gclos.html
[16] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) (516 UNTS 205) (TSC).
[17] R P Anand, above n 6, 194.
[18] *Ibid*, above n 6, 197.
[19] *Ibid*, above n 6, 194.
[20] *Ibid*, above n 6, 194.
[21] *Ibid*, above n 6, 197.
[22] *Ibid*, above n 6, 197
[23] Alan G. Friedman and Cynthia A. Williams, above n 7, 563.
[24] *Ibid*, above n 7, 563.

achieve the conclusion of the law and policy for the sea[25] for the purpose of addressing those *various 'cross-cutting interests'* at stake.

Mauritius and the Group 77[26]

12. Although Mauritius had acceded to the 1958 Geneva Conventions[27] on 5 October 1970, it also formed part of the bloc of nations, known as the Group of 77, which 'opposed' the main maritime power of the Western States during negotiations of the Third United Nations Conference on the law of the Sea (UNCLOS III). Mauritius and Fiji joined Indonesia and the Philippines in respect of the recognition of the interests of States for the mid-ocean archipelagos during the negotiations of UNCLOS III.[28] Although, the establishment of the Group of 77 can be traced to 1963, however, it was during the 1964 United Nations Conference on Trade and Development in Geneva that the concerted approach of the Group 77 emerged for the purpose of their vested interests. This led to the establishment of an 'institutional machinery'[29] for Group 77. States forming part of Group 77 consisted of three main regional groups, namely the Latin American, the African and the Asian group. They were referred to as the "less-developed countries", or the "Third World countries" or the "developing countries" or "underdeveloped countries."[30] However, despite such 'stigma', the unity of Group 77 was considered as an effective political force[31] for the protection of their common interests. It is generally accepted that the Group 77 has contributed in the law-making process of UNCLOS III and their impact was significant.[32]

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[25] *Ibid*, above n 7, 570.

[26] The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the "Joint Declaration of the Seventy-Seven Developing Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. The Group of 77 is the largest intergovernmental organisation of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.

[27] https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-2.en.pdf access on 21/02/2021 at 1135 hrs

[28] Donald R. Rothwell and Tim Stephens, '*International Law of the Sea*', Hart Publishing 2016, 189.

[29] Alan G. Friedman and Cynthia A. Williams, above n 7, 558.

[30] *Ibid*, above n 7, 555.

[31] *Ibid*, above n 7, 558.

[32] *Ibid*, above n 7, 574.

The United Nations Conference on the Law of the Sea

13. The 3rd United Nations Conference on the Law of the Sea that was held on 30/04/82[33] adopted the United Nations Convention on the Law of the Sea (UNCLOS).[34] The Convention was opened for signature as from 10/12/82 at Montego Bay in Jamaica[35] for a period of two years and subsequently, it entered into force on 16/11/94[36], as per Article 308 of UNCLOS. It was Guyana, the sixtieth State ratifying the Convention on 16/11/93[37], which brought it into force. The Convention has gained momentum with its ratification by 168 parties while 14 members of the United Nations have signed the Convention but have not ratified it.[38] The increasing number of States ratifying the Convention can only improve its authority and implementation.

The Codification of the Law of the Sea: The Constitution for the Oceans

14. The legal framework which regulates the rights and obligations of States, including public order at sea, the use and utilisation of the seas, has been codified in UNCLOS. It also regulates issues related to the jurisdictions of the different maritime zones, including the rights and obligations of coastal States in these maritime zones and the peaceful resolution of disputes between States. However, the Convention cannot be said to be the only source of law governing the sea.[39] The law of the sea is in fact a mixture of both customary law and international treaties, including bilateral and multilateral ones. Although treaties may be said to be binding only on those States which are party to them, but it may also be argued that those who are not are still bound as a result of the applicability of customary international law.[40] The binding nature of customary international law has been explained by the Supreme Court of Mauritius in ***Michael Rex***

[33] R.R. Churchill and A. V. Lowe, '*The Law of the Sea*', 3rd edition, Juris Publishing, 18.
[34] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (1833 UNTS 3) (UNCLOS).
[35] R.R. Churchill and A. V. Lowe, above n 29, 18.
[36] *Ibid*, above n 29, 22.
[37] R.R. Churchill and A. V. Lowe, above n 29, 19.
[38] https://en.wikipedia.org/wiki/List_of_parties_to_the_United_Nations_Convention_on_the_Law_of_the_Sea, accessed on 02/02/2021 at 2320 hrs.
[39] R.R. Churchill and A. V. Lowe, above n 29, 24.
[40] *Ibid*, above n 29, 6 and 24.

Jordan v Marie Martine Jordan [2000 SCJ 057] where it was held that a treaty made by the State would bind the State in public international law but will have to be enacted through Parliament to become law of the land, due to the fact that Mauritius is a dualist system. Dualists States emphasise the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law.

15. The Convention is now universally considered as the *"Constitution for the Oceans"*.[41] It also constitutes the legal framework to deal with practically all issues related to the uses and resources of the sea[42]. These include the use of oceans not only for fishing, shipping, exploration, navigation and mining but also in respect of the delimitation of maritime boundaries, the protection of the marine environment, the conduct of marine scientific research, the principles underpinning the right of hot pursuit and the fight against piracy among others.[43]

16. UNCLOS consists of 320 Articles and 9 annexes and is divided into 17 parts. Part I constitutes the introductory while Parts II to XI relate to the legal regimes of the different maritime zones from the territorial sea to the Area. The legal regime dealing with the protection and the preservation of the marine environment, marine scientific research, the development and transfer of marine technology and settlement of disputes may be found in Parts XII to XV. As far as issues related to general matters and final provisions are concerned, these are respectively catered for in Parts XVI and XVII.

[41] "*A Constitution for the Oceans*", remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at:
https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf (accessed on 14/02/2021 at 1300hrs)
[42] R.R. Churchill and A. V. Lowe, above n 29, 24.
[43] Arif Ahmed, '*International Law of the Sea: An Overlook and Case Study*', Beijing Law Review, 2017, 23.

Status of the Geneva Conventions and UNCLOS

17. The four Geneva Conventions, reaffirming the traditional freedoms[44] of the sea, namely (1) the Convention on the Territorial Sea and Contiguous Zone;[45] (2) the Convention on the High Seas;[46] (3) the Convention on Fishing and Conservation of Living Resources;[47] and (4) the Convention on the Continental Shelf[48] are still applicable, particularly in relation to States which have ratified them but have not signed UNCLOS 1982. However, once ratification of UNCLOS is made, by virtue of Article 311, the latter convention takes precedence over the Geneva Conventions.[49] States which have neither ratified any of the four Geneva Conventions nor UNCLOS 1982 continued to be regulated by customary international law,[50] which, in principle, is binding on all States.[51]

18. The obligations and duties of States under UNCLOS vary according to which maritime zones are being considered. One of the main features of UNCLOS is the way in which maritime zones are delimited and measured. This is done through the use of baselines, which will be the subject of the present analysis.

[44] R P Anand, above n 6, 184.

[45] By accession on 05/10/1970 but Mauritius was still under the colonial power of the United Kingdom which had ratified the Conventions on 14 March 1960- see the Territorial Sea and the Contiguous Zone. Done at Geneva, on 29 April 1958 where the United Kingdom of Great Britain and Northern Ireland ratified the same on 14 March 1960, https://treaties.un.org/doc/Publication/UNTS/Volume%20516/volume-516-I-7477-English.pdf accessed on 21/02/2021 at 1150 hrs; https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-1.en.pdf

[46] Entry into force on 30/09/1962-by accession on 5 October 1970

[47] Entry into force on 20/03/1966, accessed on https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-3.en.pdf - Convention on Fishing and Conservation of the Living Resources of the High Seas Done at Geneva on 29 April 1958, https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_fishing.pdf accessed on 21/02/2021 at 1155 hrs, entry into force on 20/03/1966. Mauritius acceded to the Convention on 05 October 1970

[48] Entry into force on 10/06/1964-accessed on 21/02/2021 at 1215 hrs- https://cil.nus.edu.sg/databasecil/1958-convention-on-the-continental-shelf/?id=702

[49] R P Anand, above n 6, 24.

[50] R.R. Churchill and A. V. Lowe, above n 29, 7-8.

[51] *Ibid*, above n 29, 8.

PART II: BASELINES AND HISTORIC BAYS

Importance of Baselines under UNCLOS

19. Under the law of the sea, the ocean is divided into jurisdictional maritime zones. On the one hand, there are maritime zones under national jurisdiction and on the other, there are zones that fall outside the national jurisdiction. As will be explained below, it is from the baselines that the different maritime zones are measured[52]. The baselines are also relevant for the delimitation of maritime boundaries between States having an adjacent or opposite coast[53]. Besides, baselines also constitute the starting point of the territorial sea of the coastal State[54]. They are also the line apportioning the internal water of a coastal State from its territorial sea and hence enables the coastal State to secure their internal waters[55] wherein sovereignty is exercised to its full extent.[56]

20. It is worth noting that the distinction between the internal waters and the territorial sea is mainly in respect of the exercise of sovereignty. Effectively, sovereignty in the internal water is exercised as if the latter is the land territory.[57] As far as sovereignty in the territorial sea is concerned, its exercise is subject to the right of innocent passage of foreign vessels, as provided under Article 17 of UNCLOS.[58]

Baselines and the Measurement of the Maritime Zones

21. One of the most important functions of the baselines is when they are used for the measurement of the different maritime zones. In fact, each of the maritime zones under the law of the sea is governed by a specific legal regime that imposes certain obligations on the coastal State as well as giving certain rights. Therefore, the drawing of baselines

[52] Donald R. Rothwell and Tim Stephens, above n 24, 33.
[53] *Ibid*, above n 24, 33.
[54] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 3.
[55] Donald R. Rothwell and Tim Stephens, above n 24, 181.
[56] The baseline is also the line which establishes the outer limit of the internal waters in which the State exercises its full sovereignty and where the right of innocent passage does not apply - Office for Ocean Affairs and the Law of the Sea- Baselines: National Legislation with Illustrative Maps- United Nations New York, 1989.
[57] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 3.
[58] *Ibid*, above n 10, 3.

is fundamental for the measurement of the different maritime zones under the national jurisdiction of a State. It is from baselines that the measurement of the extent and limit of the internal waters, territorial sea, the contiguous zone, the Exclusive Economic Zone (EEZ) and to a certain extent the continental shelf, namely the distance criterion, is made.

22. UNCLOS provides the different methods by which baselines may be used for the measurement of the maritime zones. The methods used may also depend upon the geographical conditions or configurations of the coastal States.[59] One or several methods may be used by a coastal State for the measurement of its maritime zones.

Methods for the Determination of Baselines

23. There are three main methods by which baselines are determined under UNCLOS.[60] These include (i) the normal baselines (low-water line), (ii) the straight baselines (depending on certain natural conditions) or straight baselines in respect of archipelagic States and (iii) the 'special local circumstances' such as rivers, bays, and ports.[61]

24. However, the determination of baselines is not limited to these three methods but may also be determined by the State to *'suit different conditions'*[62]. Hence, the need to discuss the criteria set out in UNCLOS under which a State may have recourse to one of these methods to determine its baselines.

Normal Baselines

25. Articles 3 and 5 respectively of the Territorial Sea and Contiguous Zone Convention and UNCLOS provide that *"the normal baseline for measuring the breadth of the territorial sea is from the low-water line*[63]*"*, as marked on large-scale charts recognised officially.

[59] R.R. Churchill and A. V. Lowe, above n 29, 33.
[60] The Convention defines three ways of establishing baselines: Office for Ocean Affairs and the Law of the Sea-Baselines: National Legislation with Illustrative Maps- United Nations New York, 1989.
[61] Vide Articles 9 and 10 of UNCLOS.
[62] As per Article 14 of UNCLOS.
[63] R.R. Churchill and A. V. Lowe, above n 29, 33.

It is noted that the charts should be given publicity and deposited with the Secretary-General of the UN[64], which is particularly important for the enforcement of regulations.

26. The normal baselines are normally applicable in relation to States having relatively straight and un-indented coasts. In relation to islands situated on atolls or having fringing reefs,[65] the baselines for measuring the breadth of the territorial sea are the low-water line.[66] Therefore, the normal baselines are generally considered as the default baselines.

27. However, the normal baselines of low-water may not be convenient for all States, particularly those having different geographical conditions. Thus, where normal baselines cannot be used, the coastal State may have recourse to straight baselines.

Straight Baselines

28. The ***Anglo-Norwegian Fisheries Case*** (***Fisheries Case***),[67] is authority for the proposition in respect of the legitimacy of a State to draw its baselines. In the ***Fisheries Case***, the British raised objections against Norway for using straight baselines instead of the low-water mark. The British grounded their objection on the basis that because using straight baselines, Norway was increasing its territorial sea further seawards. The effect of increasing the territorial sea further seawards is the reduction of the breath of high seas with the resulting consequences of affecting fishing in that area.

29. In the ***Fisheries Case***, the International Court of Justice (ICJ) confirmed the entitlement of Norway to draw its (straight) baselines around its outer edge, that is, drawn between the outermost of its islands.[68] The effect of drawing straight baselines is that it may significantly increase the internal waters,[69] hence permitting the State to extend its sovereignty rights over the said increased areas of internal waters and at the same time it

[64] As per Article 16 of UNCLOS.
[65] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 1.
[66] Vide Articles 6 and 13 of UNCLOS.
[67] Fisheries (United Kingdom v Norway) [1951] ICJ Rep 116
[68] Office for Ocean Affairs and the Law of the Sea: The Law of the Sea-Practice of Archipelagic States, (United Nations Publication, 1992)
[69] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 1.

allows the extension of the limits of the other maritime zones in a seaward direction. It has to be pointed out that in the ***Fisheries Case***; Norway has about 50,000 islands that border its coasts with a coastline of 58,133 km while its mainland has a coastline of only 2650 km.

30. The drawing of a straight baseline between the outermost of islands, as explained by the ICJ in the ***Fisheries Case***, is subject to two main conditions. The first is where the coastline of the States is *"deeply indented and cut into*" or where there is *"a fringe of islands in the immediate vicinity"* of the coastal State. The second condition is that the baselines should not depart to any appreciable extent from the general direction of the coast. Moreover, the ICJ also held that the economic[70] interests of the said region, *"the reality and the importance of which are clear evidence by a long usage*[71]*"* are also relevant factors that should be considered to ascertain the legality of the use of straight baselines.

31. In addition, the use of a straight baseline is also subject to other conditions as set out in Article 7 of UNCLOS. Indeed, in the ***Fisheries Case***, ICJ was of the view that the use of straight baselines is an exception to the normal rules for the determination of baselines and may only be resorted to if the relevant conditions are met. Hence, in such a case, the other methods such as the low-water mark or drawing of arcs of circles from points along the low-water line would not be inappropriate[72], particularly because of the possibility of creating complex enclaves and deep pockets of non-territorial sea.[73]

32. The conditions, as set out in the ***Fisheries Case,*** have been given effect in drafting the provisions of Article 4 of the 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone (TSC)[74] and subsequently reproduced in the provisions of Article 7(1)

[70] Which threatened the Icelandic nations livelihood.
[71] *Fisheries Case (United Kingdom v Norway)*, [1951] ICJ Rep 116 (International Court of Justice) at para 133. See also Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 9, 5.
[72] R.R. Churchill and A. V. Lowe, above n 29, 34.
[73] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 18.
[74] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, page viii-Introduction

of UNCLOS,[75] with certain additional conditions. Article 4 of the 1958 Convention as well as Article 7(1) of UNCLOS cater for *"the coastline being deeply indented and cut into"* or where *"there is a fringe of islands along the coast in its immediate vicinity"*.

33. Moreover, it is observed that the language used in the provisions of UNCLOS in respect of baselines is very similar to the language in the TSC as far as the ruling of the ***Fisheries Case*** is concerned.[76] The provisions of both Article 4 of the 1958 Convention and Article 7 of UNCLOS have been made to address the issues due to the complex coastal geography of coastal States.[77] The other conditions that straight baselines have to cater for are issues in respect of not departing from the general direction of the coast to any appreciable extent, the linkage to the land domain, the use of low-tide elevation and the issue of the accessibility to the EEZ and the high seas by other States.

34. Thus, the low watermark of the mainland does not need to be used as the baselines, especially where there are particularly geographical circumstances and as such the coastal State may have recourse to straight baselines instead of normal baselines.[78]

Implications of the Use of Straight Baselines.

35. The use of the baseline method is the choice of the coastal State.[79] However, the discretion of the coastal State in its choice to use the baseline method is subject to international law, as clearly explained by the ICJ in the ***Fisheries Case*** where the following was stated: *"the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law....the validity of the delimitation with regard to other States depends upon the international law"*.[80]

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[75] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, page ix-Introduction.
[76] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 5.
[77] Sam Bateman and Clive Schofield, 'State Practice Regarding Straight Baselines in East Asia-Legal, Technical and Political Issues in a Changing Environment', 4.
[78] Sam Bateman and Clive Schofield, above n 73, 3.
[79] Clive Schofield, '*Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention*', The International Journal of Marine and Coastal Law 27 (2012) 723–732- This journal article is available at Research Online: http://ro.uow.edu.au/lawpapers, 624.
[80] Anglo-Norwegian Fisheries Case [1951] ICJ Rep. 116 at 132.

36. The coastal State using straight baselines would have the starting point of the measurement farther seawards,[81] which in a way 'extend' their territorial limit further seawards. The use of straight baselines implies that the area of national jurisdiction of the coastal State is increased beyond the limit of what it would have been if the method of normal baselines had been employed. Such extension of the area under the national jurisdiction of the coastal State in the maritime zones has the potential effect of affecting the navigational rights and freedoms of other States[82] and as such, it has been a major source of contentions in respect of these competing interests.

37. It is also important to bear in mind that straight baselines are usually used in specific and restricted circumstances. In fact, in 2001, the ICJ[83] reaffirmed the restricted use of straight baselines in Article 7 of UNCLOS in the case of ***Qatar v Bahrain***.[84] This is what the ICJ had said in that connection:

> "*The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.*" [85]

38. In a study in 2014, out of 80 States claiming straight baselines, 82 objections to straight baselines have been made by 24 States.[86] The types of objections that have been raised include (i) the drawing of baselines along coasts which are not deeply indented; (ii) the drawing of baselines along the coasts with no fringe of islands; (iii) the drawing of baselines along coasts which possess some offshore islands but which do not form a fringe in the immediate vicinity of the coast; (iv) where the baselines depart to a

[81] R.R. Churchill and A. V. Lowe, above n 29, 35.
[82] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 2.
[83] Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 ICJ Rep, paras. 184-185, 210-215, available at <http://www.icjcij.org/icjwww/idocket/iqb/iqbframe.htm>
[84] Sam Bateman and Clive Schofield, above n 73, 19.
[85] ILA Straight Baselines Study—Protests, 27.
[86] ILA Straight Baselines Study—Protests, 1.

considerable extent from the general direction of the coast (e.g. where they are at an angle of 60 degrees to the general direction of the coast instead of being less than 15 degrees, as the Norwegian baseline model); (v) where the sea areas enclosed are not sufficiently closed to the land to be under the regime of internal waters; (vi) where low-tide elevations have been used as basepoints although no lighthouses or similar installations have been erected on them; (vii) in disregard to the principle that they should not be drawn so as to cut off the territorial sea of another state from the high seas or the EEZ; (viii) drawn without any publication; and (ix) where the basepoints are located in the sea.[87] Most of the objections came from the United States[88] based on its Freedom of Navigation Program.[89] The protest of the United States also includes opposition to the claim of Mauritius as well.[90]

Archipelagic Baselines

39. Archipelagic baselines may be claimed by archipelagic States. The conditions under which an archipelagic State may establish archipelagic baselines are set out in Article 47 of UNCLOS. From a technical point of view, five conditions should be met for claiming archipelagic baselines under Article 47 of UNCLOS. The first is that the mainland should be within the archipelagic baseline system. The second condition is that the ratio of water to land within the baselines must be between 1 to 1 and 1 to 9. The third condition is that the length of a single baseline segment must not be more than 100 nm.[91] The fourth condition is that no more than 3% of the total number of baseline segments enclosing an archipelago may exceed 125 nm. Finally, the fifth condition is that the baselines "*shall not depart to any appreciable extent from the general configuration of the archipelago*".

40. It appears that the aim of the first condition is to exclude coastal States dominated by some large islands or where those islands are quite separate apart.[92]

[87] R. R. Churchill and A. V Lowe, above n 29, 39-40.
[88] Egypt, Sudan, USA have signed, but not ratified the agreement- the US signed the Convention on Jul 29, 1994,https://en.wikipedia.org/wiki/List_of_parties_to_the_United_Nations_Convention_on_the_Law_of_the_Sea, accessed on 07/03/2021 at 1820 hrs
[89] Sam Bateman and Clive Schofield, above n 73, 22.
[90] See "Limits in the Seas No. 140 Mauritius: Archipelagic and other Maritime Claims and Boundaries United States Department of State *Bureau of Oceans and International Environmental and Scientific Affairs.* Available online at https://2017-2021.state.gov/limits-in-the-seas/index.html.
[91] A nautical mile is 1,852 meters.
[92] Sam Bateman and Clive Schofield, above n 73, 6.

41. Most of the above conditions are objective criteria except for the fourth condition. This is because the choice of using archipelagic baseline is that of the coastal State and the fact that no-limit is given for the drawing of the number of baselines by archipelagic State, it is therefore submitted that the condition that the 3% of the baseline segments should not exceed 125 nm in length may easily be circumvented.[93] In doing so, the coastal State concerned will be compliant with the provisions of UNCLOS.[94]

42. Although the provisions of Article 47 of UNCLOS appear to set out objective criteria for the use of archipelagic straight baselines yet the fact that its interpretation[95] has been left to the coastal States led to the consequence that an excessive number of claims have been made by them.[96]

Baselines and the Special Features to Suit Different Conditions

43. Article 14 of UNCLOS allows coastal States to determine their own baselines to *"suit different conditions"*. Thus, a coastal State may determine which method of baselines is more appropriate for any section of its coasts.

44. The geographical locations of islands may constitute a prominent feature relating to their strategic importance in the sea. Similarly, their importance may be related to the biological marine they may contain and hence may give rise to disputes between States. However, due to the features of the oceans, issues connected with islands have been an area of contentions in the international sphere. In fact, as a result of their specific features, islands may be found in clusters or isolated or may be scattered throughout them.[97] Another source of contention arising from islands is when coastal archipelagos are

[93] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, page 37
[94] Sam Bateman and Clive Schofield, above n 73, 7.
[95] The U.S. Department of State has issued guidelines on the application of Article 7 but, as the study itself states, such guidelines "do not have international standing as benchmarks" for testing the legality of straight baselines systems. See United States Department of State, "Developing Standard Guidelines for Evaluating Straight Baselines", Limits in the Seas, No. 106 (Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, Washington, D.C.: 31 August 1987)
[96] Clive Schofield, 'The International Journal of Marine and Coastal Law' 27 (2012), 727.
[97] Donald R. Rothwell and Tim Stephens, above n 24, 180.

created by offshore islands or when the offshore archipelagos fringe the coastlines of the State. Here, the issue would likely be associated with whether such coastal islands may respectively be entitled to generate claims to a territorial sea similar to those of the mainland of that State.

45. The above shows the importance of determining the way in which baseline is to be drawn and this is usually set out in the domestic legislation of the coastal State. The MZA sets the way in which the baselines are to be drawn for the purpose of measuring the different maritime zones of Mauritius. This issue will now be analysed to determine whether Mauritius is compliant with international law.

The Maritime Zone Act (MZA)

46. The implementation of the provisions of UNCLOS, including the rules in relation to baselines are to be found in the MZA. Section 3 of the Act specifically states *"UNCLOS to have force of law in Mauritius"*.

47. Additionally, section 4(1) of the MZA provides that the *"Prime Minister may, by regulations, prescribe the baselines from which the maritime zones of Mauritius shall be determined"* and section 4(2) sets out how baselines may be determined, that is, either under Articles 47,[98] 5,[99] 6,[100] 7,[101] of UNCLOS or a combination of these Articles.[102]

[98] Section 4(2) of MZA:-((a) straight archipelagic baselines determined in the manner referred to in Article 47 of UNCLOS.
[99] Section 4(2) of MZA:-(b) normal baselines, being the low-water line as specified in Article 5 of UNCLOS.
[100] Section 4(2) of MZA:-(c) the seaward low-water line of reefs as specified in Article 6 of UNCLOS.
[101] Section 4(2) of MZA:-(d) straight baselines determined in the manner referred to in Article 7 of UNCLOS.
[102] Section 4(2) of MZA:-(e) a combination of the methods for determining baselines specified in paragraphs (a), (b), (c) and (d).

48. Regulations have been made by the Prime Minister under sections 4[103] and 5[104] of the MZA in respect of baselines and closing lines of internal waters respectively. The Maritime Zones (Baselines and Delineating Lines) Regulations[105] came into force on 5 May 2005, and established the coordinates of Mauritius's baselines, including archipelagic and other baselines. On 20 June 2008, Mauritius deposited the charts and lists of geographical coordinates of the basepoints with the Secretary of the United Nations, as required by Article 16 of UNCLOS. The relevant information has been published in the *Law of the Sea Bulletin No. 67 of 2008.*[106]

49. According to the provisions of section 4 of MZA, archipelagic baselines, straight baselines or normal baselines or a combination of those methods may be used by Mauritius to establish its baselines for the determination of its maritime zones. Indeed, Mauritius has used all the above methods in its Regulations for the drawing up of its baselines.

Discussions Relating to Straight Baselines Under UNCLOS

50. Usually, the basepoints are joined to draw up the straight baselines and from which the maritime zones may be measured. According to Article 5 of UNCLOS, the normal baseline, which is the low-water line along the coast, is the general rule from which the measurement of the maritime zones may be made. The main conditions for which a coastal State, including Mauritius, may elect to use straight baselines, as set out under

[103] Section 4 of the MZA: - Baselines
(1) The Prime Minister may, by regulations, prescribe the baselines from which the maritime zones of Mauritius shall be determined.
(2) The baselines may be—
(a) straight archipelagic baselines determined in the manner referred to in Article 47 of UNCLOS;
(b) normal baselines, being the low-water line as specified in Article 5 of UNCLOS;
(c) the seaward low-water line of reefs as specified in Article 6 of UNCLOS; or
(d) straight baselines determined in the manner referred to in Article 7 of UNCLOS; or
(e) a combination of the methods for determining baselines specified in paragraphs (a), (b), (c) and (d).

[104] 5. Closing lines for internal waters
(1) The Prime Minister may, by regulations, prescribe closing lines to delimit internal waters.
(2) The closing lines may be determined by using all or any of the methods specified in Articles 9, 10 and 11 of UNCLOS.

[105] Maritime Zones (Baselines and Delineating Lines) Regulations 2005, GN No. 126 of 2005

[106] https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MUS.html, accessed on 02/02/2021 at 20.30 hrs.

Article 7(1) of UNCLOS, are that the coast must be *"deeply indented and cut into"*, or if there is *"a fringe of islands along the coast in its immediate vicinity"*. Either of these two specific geographic conditions must be met to enable a coastal State to use the method of straight baseline in conformity with UNCLOS. Moreover, Article 7 of UNCLOS also provides that the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast.

51. These two conditions are referred to as the geographical tests[107]and must be satisfied before the use of the straight baselines may be contemplated. Hence, there is a need to clarify the terms used in the provisions of UNCLOS relating to straight baselines for a proper understanding of their implications in the Mauritian legislations.

The Geographical Tests

52. When assessing the geographical tests, namely the *"deeply indented and cut into"*, or *"a fringe of islands along the coast in its immediate vicinity"* attention must be drawn to the word ***'localities'*** referred to in Article 7(1)[108] of UNCLOS. As the word ***'localities'***, in Article 7(1) is in the plural form, it, therefore, indicates that reference is being made to several specific segments of the coastline. Thus, it is submitted that if a part or a segment of a coastline meets the geographical test, such a qualification alone will not be sufficient for the drawing of straight baselines. The use of the word ***'localities'***, by the ICJ in the ***Fisheries Case***, is a clear indication of the interpretation to be given to the said term. It is submitted that it is reasonable to say that there is a requirement for several indentations of which each indentation should be in conformity with the requirements of establishing a juridical bay[109] in line with Article 10 of UNCLOS. Therefore, if one segment passes either of the two geographical tests, a violation of the rules may still arise if only this very segment is used as a basis to draw straight baselines.

[107] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 42.
[108]Article 7(1) of UNCLOS: In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
[109] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 18.

Geographical Test: 'Deeply Indented and Cut Into'

53. In the ***Fisheries Case,*** when the phrase *'deeply indented and cut into'* was being considered, the ICJ was in presence of coasts with very deep indentations of the range of 75 nm. This indicates the nature of such indentation and as such, the term was not meant to refer to any type of coastal indentations but to those which were *'deeply indented'*.[110] It does not suffice that the coastline be irregular in configuration but it must be *'deeply indented'*.

54. Moreover, the requirement that the coastline to *'cut into'* means that the coastline must have more than one indentation. The existence of one indentation means that a semicircle test should be applied to evaluate the indentation in order to ascertain whether it is considered as a bay. If this is the case, the closing line must not exceed 24 nm, as per Article 10 of UNCLOS.

Geographical Test: "Fringe of Islands along the Coast in its Immediate Vicinity"

55. An alternative basis for the use of straight baselines is where there exists a *'fringe of islands along the coast in its immediate vicinity'*. The concept of a *'fringe of islands'* denotes that there must be more than one island though there is no indication of the minimum number of islands that should exist[111]. Experts argued that there must be a number of islands located in a continuous manner in parallel to the coasts so that they may be considered as a *'fringe of islands'*.[112] The arguments supporting such an interpretation stem from the use of the word *'along'* in the phrase, which indicates that islands must follow the coast in such a manner that they are in parallel to it or inclined to a certain degree. In the ***Fisheries Case,*** the Norwegian islands were found to be inclined to 15 degrees along its coasts and were considered as a model.[113] However, the islands cannot be perpendicular to the coast.

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[110] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 43.
[111] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 21.
[112] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 46.
[113] R. R. Churchill and A. V Lowe, above n 29, 39-40.

56. Finally, the term "*immediate vicinity*" of the coast means that there should be proximity between the islands and the coast.[114] Having set the above requirements, it is now time to consider how they have been applied in the Mauritian context.

The Use of Straight Baselines for the Measurement of the Mauritian Maritime Zones

57. In the light of the above discussions, it is clear that there is an imperative necessity to comply with the provisions of UNCLOS for the drawing of the appropriate baselines. If the baselines do not comply with the provisions of UNCLOS, Mauritius may find itself in an awkward position should an incident occur in its jurisdiction where straight baselines were employed and gave right for the jurisdictional exercise of sovereignty instead of sovereign rights. The main issue in a such case would be whether or not the foreign vessel was in fact within the maritime zones in which Mauritius is entitled to exercise sovereignty or it is a maritime zone in which it is only entitled to exercise sovereign rights.[115] Moreover, the wrong practice of using straight baselines instead of normal baselines may also give rise to tensions for a stable maritime regime in the region, being given that the effect of straight baselines may push the starting line for the measurement of the different maritime zones seaward.

58. As far as the main island of Mauritius is concerned, there are 3 instances where straight baselines have been used as the starting points for the measurement of its maritime zones. It is crucial to verify the specific rules that have been applied to these straight baselines to ascertain whether they are in line with international law bearing in mind that Mauritius was a signatory to both the Geneva Conventions and UNCLOS. In fact, both conventions have also been ratified by Mauritius.

59. As per the Maritime Zones (Baselines and Delineating Lines) Regulations 2005, the following basepoints have respectively been used for drawing of these 3 straight baselines, namely M2-M3, M6-M7 and M7-M8. As per the First Schedule of the said

[114] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 44.
[115] Sam Bateman and Clive Schofield, above n 73, 22.

Regulations, M2[116] is an *'unnamed reef'* on the eastern of Mauritius (close to Ile aux Cerfs) while M3[117] is a basepoint at Serpent Island, the distance between M2 and M3 makes a segment of 27[118] nm in a north direction. M6[119] is another basepoint at Serpent Island and it is linked to basepoint M7[120], which is a basepoint at Pigeon House Rock with a segment of 8.8 nm. Finally, M7 links basepoint M8[121] in a south direction to the reef near Canonniers Point, with a segment of 10.3 nm. These three straight baselines linked the island of Mauritius to Serpent Island and Pigeon House Rock with a distance of 8.8 nm between the two small islands. The distance between Mauritius and Serpent Island is 12 nm while the distance between Mauritius and Pigeon House Rock is 6 nm.

60. Each of these basepoints will now be analysed for consistency with the provisions of UNCLOS.

61. Although low-tide elevations associated with reefs may be used as basepoints for the measurement of maritime zones, however, due hazards attached to reefs, they (low-tide elevations) cannot be charted with precision. Moreover, low-tide elevations associated with reefs are often submerged and as such, they should not be used as basepoints[122] for the drawing up of baselines.

62. However, there are situations where UNCLOS authorises low-tide elevations associated with reef to be used as baselines. In fact, Article 7(4) of UNCLOS provides that low-tide elevations, such as reefs, may be used as basepoints for straight baselines, where lighthouses or similar installations have been built on them and these must be permanently above sea level. In addition, as an exception to the first method, other low-tide elevations which have *'received general international recognition'* may also be used

[116] Location: un-named reef point with the following geographical coordinates, latitude 20° 16' 09.6" and longitude 57° 49' 27.1".
[117] See First Schedule of Maritime Zones (Baselines and Delineating Lines) Regulations 2005: M3 Serpent Island east 19° 49' 05.8" 57° 48' 30.3".
[118] A nautical mile is 1852 metres.
[119] See First Schedule of Maritime Zones (Baselines and Delineating Lines) Regulations 2005: M6 Serpent Island North West 19° 48' 57.1" 57° 48' 15.1".
[120] See First Schedule of Maritime Zones (Baselines and Delineating Lines) Regulations 2005: M7 Pigeon House Rock 19° 51' 43.2" 57° 39' 26.1".
[121] See First Schedule of Maritime Zones (Baselines and Delineating Lines) Regulations 2005: M8 Canonniers Pt reef point 19° 59' 56.1" 57° 32' 47.4".
[122] R. R Churchill and A. V. Lowe, above n 29, 51.

as basepoints for baselines. To *'receive international recognition'* means before the elevation is used as a basepoint, it must necessarily have obtained such international recognition with the required publicity.

63. As far as Mauritius is concerned, there is no indication in the Regulation whether there is any permanent lighthouse or similar installation constructed on the *'unnamed reef'* which has been used as basepoint M2 in order to be considered as a basepoint for straight baselines under international law. There is also a need to analyse the other basepoints which have been used.

64. On the assumption that the basepoints at Serpent Island, M6, and Pigeon House Rock, M7 (considered for this scenario as two islands) are sufficient to constitute a 'fringe of islands', and being given that the segment M6 and M7 is almost parallel to the north coast of Mauritius, the said segment may be used for drawing of the straight baselines. However, as explained above, one segment is insufficient to be considered as the basis for the drawing up of straight baselines, because basepoint M2 (near Ile aux Cerfs) does not appear to satisfy the requirements of straight baselines. M8 is also a reef point of Canonniers Point. As explained above, these are the types of objections that have been made in relation to the drawing of straight baselines.

65. On the assumption that there is no lighthouse or other similar installation built on the basepoint referred to as *'unnamed reef'*, (M2), and if the latter is considered as a low-tide elevation, it appears that Article 13(1) ought to have its application here, particularly, as it also satisfies the condition in relation to the breadth of the territorial sea. In fact, Article 13(1) of UNCLOS is to the effect that normal baselines of the low-water line may be used in relation to a low-tide elevation, provided that the breadth of the latter does not exceed that of the territorial sea. It has to be stated that if the said scenario is correct and since the *'unnamed reef'* is within the breadth of the territorial sea, it will be capable to generate territorial sea boundary on its own.[123]

[123] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, pages 15-16.

66. In addition, the '*unnamed reef*', which is used as the basepoint of M2, does not appear to have *'received international recognition'*. Furthermore, the *'unnamed reef'* may also be questioned as to whether it falls within the definition of Article 121(3)[124] of UNCLOS, in the light of the provisions of Article 7 of UNCLOS which makes reference to a fringe of islands and not to a fringe of reefs.

67. It is therefore submitted that the *'unnamed reef'* cannot be used as the basepoint for straight baselines in relation to M2. Thus, **it appears that basepoint M2 is not in conformity with UNCLOS** and hence the use of such basepoint for drawing the straight baselines may be questioned.

68. It should also be observed that the locations of Serpent Island and Pigeon House Rock are quite separate from each other and also from the mainland of Mauritius. Hence, it may also be questioned as to whether they would be considered as forming a unity to the mainland of Mauritius contrary to the islands (known as skjaergaard) of Norway in the ***Fisheries Case.***[125]

69. To be compliant with the conditions set out in Article 7(1) for the use of straight baselines, it is submitted there must be a fringe of islands along the coast of Mauritius in its immediate vicinity. One of the breaches that was identified in the study of States practice in 1987 concerning straight baselines was the drawing of straight baseline to and from islands that do not constitute a fringe.[126] Although UNCLOS neither specifically refers to the number of islands that will constitute a *'fringe of islands'* nor how close these islands should be, however, **it may be argued whether two islands would be sufficient to constitute a fringe of islands**. Moreover, in the case of ***Qatar v Bahrain,***[127] the ICJ not only emphasised that straight baselines should "*only be applied if a number of conditions are met*" [128] but it also said that "*this method must be applied restrictively*".

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[124] 121(3). Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

[125] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 21.

[126] Donald R. Rothwell and Tim Stephens, above n 24, 41-46.

[127] Sam Bateman and Clive Schofield, above n 73, 19.

[128] ILA Straight Baselines Study—Protests, 27.

70. It is presented that to constitute a *'fringe of islands'*, more than a few islands must continuously be aligned at an angle parallel along the coast. This is not the case here as the four basepoints M3, M4, M5 and M6 are situated near Ile aux Serpents, that is, only one island, while M7 is situated near Pigeon House Rock. These two last basepoints form segment M6 and M7. If these two basepoints are being considered as two islands and being given that there are neither any other islands in the immediate vicinity, nor any other islands in between them (M6 and M7), it is arguable whether these two islands would be sufficient to constitute a *'fringe of islands'*. It may therefore be questioned whether these basepoints at M6 and M7 satisfy Article 7(1) of UNCLOS. The above arguments are also supported by the fact that the two other basepoints, namely M2 and M8 are respectively an *'unnamed reef'* and a *'reef'* near Canonniers Pt. Following the above analysis, it may be concluded that the likelihood of establishing that a *'fringe of islands'* exits along the coast of Mauritius is very thin.

71. Moreover, segment M2 to M3 points towards a northerly direction to the eastern coast of Mauritius while segment M6 to M7 points to southwesterly direction along the north coast of Mauritius. Thus, although segment M2 to M3 may appear not to depart significantly from the general direction of the coast of the island of Mauritius while M6 to M7 appear to do so. Hence, it also appears that the criterion that the baselines *"shall not depart to any appreciable extent from the general configuration"* of the Mauritius has not been satisfied as far as segment M6 to M7 is concerned.

72. In the ***Fisheries Case***, the separate opinion of Judge Hsu in his findings to support the claim of Norway made it clear that his findings are based on the special geographical conditions and consistent with the state practice of Norway. He further added that in the absence of such physical and historical conditions, the baselines of Norway would be against international law. Therefore, as far as Mauritius is concerned, it is submitted that the likelihood of drawing the baselines using the above basepoints for enclosing internal waters may be against international law.

Archipelagic States

73. Mauritius[129] was among the first of the few countries together with Fiji, Indonesia and the Philippines[130] to introduce proposals during the sessions of the Seabed Committee in 1973 for the inclusion of the archipelago principles. These 'archipelagic States' introduced a draft of the archipelago principles and a regime of restricted innocent passage through the archipelagic waters. In the same sessions, the United Kingdom submitted a draft Article on the 'Right and Duties of Archipelagic States'. Although the United Kingdom was agreeable to the archipelagic principles but it argued for a guarantee in respect of the freedom for the unimpeded passage through the archipelagic waters.[131]

74. Article 46 (a) of UNCLOS defines an archipelagic State as *"a State constituted wholly by one or more archipelagos and may include other islands"*. Moreover, Article 46(b) states that an archipelago means *"a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."*

Archipelagic Baselines and Conformity with UNCLOS

75. Mauritius claims archipelagic baselines[132] around St Brandon, also known as the Cargados Carajos Shoals and Chagos Archipelago. Mauritius has drawn two sets of archipelagic baselines consisting of 35 baseline segments. The total length of the segments is 486.15 nm.

76. As only an archipelagic State may draw archipelagic baselines, it is, therefore, necessary to consider the conditions that must be satisfied by the archipelagic State under Article 47 of UNCLOS to allow the latter to establish archipelagic baselines. To be in line with

[129] Third United Nations Conference on the Law of the Sea: DOCUMENT A/CONF.62/C.2/L.49
[130] Donald R. Rothwell and Tim Stephens, above n 24, 190.
[131] R P Anand, above n 6, 202-203.
[132] https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MUS_Deposit_MZN63.html accessed on 27/02/2021 at 16.07 hrs.

Article 46(b) of UNCLOS, each of the archipelagic baseline must include an 'archipelago' and also satisfy Article 47 (1) of UNCLOS. The two conditions specified under Article 47(1), namely, that the mainland is within the archipelagic baseline system, and the ratio of water to land within the baselines be between 1 to 1 and 1 to 9 need to be considered.

77. The area of water at St Brandon is 765 km² while the land area is 269 km². This makes a total area of 1,034 km² and thus giving a ratio of 2.84 to 1. Therefore, as far as St Brandon is concerned, the water-to-land area ratio appears to meet the condition of 1 to 1 and 1 to 9.

78. In relation to Chagos Archipelago, the area of water is 6,520 km² and the area of land is 868 km², making a total area of 7,388 km² and hence a ratio of 7.5 to 1.[133] Hence, there is no issue in relation to the ratio of water-to-land within the baselines in respect of Chagos Archipelago.

79. As per Article 47(2), the third condition is that the length of a single baseline segment must not exceed 100 nm. This condition is also satisfied as the maximum length of segment C70-(Egmont Islands South) and C46 (Diego Garcia)[134] is 80.05 nm.[135] Being given that there is no issue about the length of the segment exceeding 100 nm, therefore, there is no need to consider the fourth condition which is to the effect that no more than 3% of the total number of baseline segments enclosing an archipelago may exceed 125 nm.

80. Finally, the fifth condition is that the baselines *"shall not depart to any appreciable extent from the general configuration of the archipelago", vide* Article 47(3) of UNCLOS. This condition appears to be satisfied as the configuration of the baselines does not depart to any appreciable extent from the general direction of the archipelago.

[133] Limits in the Seas No. 140, Mauritius: Archipelagic and other Maritime Claims and Boundaries, United States Department of State *Bureau of Oceans and International Environmental and Scientific Affairs, 5.*
[134] Re Chagos Archipelago: Co-ordinates for basepoints in respect of archipelagic baselines: C46 un-named reef point 07° 26' 41.0" 72° 25' 24.0" and C71 Ile Sud-est reef point west 06° 41' 06" 71° 22' 01".
[135] Limits in the Seas No. 140, Mauritius: Archipelagic and other Maritime Claims and Boundaries, United States Department of State *Bureau of Oceans and International Environmental and Scientific Affairs, 4.*

81. As regards Article 47(4) of UNCLOS, there is no evidence in the Regulations to the effect that low-tide elevations have been used as basepoints for the drawing of the archipelagic baselines. Moreover, the condition in relation to Article 47(5) to the effect that the baselines should not "cut off from the high seas or the EEZ the territorial sea of another State" is also satisfied.

82. The above analysis shows that the Regulations made by Mauritius for the drawing of archipelagic baselines in relation to St Brandon and Chagos Archipelago, namely the Maritime Zones (Baselines and Delineating Lines) Regulations, comply with the provisions of Article 47 of UNCLOS as far as these two archipelagos are concerned.

83. It also appears that the requirements of publicity[136] have also been complied with as per Article 47(9) of UNCLOS, either on a chart or by a list of coordinates.[137] All the above conditions appear to be in line with the provisions of Article 47.[138]

84. Moreover, it is worth noting that where the five conditions set out in Article 47 cannot be complied with, the rules of straight baselines under Article 7 may represent the alternative to archipelagic straight baselines[139].

Special Local Conditions: Rivers, Bays, Ports, Roadsteads

85. The special local conditions in respect to rivers, ports and roadsteads[140] raise no contentions as they appear to be consistent with the provisions of UNCLOS as far as Mauritius is concerned. In the light of the above and for the reasons that will become evident below, this study will deal with issues related to baselines in relation bays only.

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[136] See *Law of the Sea Bulletin* No. 67 at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MUS.html

[137] The obligation of the State to make publicity as per Article 16 in relation to internal waters created under Article 50 of UNCLOS- Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 40.

[138] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July, 2014, 5.

[139] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 38.

[140] Vide Articles 9, 10, 11 and 12 of UNCLOS.

[141] In addition, as the MZA refers to historic bays, this paper will address issues related to them below, particularly as they are not covered under Article 10 of UNCLOS.

Historic Bays

86. In 1877, the Privy Council in the case of ***Direct United States Cable Co v The Anglo-American Telegraph Co.*** gave the following definition in relation to 'Conception Bay': *"it seems generally agreed that, where the configuration and dimensions of the bays are such as to show that the nation occupying the adjoining coasts also occupies the bays, it is part of the territory"*[142]. Moreover, their Lordships also had this to say concerning the conditions that should be satisfied for a bay to be considered as historic: "*It seems to them that, in point of fact, the British Government has for* ***a long period*** *exercised dominion over this bay, and that their* ***claim has been acquiesced*** *in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be every important. And, moreover (which in a British tribunal is conclusive), the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland".*[143]

87. Furthermore, in the ***Fisheries Case,*** the ICJ sets the conditions in relation to *'historic bays'* as *"open, effective, long-term, and continuous exercise of authority over the body of water together with acquiescence by foreign States"*[144]. The proprietary title is an important consideration, as clearly pointed out in the ***Fisheries Case,*** where it was held that historic bays would extend to *"waters that are treated as internal waters but which would not have that character were it not for the existence of an historic title"*[145].

[141] Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, 29
[142] Historic Bays: Memorandum by the Secretariat of the United Nations in the United Nations Conference on the law of the sea: Official Records, vol 1, 4.
[143] Historic Bays: Memorandum by the Secretariat of the United Nations in the United Nations Conference on the law of the sea: Official Records, vol 1, 5.
[144] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July, 2014, 3.
[145] Donald R. Rothwell and Tim Stephens, above n 24, 49.

Bays under UNCLOS

88. Article 10 of UNCLOS is to the effect that if an indentation is larger than a semicircle and its diameter is two closing lines, such bay will be consistent with the definition of bays under the Convention. Thus, the bay closing lines will be considered as baselines, provided that the total lengths of the closing lines do not exceed 24 nm.

89. However, the provisions[146] of Article 10 of UNCLOS do not apply to historic bays and bays whose *'coasts do not belong to more than one State'*, that is, it applies to the coasts belonging to a single State. Moreover, Article 10(6) of UNCLOS specifically excludes the provisions of Article 10 to *'historic bays'*. It has to be noted that UNCLOS does not contain special clauses dealing with historic bays but, in most cases, mention them incidentally, in the form of an exception to the general rule recommended for ordinary bays.

Historic Bays and the Maritime Zones Act

90. The relevance of *'historic bays'* is that straight baselines may be used as a measurement of the maritime zone[147]. It has to be highlighted that the effect of establishing *'historic bays'* is the same in respect of the use of straight baselines. Hence, the coastal State concerned may increase its area of the seas as internal waters for the exercise of sovereignty and jurisdiction with the effect of penalising the international community as far as free navigation is concerned.[148]

91. As per the provisions of section 11[149] of the MZA, the Prime Minister may make regulations to prescribe the limits of the historic waters of Mauritius. Moreover, section 5[150] of the MZA gives the authority to the Prime Minister to prescribe closing lines to

[146] Article 7 of the Territorial Sea Convention neither applies to historic bays nor to bays belonging to more than one State.
[147] Donald R. Rothwell and Tim Stephens, above n 24, 45.
[148] R.R. Churchill and A. V. Lowe, above n 29, 44.
[149] Section 11 of the MZA: - Historic waters
The Prime Minister may, by regulations, prescribe the limits of the historic waters of Mauritius.
[150] Section 5 of the MZA: - Closing lines for internal waters
(1) The Prime Minister may, by regulations, prescribe closing lines to delimit internal waters.

delimit internal waters. The Maritime Zones (Baselines and Delineating Lines) Regulations provide that *"for the purposes of section 5 of the Act, the lists of geographical coordinates of points set out in the Second Schedule shall be the closing lines to delimit the internal waters of Mauritius"*.

92. As per the Second Schedule of the Regulations, one historic bay closing line is observed with basepoints R 30 and R 31 of Mathurin Bay in Rodrigues Island. The geographical coordinates of R30 Mathurin Bay east terminal point are 19° 39' 34.8" and 63° 26' 24.4" and for R31 Mathurin Bay west terminal point are 19° 39' 18.7" and 63° 24' 20.5".

93. As far as Article 10(1) of UNCLOS is concerned, it is clear that there is no issue in relation to bays whose *'coasts do not belong to more than one State'*. However, in relation to *'historic bay'*, in the absence of any provisions in UNCLOS for its determination, the principles of customary international law will be applicable[151] to ascertain whether its determination is within the parameters of international law. Hence, the need to ascertain the characteristics of *'historic bays'* under the customary international law.

Characteristics of Historic Bays

94. There have been significant difficulties to address the issue of '*historic bays'* during the different negotiations in respect of the codification of the law of the sea. A memorandum was presented by the Secretariat of the United Nations under the heading of '*Historic Bays'* in relation to issues related to bays[152] during the negotiations in respect of the Geneva Conference in 1958. As per the said memorandum, the proprietary title in relation to '*historic bays'* may be found either on considerations connected with history or on the basis of necessity[153]. The memorandum shows that agreements or treaties in relation to those bays could provide evidence of their proprietary title. For example, the proprietary title of Granville Bay in France was considered by reference to the Fisheries Convention of 2 August 1839, concluded with Great Britain (article 1) and by article 2 of the Fisheries

[151] Donald R. Rothwell and Tim Stephens, above n 24, 49.
[152]Donald R. Rothwell and Tim Stephens, above n 24, 37.
[153] Historic Bays: Memorandum by the Secretariat of the United Nations' in the United Nations Conference on the law of the sea: Official records, vol 1, 3.

Regulations concluded on 24 May 1843 with Great Britain[154]. Another factor that may also be considered is whether there is no objection to such claim by other States. Thus, any exploitation made in the bay over a long period of time may also constitute evidence to show that there was no objection from other States. Moreover, other States may by agreements through treaties either recognise the proprietary title or acquiesce to the proprietary title of the State to the bay. An arbitral award may also provide evidence to the proprietary title of the bay. For example, Conception Bay had been claimed by Great Britain and the decision was upheld by the Privy Council in 1877 *vide* the case ***Direct United States Cable Co* v. *The Anglo-American Telegraph Co.***[155]

95. The conditions that are required for a claim regarding *'historic bays'* have also been formulated in the 1962 UN Secretariat study[156]. The conditions that must be met are that the State must be able to demonstrate that it has for a considerable period of time claimed the bay as internal waters and has effectively, openly and continuously exercised its authority in that part of waters. In addition, in exercising its authority such claim has been acquiesced by other States. As far as the issue of 'considerable period of time' is concerned, it has to be highlighted that in the ***Fisheries Case***, the claim for Norway was traced as far as 1812 through the issue of a Royal Decree with regard to its territorial sovereignty at sea[157].

96. These conditions have been confirmed in the case of the ***Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*** in 1992[158] where it was also held that historic bays may have its particular legal regime, 'sui generis'[159].

[154] Historic Bays: Memorandum by the Secretariat of the United Nations' in the United Nations Conference on the law of the sea: Official records, vol 1,3.
[155] Historic Bays: Memorandum by the Secretariat of the United Nations' in the United Nations Conference on the law of the sea: Official records, vol 1, page 4.
[156] R.R. Churchill and A. V. Lowe, above n 29, 43.
[157] Dr. Bjarni Már Magnússon and Helgi Bergmann, above n 10, 19.
[158] https://www.icj-cij.org/en/case/75/judgments, accessed on 03/03/2021 at 2045 hrs.
[159] Donald R. Rothwell and Tim Stephens, above n 24, 50.

Do the Historic Bays referred in the Mauritian Legal Provisions meet the Conditions required under Customary International Law?

97. At the very outset it has to be stated that Mathurin Bay does not appear in the compilation of historic bays.[160] It is observed that the repealed provisions of law,[161] namely, the Territorial Sea Act of 1970 did not make any reference at all to historic waters. As far as the repealed Maritime Zones Act of 1977 is concerned, although under section 8[162] of the Act, the Minister was empowered to proclaim historic waters, however, it does not appear that this has been done. Hence, it appears that the claim in respect of *'historic bays'* by Mauritius can only be traced to the enactment of MZA in 2005 in the light of the Maritime Zones (Baselines and Delineating Lines) Regulations that have been enacted for claiming Mathurin Bay as *'historic bay'*. It is arguable to say that since its independence in 1968, the claim made in 2005 can be considered as having been for a long period of time. It, therefore, appears that there may be an issue for the classification of Mathurin Bay as a historic bay in the light of the test of *"open, effective, long-term and continuous exercise of authority over the body of water"*.

98. It is, therefore, submitted that **the recent claim by Mauritius of Mathurin Bay as a *'historic bay'* may be challenged on the basis that its exercise of authority was not for a long term,** especially if there is no acquiescence by other States. It has to be borne in mind that the effect of a 'historic bay' is the entitlement of increasing larger areas of the sea as internal waters to the detriment of the international community and as such strict compliance of its legal requirements are expected to be observed.

[160] C.R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Nijhoff, 2008).
[161] The Territorial Sea Act of 1970 has been repealed by Act 2 of 2005.
[162] Section 8 of the Maritime Zones Act of 1977:- Historic waters
(1) The Prime Minister may, by regulations, specify the limits of the historic waters.
(2) The sovereign right of Mauritius extends, and has always extended, to the historic waters and to the seabed and subsoil underlying, and the air space over, the historic waters.

PART III: RIGHTS AND DUTIES OF MAURITIUS UNDER UNCLOS

Rights of Other States and Obligations of Coastal State under UNCLOS

99. UNCLOS has been designed to seek to strike a balance between the rights of coastal States to regulate and exploit areas of the sea under their jurisdiction and the rights of other States in relation to the freedom of navigation and access to resources outside their control. To assist the States in the balancing exercise of their respective interests, UNCLOS allows coastal States to establish different maritime zones in the sea and at the same time conferring on the coastal States different jurisdictional rights as well as duties towards other States. Hence, six types of maritime zones are recognised under the law of the sea with their respective rights and duties. As a general rule of thumb, a coastal State has greater rights in maritime zones which are closer to its coastline than it would in respect of those which are further seaward. The main challenges associated with the rights and duties conferred by UNCLOS will now be analysed in relation to each of these maritime zones, namely the internal waters (and archipelagic waters), the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf and the high seas with particular regard to the main domestic legislation dealing with UNCLOS.

100. As far as the internal waters/archipelagic waters, and the territorial sea are concerned, these rights and duties are mostly in relation to the exercise of sovereignty rights of the coastal State versus the rights of *'innocent passage'* of foreign ships in these maritime zones. In relation to the contiguous zone, the exclusive economic zone, the continental shelf and the high seas, the analysis will focus on the sovereign rights of the coastal States having regard to the freedom of the sea enjoyed by other State in those maritime zones. This will be done by considering the main domestic legislation dealing with UNCLOS. The freedom of the sea may include non-interference with navigation, such as installation of structures.

Internal waters and Innocent Passage

101. Article 8 (1) of UNCLOS provides that *"waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State"*. In simple words, this means that the internal waters are considered as if they were an integral part of the land territory and as such, the sovereignty of the coastal States is exercised in the same manner as on the land territory of that State.[163] As a result of such exclusive sovereignty in the internal waters, the right of innocent passage is therefore excluded.[164] The peculiarity of the internal waters is that it is a space where other States do not enjoy general rights that they may exercise in other maritime zones[165]. Therefore, the coastal State is empowered to exercise full sovereignty and authority both in terms of civil and criminal jurisdiction over its internal waters.

102. Internal waters usually consist of bays, estuaries and port and waters which have been enclosed as a result of straight baselines. However, it is worth mentioning that where straight baselines have been used to enclose internal waters which were not previously enclosed, a right of innocent passage will continue to exist through the said enclosed waters. This exception is as provided by Article 8(2) of UNCLOS.[166]

Archipelagic Waters and Innocent Passage

103. As far as archipelagic State is concerned, according to Article 53(1) of UNCLOS, the coastal State has to designate sea lanes (and air routes) for innocent passage in its archipelagic waters and adjacent territorial sea. In addition, Article 53(2) of UNCLOS further provides that ships have a right to archipelagic sea lanes passage (equivalent to innocent passage) in the sea lanes. Thus, such archipelagic sea lanes passage may be exercised through designated sea lanes.

[163]R.R. Churchill and A. V. Lowe, above n 29, 61.
[164] *Ibid*, above n 29, 61.
[165]*Ibid*, above n 29, 31.
[166] *Ibid*, above n 29, 61.

104. However, in designating the sea lanes or prescribing the traffic separation schemes, there is a duty on the archipelagic States to refer the proposals to the competent international organisation in view of their adoption, vide Article 53(9) of UNCLOS. The International Maritime Organization, (IMO), is the competent international organisation to which the proposals for designation of sea lanes and traffic separation schemes should be submitted by the archipelagic State before any agreement is reached between the parties. It is only after such proposals have been submitted that the archipelagic State may designate, prescribe or substitute such sea lanes and traffic separation schemes.[167]

The Territorial Sea and Innocent Passage

105. Quite similar to the internal waters, the territorial sea also forms an integral part of the land territory of a coastal State. The definition of the territorial sea is to be found in Article 2(1) of UNCLOS[168]. Sovereignty over the territorial sea includes the air space as well as its bed and subsoil, vide Article 2(2) of UNCLOS. However, a limitation is placed on its 'absolute' sovereignty in the sense that it is subjected to the Convention and other rules of international law, as provided under Article 2(3) of UNCLOS.[169] One of the limitations to which the exercise of sovereignty by the coastal State in the territorial seas is subjected to under the Convention is the right of innocent passage. In fact, Article 17 of UNCLOS provides a right of innocent passage for foreign ships through the territorial seas of another State.

Duties of Mauritius and Right of Innocent Passage

106. The obligations of Mauritius under UNCLOS relate to the requirements to domesticate its law to provide for the right of innocent passage in its territorial sea, as stipulated in Article 21(1)-(4) of UNCLOS. Indeed, **Mauritius has enacted provisions in the MZA to give effect to the right of innocent passage by foreign ships in the maritime zones where sovereignty is exercised**. Sections 6[170] of the MZA provides, on the one hand, for

[167] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July 8, 2014, 8.
[168] Defined by Article 1 of the 1958 Convention.
[169] The rights and obligations of the coastal State as well as the foreign ship exercising the right to innocent passage are found in Article 18-26 of UNCLOS.
[170] 6. Legal status of territorial sea and internal, historic and archipelagic waters

the exercise of sovereignty by Mauritius in its territorial sea, internal waters, archipelagic waters and historic waters and, on the other hand, the different provisions of the MZA refer to the rights of innocent passage. Section 9[171] provides for the limits on the exercise of sovereignty in the archipelagic waters. Section 9(c) of the MZA specifies that the exercise of the sovereignty of Mauritius is subjected to the right of innocent passage within its archipelagic waters. Section 8 of the MZA stipulates that *"any right of innocent passage existing in the internal waters delimited by closing lines shall continue to exist prior to those closing lines were prescribed"*. Similarly, section 10 of the MZA also recognises a right of innocent passage within the territorial sea of Mauritius.

107. It is apposite to examine the maritime zones in which sovereignty is exercised by Mauritius in order to assess whether the domestic legislation is in line with UNCLOS, particularly in the context of striking a balance between the competing interests of Mauritius and those of the other States in respect of their rights for the unimpeded and continuous passage. But before dealing with the analysis, a few words need to be said in relation to the meaning of *'innocent passage'* in the domestic legislation.

Meaning of Innocent Passage under MZA

108. Section 2 of the MZA provides for the definition of '*innocent passage*'[172] as having the same meaning as defined under Article 19 of UNCLOS. Although it may be the practice of drafters of legislation to refer the meaning of a term to another piece of legislation, but it is submitted that for objectivity and preventing subjective interpretations, it is better to be precise and clear, as will be explained below.

109. Whilst Article 19(1) of UNCLOS sets out the limit up to which the passage remains innocent, **Article 19 (2) of UNCLOS appears to be an enabling provision in the light**

(1) The sovereignty of Mauritius-(a) extends and has always extended to –(i) the territorial sea; (ii) its internal waters; (iii) its archipelagic waters; (iv) its historic waters;
(b) also extends to the air space over the archipelagic waters, the historic waters, the internal waters and the territorial sea as well as to their beds and subsoil, and the resources contained in them.

[171] 9. Limits on exercise of sovereignty in archipelagic waters
The exercise by Mauritius of its sovereignty in archipelagic waters shall be subject to -
(a) ...; (b)... and (c) the right of innocent passage.

[172] "Innocent passage" has the same meaning as in Article 19 of UNCLOS.

of its wording. It states that *"the coastal State may adopt law and regulations"*. It is clear that Article 19(2) of UNCLOS gives powers to the coastal State to legislate in order to enforce its law regarding those activities listed in the said provision, which may be *"prejudicial to the peace, good order or security of the coastal State"*. It does not seem that Article 19 of UNCLOS provides for the meaning of *'innocent passage' per se*. **Mauritius ought to specifically provide for the meaning of *'innocent passage'*** and also what is deemed to be *"prejudicial to the peace, good order or security of Mauritius"*. It is submitted that defining the meaning of innocent passage would clarify objectively the criteria for determining when a passage is innocent. Such a definition should be formulated while paying attention to the list of activities that may satisfy the prejudicial element. This will leave less scope for the subjective interpretation of innocent passage for its application.

110. Furthermore, one major issue in referring *'innocent passage'* as having the same meaning as defined under Article 19 of UNCLOS, is the omission in relation to the passage of submarines and other underwater vehicles in the territorial sea of Mauritius, as provided under Article 20 of UNCLOS. In fact, Article 20 of UNCLOS provides that the passage of submarines or underwater vehicles should be effected on the surface and the necessity for the submarines/underwater vehicles to show their flag. However, it is observed by referring to the definition of innocent passage *'as having the same meaning under Article 19 of UNCLOS'*, it appears that the said definition under section 2 of the MZA does not cater for Article 20 of UNCLOS in respect of submarines and underwater vehicles in the territorial sea of Mauritius. In fact, no reference is made in respect of submarines or underwater vehicles in the MZA.

111. In the light of the above, it appears that **there is no provision in the domestic legislation in respect of the passage of submarines and other underwater vehicles in the territorial seas of Mauritius as far as *'innocent passage'* is concerned**. Moreover, the possibility for submarines or other foreign underwater vehicles passing underwater during their passage through the territorial seas of Mauritius may not only be a security issue but may also raise issues in relation to actions that may be contemplated against them if they are in breach of the listed activities under Article 19(2) of UNCLOS. It has to be observed that since submarines are generally recognised as warships, as they are

used as naval vessels, they also enjoyed a right of innocent passage. However, their rights to complete immunity are recognised under Articles 95 and 96 of UNCLOS and as such no actions may be contemplated against them.

112. It is, **therefore, necessary to amend the law to enact that submarines and other underwater vehicles could only exercise the right of innocent passage in the territorial/archipelagic waters on the surface and showing their flag.**[173]

113. It is also submitted that the word *'passage'* is clearly defined in Article 18(1) of UNCLOS and is characterised by being *'continuous and expeditious'*, although stopping or anchoring is permitted only to the extent that it is incidental to ordinary navigation or necessary on the basis of force majeure.[174] Article 19 of UNCLOS provides for the definition of *'innocent passage'* so long that it is not detrimental to the *"peace, good order or security of the coastal State"*. It is submitted that if a foreign ship is found at anchorage or stopped, and may represent a risk to the *'security of the coastal State'*, as was the case in respect of the grounding of **Wakashio,** in relation to any risk of pollution, the passage cannot be said to be *'innocent'*. Thus, the ship may be subjected to the 'exclusive jurisdiction' of the coastal State, see Article 19(2)(a) - (h)[175] and Article 25(1)[176] of UNCLOS, pertaining to non-innocent passage. It is therefore important to define the prejudicial element of *"peace, good order or security of the coastal State"*.

114. Having clarified some of the issues related to the definition of *'innocent passage'* in the MZA, an analysis will now be made in relation to the different provisions of the domestic legislation with the provisions of UNCLOS.

[173] See section 15 of the Maritime Areas Act, 1982 of Antigua and Barbuda in Practice of Archipelagic States.
[174] R.R. Churchill and A. V. Lowe, above n 29, 81.
[175] *Ibid*, above n 29, 353.
[176] Article 25(1) of UNCLOS: The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

Application of UNCLOS and the MZA

115. As explained above, sections 8,[177] 9[178] and 10 of the Maritime Zone Act have been enacted and the said provisions cater for the limitation of the exercise of sovereignty in the internal waters, archipelagic waters and territorial sea as far as the right of '*innocent passage*' in these maritime zones is concerned. It appears that Mauritius may have complied with its obligations under UNCLOS. However, it is necessary to verify how far has this been the case. This will be done by examining the specific provisions of domestic legislation, namely the MZA, dealing with the issue of '*innocent passage*' in the internal waters, archipelagic waters and territorial seas.

116. Section 9 (c) of MZA provides that sovereignty in the archipelagic waters of Mauritius is subjected to the right to '*innocent passage*'. Section 10 of the MZA relates to the "*limits on exercise of right of innocent passage*". In fact, section 10 (1)(a) of the MZA requires the Prime Minister to make Regulations to designate sea lanes[179] to be used by foreign ships for the exercise of *'innocent passage'* through the internal waters, archipelagic waters and territorial sea. In addition, section 10(1)(b) of the MZA also requires Regulations to be made to prescribe traffic separation schemes for the passage through narrow channels in the sea lanes.

117. However, no regulations have been made under section 10 of the MZA as at date (12/02/2021), either for the designation of sea lanes or for traffic separation schemes.[180]

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[177] 8. Limits on exercise of sovereignty in internal waters
Any right of innocent passage existing in internal waters delimited by closing lines prescribed under section 5 shall continue to exist to the extent that it existed immediately before the closing lines were prescribed.

[178] 9. Limits on exercise of sovereignty in archipelagic waters
The exercise by Mauritius of its sovereignty in archipelagic waters shall be subject to—
(a) ..
(b) and
(c) the right of innocent passage.

[179] Section 10 of MZA also provides for passage of aircraft but innocent is considered in the present paper in relation to ships.

[180] Only the following Regulations have been made under the Maritime Zones Act as at 26/02/2021:- (i) Maritime Zones (Fishing Licences) Regulations 1978, 23/1978, 221/78; 344/81; (ii) Maritime Zones (Exclusive Economic Zones) Regulations 1984, 199/1984, Rp 5/91; (iii) Maritime Zones (Baselines and Delineating Lines) Regulations 2005, 126/2005; (iv) Maritime Zones (EEZ Outer Limit Lines) Regulations 2008, 220/2008, 282/08; (v) Maritime Zones (Coordinates of Outer Limits of Extended Continental Shelf in the Mascarene Plateau Region) Regulations

Moreover, it also appears that no proposals have been submitted to the IMO with a view for the adoption of sea lanes/traffic separation schemes. The effects of these omissions are that foreign ships may exercise their rights of archipelagic sea lane passage through routes normally used for international navigation, as provided for under Article 53(12).[181]

118. In the light of the **failure to incorporate in the domestic legislation the provisions relating to the designation of sea lanes and traffic separation scheme**, the provisions of UNCLOS for the exercise of the right of innocent passage in the internal waters, archipelagic seas and territorial seas cannot be made effective, as explained in the case of ***Pierce v. Pierce [1998 SCJ 397].*** This is what the Court said in ***Pierce v Pierce*** in connection to the failure to incorporate international conventions in our domestic legislation: *"Though Mauritius has acceded to that Convention, the provisions of the whole or part of that Convention have not been implemented in our national laws, unlike, for example, the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents Act which gave the force of law in Mauritius to the Convention on that matter signed at the Hague on 5 October 1961 and published in [GN No. 14 of 1966]. Consequently, without having to enquire initially whether the child has been "abducted" or "wrongfully" removed under the terms of the Convention on the Civil Aspects of International Child Abduction, suffice it to say that that Convention is not part of our law and that this Court is not bound to give effect to its provisions".*

119. It, therefore, appears that **Mauritius may be in breach of Article 53(1) of UNCLOS in relation to its obligation to designate sea lanes for allowing innocent passage by foreign ships within its internal waters, archipelagic waters and territorial sea.**

2012, 96/2012, Cio 13/03/12; (vi) Maritime Zones (Economic Activities) Regulations 2014, 88/2014, Cio 26/05/14; 157/17, Cio 15/08/17; (vii) Land-Based Oceanic Industry (Prescribed Area) Regulations 2015, 7/2016, (Cio 22/12/16); and (viii) Maritime Zones (Conduct of Marine Scientific Research) Regulations 2017, 57/2017, Cio 10/04/17;

[181] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July 8, 2014, 8.

Safety of Foreign Ship during Innocent Passage

120. Additionally, the failure to designate sea lanes and traffic separation schemes as required by Article 22 of UNCLOS may also be an issue in relation to the safety of foreign ships in the exercise of innocent passage, as provided under Article 22 of UNCLOS.

Foreign Nuclear-Powered Ships and Innocent Passage

121. Another issue in respect of innocent passage is related to section 10(3) of MZA.[182] Article 23 of UNCLOS provides for the right of innocent passage for foreign nuclear-powered ships and ships carrying radioactive nuclear or inherently dangerous or noxious substances in the territorial sea. As per the said Article, the right of innocent passage in relation to these ships is subjected to the conditions of carrying documents and observation of special precautionary measures established for such ships by international agreements. However, it is noted that although there is not a ban *per se* to the right of innocent passage for these radioactive ships in the Mauritian legislation, the latter provides that such rights may only be exercised after prior notice is given and prior authorisation and consent for passage have been obtained.

122. The conditions under Article 23 of UNCLOS are related to carrying of documents and observation of special precautionary measures while those of section 10(3) of MZA are related to prior notification of intended passage and 'prior authorisation and consent' being obtained. It is clear that the conditions specified in section 10(3) of MZA relating to the rights to innocent passage through territorial sea are not in conformity with the provisions of Article 23 of UNCLOS.

123. As far as the issue relating to 'prior notification' and 'prior authorisation and consent' are concerned, it is worth to note what was held in the case of ***Corfu Channel Case***. Although the case is in respect of innocent passage of warships through straits but the

[182] Section 10(3) of MZA:- No ship carrying radioactive materials shall pass through any part of the archipelagic waters, internal waters or territorial sea unless prior notification of the intended passage of the ship through those waters or sea has been given, and prior authorisation and consent for the passage, specifying the route to be taken by the ship, has been given, in accordance with regulations made under this section.

issue of *'prior notification'* and *'prior authorisation and consent'* are relevant for the purpose of this discussion. The case relates to the claim of violation of the sovereignty right of Albany against the right of innocent passage of British warships[183] through the Strait of Corfu without notification and consent. The Court rejected the Albanian's claim and held that warships had a right of passage through straits used for international navigation between two parts of the high seas subject to the condition that it is 'innocent'. In giving a wide interpretation to *'innocent passage'*, the Court made it clear that passage through strait cannot be restricted except where it was a threat to important interests of the coastal State and was not innocent[184]. In fact, according to Article 14(4) of the 1958 Geneva Conventions, so long that it is not prejudicial to the peace, good order and security of the coastal State, the passage is deemed to be 'innocent'.

124. In addition, it is observed that Article 23 of UNCLOS refers to the right of innocent passage in relation to nuclear-powered ships or ships carrying radioactive substances only in the territorial sea and as such, this impliedly excludes the passage of those vessels through the internal waters or archipelagic waters. It is submitted that **the implied exclusion of the passage of nuclear-powered ships or ships carrying radioactive substances in the archipelagic waters could become a serious issue in the light of the failure of Mauritius to designate sea lanes and traffic separation schemes**. Moreover, Article 22(2) of UNCLOS provides for the confinement of the innocent passage of tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to the sea lanes of the territorial sea of the coastal State that have made such designation.[185] Since Mauritius has not done so, it is submitted that this may be an issue, not only in relation to nuclear-power ships or ships carrying radioactive substances but also in relation to tankers, particularly in the light of the recent oil spilled cause by the grounding of vessel ***Wakashio*** in the internal water of Mauritius. In fact, Article 53(12) of UNCLOS confers an automatic right of archipelagic sea lane passage to those nuclear vessels, including tankers, through the routes normally used for international navigation if archipelagic State has not designated any sea lanes[186].

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[183] R. P Anand, above n 6, 181.
[184] *Ibid*, above n 6, 182.
[185] R.R. Churchill and A. V. Lowe, above n 29, 91.
[186] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July, 2014, 8.

125. As explained above, the MZA is silent on the right of innocent passage of warships, including submarines and other underwater vehicles in the territorial sea of Mauritius. However, the following observations should be made in respect of the requirements under section 10(3) of MZA for demanding 'prior notification of the intended passage' and 'prior authorisation and consent' are given for the innocent passage of warships, which also includes submarines. It has been observed that a number of States require prior authorisation or notification in relation to the innocent passage of warships in their territorial sea.[187] However, as a result of such demand of prior notification and authorisation, major maritime powers have contested such requirement in a defiance and confrontational attitude. They have, thus, been exercising their right of innocent passage without prior authorisation or notification[188] despite such legal requirements in the domestic legislation of coastal States. The omission of the innocent passage of warships and submarines in the domestic legislation of Mauritius may be the reason for which there is no reported assertion of the right of innocent passage in the territorial sea despite the requirements of prior notification and authorisation by major maritime powers. It is therefore submitted that should Mauritius decide to include the right of innocent passage in respect of warships and submarines, the above concerns should be taken on board in the domestic legislation.

126. To conclude on the issue of prior notification and prior authorisation and consent, it is submitted that section 10(3) of MZA provides another instance where the Mauritian law is in contradiction with UNCLOS, especially given that section 3 of the MZA specifically states that *"UNCLOS shall have force of law in Mauritius"*.[189]

The Contiguous Zone: UNCLOS and Section 12 of the MZA

127. The contiguous zone is the part of the sea that is beyond and adjacent to the territorial sea of the coastal State and its breadth is limited to 24 nm from the baseline. As per Article 33(1) of UNCLOS, the coastal States have additional jurisdiction on specific

[187] R.R. Churchill and A. V. Lowe, above n 29, 89.
[188] R.R. Churchill and A. V. Lowe, above n 29, 89.
[189] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July, 2014, 8.

matters within the contiguous zone. These include jurisdiction pertaining to customs, fiscal, immigration and sanitary matters, which occurred within its internal waters and the territorial sea.

128. Section 13[190] of the MZA specifies the four types of activities that may be proscribed within the limit of 24 miles[191] of the Contiguous Zone. It may be observed that section 13 of the MZA which relates to the 'controls in the contiguous zone' requires the Prime Minister to make regulation for the exercise of such controls. However, it appears that no such regulations have been made up to now. In the absence of such regulation, it is unlikely that Mauritius may effectively enforce controls pertaining to its territorial waters and contiguous zones. This is a matter of great urgency not only for complying with its obligations under UNCLOS but also for enforcing jurisdiction concerning customs, fiscal, immigration and particularly in respect of its sanitary law in the context of the prevailing pandemic situations related to Covid 19.

129. It is also worth noting that Article 303(2) of UNCLOS extends the jurisdiction of the coastal State in relation to the removal of archaeological and historical objects found on the seabed of the contiguous zones.[192] It is submitted that in the **absence of domestication of the law** for enforcement relating to archaeological and historical objects, any removal of such objects from the contiguous zone will be beyond the national jurisdiction of Mauritius, as are any 'illegal activities' related to customs, fiscal, immigration or sanitary laws. The restriction to the removal of archaeological and historical objects found on the seabed of the contiguous zones is an additional jurisdiction recognised under UNCLOS and requires the attention of the legislator of Mauritius for its enforcement.

[190] Section 13 of MZA: Controls in the contiguous zone
The Prime Minister may make regulations for the exercise of controls necessary in the contiguous zone to prevent and punish infringement of the customs, fiscal, immigration or sanitary laws within Mauritius, its archipelagic waters, internal waters and territorial sea.
[191] mile" means an international nautical mile, being a distance of 1,852 metres;
[192] Donald R Rothwell and Tim Stephens, above n 24, 82.

The Exclusive Economic Zone

130. The coastal State is given sovereign rights to explore and exploit the living and nonliving natural resources of the sea under UNCLOS. It is worth emphasising that the EEZ provides resource jurisdiction (e.g., oil and fishery) but not territorial rights.[193] The underlying principle in the EEZ is that it is primarily a jurisdictional rather than a sovereignty zone for the coastal State. Hence, the major features of the EEZ are to be considered as permitting the freedom of navigation in the high sea but limited to the extent of having access to the living and non-living resources.[194] Moreover, the EEZ can also be said to have characteristics of both the territorial sea component and the high sea component although it should not be assimilated to any of these two because it has its own attributes. On the one hand, despite its territorial *'component'*, it is, however, not a space where the coastal State will have exclusive sovereignty attributed to the territorial sea. On the other hand, despite the *'component'* of high seas, it cannot be said that it is a zone where other States would have unfettered rights. It is a mixture zone where the coastal State may enjoy sovereign rights for the purpose of exploring and exploitation of the living and non-living natural resources[195] and jurisdiction in relation to these rights, including environmental protection.[196] Article 55 of UNCLOS stipulates that the EEZ is *'subject to the specific legal regime'* which shows the mixture of both sovereign rights (ownership or dominium) and jurisdiction (competence or imperium).[197] A reading of Article 55 of UNCLOS clearly indicates the tension between the coastal State and other States within the area of the EEZ where reference is made to *'rights and jurisdiction of the coastal State'* on the one hand and the *'freedoms of other States'* on the other hand.

131. Article 57 of UNCLOS provides for the limit of the EEZ to be 200 nm. Article 56 sets out the right, jurisdiction and duties of the coastal State in the EEZ while Article 58 specifies the rights and duties of other States in the EEZ, namely the freedoms of

[193] Alan G. Friedman and Cynthia A. Williams, above n 7, 567.
[194] Donald R Rothwell and Tim Stephens, above n 24, 87.
[195] Arif Ahmed, above n 39, 32.
[196] Donald R Rothwell and Tim Stephens, above n 24, 88.
[197] *Ibid*, above n 24, 88.

navigation as provided under Article 87, in respect of the lawful uses of the sea related to these freedoms.

132. Thus, apart from the variety of sovereign rights and jurisdiction that a coastal State has in the EEZ in relation to exploring and exploitation, conservation and management of the natural resources or the installation of offshore/artificial islands, it also has duties. These require the coastal States have regard to the rights and duties of other States where the latter enjoy the freedom to lay submarine cables in such EEZ as well as other internationally lawful uses of the seas, including the operation of submarine cables, as provided in Article 58(1) of UNCLOS.[198] It is therefore necessary to analyse the relevant provisions of the domestic legislation to ascertain how these competing interests have been formulated in order to be compliant with the Oceans' Constitution which is UNCLOS.

UNCLOS and the MZA

133. Part VI of the MZA relates to the rights of Mauritius in the EEZ. Mauritius has claimed its 200 miles of EZZ in conformity with UNCLOS, *vide* section 14 (3) of the MZA. In addition, as per section 14(2) of the MZA, regulations have been made for prescribing the outer limit of the EEZ, vide Maritime Zones (EEZ Outer Limit Lines) (Amendment of Schedule) Regulations.[199] Moreover, as per section 15 of the said Act, the sovereign rights as well as, jurisdiction of Mauritius, appear to have been replicated in conformity with Article 56 of UNCLOS.

134. Although the provisions encapsulated in Part VI of the MZA appear to conform with UNCLOS, however, it is necessary to highlight the following: -

Section 15 of MZA provides for the *'rights, jurisdiction and duties of Mauritius in EEZ'* and section 16 of the MZA provides for the *'exercise of jurisdiction by Mauritius in EEZ'*. However, the MZA does not refer to the rights and duties of other States in the EEZ[200]. In fact, section 15 of MZA is almost a replica of Article 56 (1) and (3) of

[198]Kingsley Ekwere, above n 5, 166.
[199] Maritime Zones (EEZ Outer Limit Lines) (Amendment of Schedule) Regulations 2008 of GN No. 282.
[200] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July 2014. 9.

UNCLOS but it omits Article 56(2) relating to the 'due regard' to the right and duties of the other States and the requirement to act in a manner compatible with UNCLOS. Moreover, no reference is made to Article 58 of UNCLOS relating to the rights and duties of other States in the EEZ. Article 58 of UNCLOS is to the effect that all States are entitled to freedoms of navigation and also freedoms for the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms[201] in the EEZ. This omission appears to be unclear and it is arguable to say whether such omission may be considered to be compliant with section 3 of the MZA to the effect that *"UNCLOS shall have force of law in Mauritius"*, particularly in the light of the provisions of section 17 of the MZA empowering the Prime Minister to make regulations to regulate the laying of pipelines or cables in the EEZ, see section 17(b)[202] of MZA.

Rights and Duties of Coastal State in the Continental Shelf

135. The legal concept of continental shelf came into attention following the Truman Proclamation of 1945 wherein it was declared that the USA considered the resources of the shelf contiguous to be for the USA. Thus, it is appurtenant to the USA and is subjected to its jurisdiction and control[203]. This was the first-ever claim made by any State in relation to the resources of the subsoil and seabed of the continental shelf while the water column, including the airspace, would still be enjoyed by all States.[204]

136. Although the regime of the continental shelf and the EEZ regime co-exist yet such coexistence is limited to 200 nm as beyond the said limit only the regime of the continental shelf applies.[205] The maximum distance which a coastal State may claim in respect of its extended continental shelf is up to 350 nm from the baseline from which the territorial sea is measured.[206]

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[201] Limits in the Seas, No. 140, Mauritius Archipelagic and Other Maritime Claims and Boundaries, July 2014, 8.
[202] Section 17 of MZA:- Authority to explore and exploit EEZ-The Prime Minister may make regulations to—
(a) ...
(b) regulate the laying of pipelines or cables in the EEZ;
[203] Arif Ahmed, above n 39, 36.
[204] Donald R Rothwell and Tim Stephens, above n 24, 105-106.
[205] R.R. Churchill and A. V. Lowe, above n 29, 151.
[206] Kingsley Ekwere, above n, 5, 166.

137. The sovereign rights of the coastal States are restricted to the exploitation of the natural resources and exploration of the continental shelf, vide Article 77 of UNCLOS. These rights are exclusive to the coastal State and it is only with the consent and authorisation of the latter that another State may undertake such activities, see Article 77(2) of UNCLOS.

138. The sovereign rights to be exercised on the continental shelf do not depend on whether they have been proclaimed or on occupation, they exist for the coastal States as of right. Hence, the responsibilities to fix the conditions under which any activities in respect of these sovereign rights should be conducted are restricted to the coastal State through its domestic legislation.

139. Despite these sovereign rights to be exercised by the coastal States on the continental shelf, the latter also have the obligations to ensure that those rights are exercised without causing any infringement or any unjustifiable interference with navigation as well as other rights and freedoms enjoyed by other States on the continental shelf, as stipulated in Article 78(2) of UNCLOS. While other States have the right to lay submarine cables, vide Article 79(1) of UNCLOS, the obligations of the coastal States on the continental Shelf relate to non-impediments or unjustified interference to the rights of other States for the laying or maintenance of such submarine cables, see Article 79(2) of UNCLOS. Moreover, Article 79(5) of UNCLOS also obligates the coastal State not to prejudice other States in respect of the repair to be made to the existing cables or pipelines.

140. It has to be noted that the delineation of the course of pipelines is permitted under Article 79(3) of UNCLOS but subject to the consent of the coastal State. Hence, the coastal State may regulate the delineation of pipelines on its continental shelf although such rights do not apply in relation to submarine cables[207]. As far as the extended continental shelf is concerned, it has to be highlighted that such rights and duties are to be exercised up to the limit of the EEZ because beyond the 200 nm, that is, on the extended continental shelf, the regime of the freedom associated with the high seas would apply.

[207]R. R Churchill and A. V Lowe, above n 29, 174.

Continental Shelf: MZA and UNCLOS

141. The rights of Mauritius in the continental shelf are to be found in Part VII of the MZA. Section 18 of MZA refers to different ways in which the continental shelf of Mauritius is to be measured and this includes a distance of 200 nm from the baseline from which the breadth of the territorial sea of Mauritius is measured or to the outer edge of the continental margin. In simple terms, this means that Mauritius has a continental shelf comprising of the seabed up to a distance of 200 nm from the baselines and an area of physical margin, known as the outer continental shelf beyond it.[208]

142. There is a duty on the coastal State proposing to establish the outer limit of its continental shelf beyond the 200 nm limit to inform the Commission on the Limits of the Continental Shelf and deposit the relevant oceanographic data within 10 years of ratification of UNCLOS to the Secretary-General of the United Nations, as provided in Article 76(8) of UNCLOS.[209] Section 18(2) of MZA provides for regulations to be made concerning the determination of the outer limit of the continental shelf.

143. Section 19(1) of the MZA[210] provides for the exercise by Mauritius of its sovereign rights over the continental shelf in relation to exploration and exploitation of its natural resources in line with Article 77(1) of UNCLOS. In addition, section 19(2) of MZA provides for the exclusive rights of Mauritius in relation to rights of exploitation of natural resources and exploration of the continental shelf unless express consent is given, as provided in Article 77(2) of UNCLOS. However, the MZA is silent in relation to the rights of other States in relation to the continental shelf. As explained above, the rights of other States have been included in Article 78(2) of UNCLOS in respect of non-interference with navigation, such as installation of structures or for the laying of cables and pipelines. In addition, Article 79 of UNCLOS also provides that *"all States are entitled to lay submarine cables and pipelines on the continental shelf..."*, including the

[208] *Ibid*, above n 29, 149.
[209] See M.Z.N.63.2008.LOS of 27 June 2008:
[210] Section 19 of MZA:- Rights of Mauritius over continental shelf
(1) In accordance with international law and in particular Article 77 of UNCLOS, and subject to subsection (1A), Mauritius shall exercise sovereign rights over the continental shelf to explore it and exploit its natural resources.

maintenance of such cable/pipelines. Moreover, Article 87 of UNCLOS relating to the freedom of the high seas allows all States the freedom to lay submarine cable and pipelines, subject to Part VI.

144. Section 21 of the MZA relating to *"Authority to explore and exploit continental shelf"* empowers the Prime Minister to make regulations for regulating the laying of pipelines or cables in the continental shelf, vide section 21(1)(b). However, it appears that no such regulations have been made as at date.[211] It is submitted that **the provisions of MZA should make it clear that all States are entitled to lay submarine cables and pipelines on the continental shelf** although such entitlement may be subject to a certain degree of control by Mauritius.

145. The **domestic legislation is silent about the rights in superjacent waters[212] of the high seas beyond the 200 nm of the outer limit**, particularly concerning the non-sedentary species, which is one of the freedoms of the high seas.

146. As far as marine scientific research is concerned, section 15(1)(b)(ii) of MZA provides for same in the EEZ and Part VIII of the Act also caters for same in the maritime zones. Section 22 (2) of the MZA provides for the right to conduct marine scientific research in the EEZ and on the continental shelf. Moreover, section 23 of MZA also provides that such research should be conducted in accordance with regulations and with the express consent of the Prime Minister. Indeed, the Maritime Zones (Conduct of Marine Scientific Research) Regulations 2017,[213] has been made in that connection.

[211] Only the following Regulations have been made under the Maritime Zones Act as at 26/02/2021:- (i) Maritime Zones (Fishing Licences) Regulations 1978, 23/1978, 221/78; 344/81; (ii) Maritime Zones (Exclusive Economic Zones) Regulations 1984, 199/1984, Rp 5/91; (iii) Maritime Zones (Baselines and Delineating Lines) Regulations 2005, 126/2005; (iv) Maritime Zones (EEZ Outer Limit Lines) Regulations 2008, 220/2008, 282/08; (v) Maritime Zones (Coordinates of Outer Limits of Extended Continental Shelf in the Mascarene Plateau Region) Regulations 2012, 96/2012, Cio 13/03/12; (vi) Maritime Zones (Economic Activities) Regulations 2014, 88/2014, Cio 26/05/14; 157/17, Cio 15/08/17; (vii) Land-Based Oceanic Industry (Prescribed Area) Regulations 2015, 7/2016, (Cio 22/12/16); and (viii) Maritime Zones (Conduct of Marine Scientific Research) Regulations 2017, 57/2017, Cio 10/04/17;

[212] That is, waters above the continental shelf.

[213] Maritime Zones (Conduct of Marine Scientific Research) Regulations 2017, GN No. 57.

High Seas

147. As per Article 86 of UNCLOS, the High Sea includes: *"...all parts of the sea that are not included in the EEZ, in the territorial sea or internal waters of a State, or in the archipelagic waters of an archipelagic State..."*. Moreover, Article 87 of UNCLOS provides that the high seas are open to all States and that the freedom of the high seas is exercised under the conditions laid down in the Convention and by other rules of international law. It appears that freedoms exercised in the high seas refer principally to freedom of (1) navigation, (2) overflight (3) to lay submarine cables and pipelines, (4) to construct artificial islands and other installation permitted under international law, (5) fishing and (6) scientific research. Although these freedoms are recognised under UNCLOS but there are also other freedoms recognised by the general principles of international law. As per Article 87 of UNCLOS, these freedoms are to be exercised by all States *'with due regard'* to the interests of other States. The high sea is still considered, in the light of the two main objections vindicated by Grotius in his book, *Mare Liberum*, namely no ocean can be appropriated by a nation and nature prevents appropriation of things which may be used by all.[214]

Further Duties and Right of the Coastal State: Conservation of Natural Resources

148. Another duty of the coastal State is related to the conservation of natural resources. One of the means by which such duty may be conducted is by way of combatting illegal fishing through the right of hot pursuit. Obviously, the right of hot pursuit is no limited to illegal fishing but also includes other maritime violations such as marine pollution. However, the analysis of the right of hot pursuit will be made in relation to illegal fishing activities having regard to the domestic legislation dealing with this issue.

[214]Arif Ahmed, above n 39, 33.

The Right of Hot Pursuit

149. Article 111 of UNCLOS gives effect to the right of hot pursuit. The procedural steps for a justified hot pursuit are set out in Article 111(1) to (8) in a cumulative manner.[215] In ***MV Saiga Case No. 2,*** the International Tribunal for the Law of the Sea, **(ITLOS),** confirmed that the conditions for triggering the right of hot pursuit should be satisfied cumulatively and that each of these conditions should be met before the right may be exercised.[216] The ***MV Saiga Case No. 2*** will be discussed below.

150. According to the traditional doctrine of hot pursuit,[217] a right exists to pursue and arrest a foreign vessel that has committed a breach of the domestic law of a coastal State in its sovereign or territorial waters even though the foreign vessel has fled on the high seas. However, the pursuit may end with the entry of the fleeing vessel in the territorial sea of its flags State or that of other States.[218]

151. The freedom of navigation on the high seas and the principles in respect of the exercise of the exclusive sovereignty of the flag State over its flagged vessels on the high seas are thereby being curtailed when the right of hot pursuit is exercised against a foreign vessel[219], see Articles 89[220] and 92(1)[221] of UNCLOS.

152. Many coastal States, including Mauritius, are facing serious difficulties to fight against the depletion of their marine resources due to illegal, unreported and unregulated fishing, (IUU), and exploitation. Although the international community is alive to the problems

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[215] *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* ITLOS No. 2, 1 July 1999 at (1461 *[M/V Saiga].*

[216] Donald R Rothwell and Tim Stephens, above n 24, 449.

[217] The case of *I'm Alone (1935)* 29 AJIL 326 provides support to the doctrine of hot pursuit.

[218] See Article 111(3) of UNCLOS.

[219]Randall Walker, 'International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century', *Auckland University Law Review*, Vol 17(2011), 194.

[220] Article 89:-Invalidity of claims of sovereignty over the high seas-No State may validly purport to subject any part of the high seas to its sovereignty.

[221] Article 92(1):- Ships 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. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

related to the conservation of scarce resources and actions are being initiated on different fronts yet it is to be noted that the trend is still on the rise, particularly in respect of developing countries like Mauritius.

The Right of Hot Pursuit and Domestic Legislation

153. Despite its existence in UNCLOS, however, the right of hot pursuit does not appear in any of the previous legislations of Mauritius dealing with the law of the sea.[222] It is neither in the National Coast Guard Act 1988 or the Piracy and Maritime Violence Act 2011 nor in the present legislation dealing with the law of the sea, namely the MZA. Strangely, **the right of hot pursuit is found in section 62 of the Fisheries and Marine Resources Act 2007** (FMRA). It appears that the right of hot pursuit has been conferred by the State on Fisheries Protection Service (FPS), the law enforcement agency operating under the aegis of the Ministry of Blue Economy, Marine Resources, Fisheries and Shipping.

154. It is recognised that effective surveillance is one of the means that may be used to combat IUU fishing. However, contrary to surveillance, enforcement is a completely different matter. This issue has to be considered because coastal States share responsibilities under UNCLOS to prevent IUU fishing in their waters.[223] Although, the FPS is mandated to exercise its powers in respect of illegal fishing activities in the lagoon as well as outside the lagoon, however, there are serious doubts whether it is equipped logistically and has the trained human resources capable of conducting an effective hot pursuit in the different maritime zones of Mauritius, taking into consideration that the maritime zones of Mauritius consist of an area of 2.3 million kms² plus the additional sea area of 396 000 kms² managed jointly by Mauritius with Seychelles.[224]

[222] The Continental Shelf Act 1970, The Territorial Sea Act, The Maritime Zones Act 1977 as well in the present Maritime Zones Act of 2005.

[223] Rachel Baird "Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence" (2004) 5 *Melbourne Journal of International Law, 299* ["IUU Fishing"]; Food and Agriculture Organisation of the United Nations "International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" (2001) <www.fao.org> [FAO "IPOA-IUU"]-referred at page 201.

[224] https://www.edbmauritius.org/ocean-economy, accessed on 15/03/2021 at 18.00 hrs.

155. However, it has to be submitted that issues related to the sea are not limited to IUU fishing but there are a number of illegal activities which also require the attention of the coastal State as well as the international community. It should be borne in mind that the emerging trends in relation to issues such as piracy, terrorism, maritime security, the proliferation of weapons of mass destruction, human trafficking and smuggling are equally matters of great concerns on the international level. Although foreign ships may be arrested on the high sea[225] in connection with some of the above offences but it is submitted that a right of hot pursuit would be an additional tool to deal with the emerging trends of criminal activities.

156. As different law enforcement agencies are mandated to deal with different criminal activities, it is, therefore, important that they are conversant and vested with the necessary powers to conduct the right of hot pursuit. Thus, the importance of the use of hot pursuit by the competent organisation is crucial for effective enforcement actions against violators. Given the importance of the right of hot pursuit in relation to maritime enforcement, many States have enacted its substantive provisions in their national legislations. This may be seen in the Maritime Powers Act 2013 of Australia or the Criminal Code, RSC, C-46 of Canada.[226]

157. Although, it is an undeniable fact that issues related to the conservation of marine resources, including the practice of IUU fishing, are considered as a major concern for Mauritius, however, the rationale for including the right of hot pursuit in the FMRA only is unclear. The main reason for this contention is related to the fact that **hot pursuit, as envisaged under Article 111 of UNCLOS, cannot be assimilated to illegal fishing only**. This assertion may be seen is assessing the elements of the right of hot pursuit that will follow.

[225]Randall Walker, above n 214, 200.
[226]Donald R Rothwell and Tim Stephens, above n 24, 448.

Elements of Hot Pursuit v Domestic Legislation

158. Different requirements are to be met before a right of hot pursuit may legitimately be contemplated. However, the analysis of the elements will be brief and limited to issues observed in relation to the domestic legislation. The reason for doing so is related to the fact that the right of hot pursuit is an old doctrine of more than a century and may need independent research in itself in the light of issues arising in the modern law of the sea.

159. Before considering the issue, it is important to have a look at the provisions of the domestic legislation dealing with the right of hot pursuit to understand its requirements under UNCLOS. The domestic legislation of Mauritius in section 62 of the FMRA reads as follows: -

"(1) A fishery control officer may, without a warrant, following hot pursuit in accordance with international law as reflected in article 111 of the United Nations Convention on the Law of the Sea –

(a) stop, board and search outside the maritime zones, any foreign fishing boat or foreign fishing vessel which he has reason to believe has been used in the commission of an offence under this Act and bring such boat or vessel and all persons and things on board to any place, port or harbour in Mauritius;

(b) exercise beyond the maritime zones all the powers conferred to a fishery control officer under this Act.

(2) The powers conferred upon a fishery control officer under this Act shall cease when the foreign fishing boat or vessel enters the territorial sea of another State".

160. A few points will have to be made in relation to the provisions of FMRA dealing with the issue of the right of hot pursuit:- It appears from a reading of the above provisions that the arrest or the boarding of the foreign vessel may be effected *'outside the maritime zones'*. However, it is submitted that the wording of the law is quite vague in the sense that it does not say in which maritime zone that the offence should be committed to trigger the right of hot pursuit and effect an arrest *"outside the maritime zones"*.

Although, as per the provisions of UNCLOS,[227] the coastal State has sovereign rights in relation to the protection and preservation of the marine environment, including fishing, in the EEZ, however, the FMRA is silent in respect of the maritime zones in which the law enforcement officers may start engaging in the exercise of the right of hot pursuit.

161. In addition, according to section 62(2) of the FMRA, the hot pursuit must cease "*when the foreign fishing boat or vessel enters the territorial sea of another State*". However, under UNCLOS it is clear that the hot pursuit shall cease when the pursued vessel enters not only in the territorial sea of another State but also when it enters the territorial sea of its own (flag) State, as per Article 111(3).

162. The Mauritian legislation establishes the foundation in respect of the right of hot pursuit not on '***good*** *reason to believe*' but on '*reason to believe*'. There is a marked difference between the two phrases. It appears that the foundation for the exercise of the right of hot pursuit in the Mauritian legislation is more flexible. However, it is submitted that this cannot be the case. In the light of the above issues, **it may be questioned whether the exercise of the right of hot pursuit is *"in accordance with international law as reflected in article 111 of the United Nations Convention on the Law of the Sea"* as contemplated in section 62(1) of FMRA.**

163. As far as the provision of UNCLOS in relation to the element of '*good reason to believe*' in Article 111(1) is concerned, it is submitted that without any guidance in the Mauritian legislation, the result may be very problematic from a practical perspective. The term '*good reason*' should therefore be defined in the interpretation section of the enactment although there should not be an exhaustive list otherwise there may be issues for the exercise of the right. The case of ***MV Saiga Case (No. 2)***[228] shows a successful challenge to the element of '*good reason to believe*', as will be discussed below.

[227] See Article 56 of UNCLOS in respect of the protection and preservation of the marine environment.
[228] M/V Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea, (1999) 120 ILR 143, [127].

Violation of Law in the Maritime Zone of the Coastal State's Jurisdiction

164. One important element for a justified hot pursuit is set out in Article 111(1)[229] of UNCLOS. This element relates to the good belief of the coastal State that the foreign ship *"has violated the law and regulations of that State"*. In fact, this element should be evaluated at the first instance before contemplating the exercise of the right of hot pursuit. However, a reading of section 62(1) of FRMA shows that the right of hot pursuit is restricted to an offence under the FMRA only. In fact, section 62(1)(a) of FMRA clearly refers to "*any foreign fishing boat or foreign fishing vessel which he has reason to believe has been used in the commission* ***of an offence under this Act***. As it can be seen, the provision of UNCLOS does not link the matter to a violation of fishing only. The provision of UNCLOS shows that it may be any violations of the domestic legislations of the coastal State so long that they are consistent with activities that the coastal States have either sovereign right or sovereignty to prohibit in the specific maritime zone in which they are committed.

165. Thus, it is important to ascertain whether the 'illegal activities' in the specific maritime zones are those that are proscribed under international law and which the coastal State has correctly domesticated in its national legislation. If the 'illegal activity' committed in the specific maritime zone is not according to international law, the right of hot pursuit will be unjustified. In ***MV Saiga Case (No. 2)***,[230] an alleged hot pursuit was exercised by Guinea against the ship for the selling of gas oil to fishing vessels. ITLOS, however, rejected the arguments of Guinea to the effect that the coastal State was entitled to enforce its domestic legislation in relation to bunkering in the EEZ on the basis of the public interests to prevent activities such as bunkering[231]. ITLOS held that such public interests would *'curtail the rights of other States'* and hence would be inconsistent with Articles 56 and 58 of UNCLOS. It is also submitted that such violation should be a serious one.[232]

[229] Article 111(1) of UNCLOS: -The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.

[230] M/V Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea, (1999) 120 ILR 143, [127].

[231] Donald R Rothwell and Tim Stephens, above n 24, 324.

[232] Randall Walker, above n 214, 202.

166. Another issue concerning the provisions of section 62(1)(b) of FMRA is that it specifies that the fishery control officer may "*exercise beyond the maritime zones **all the powers conferred to a fishery control officer under this Act***". As per the above provision, it appears that the Mauritian legislation confers the right of hot pursuit only to 'fishery control officer'. However, it is submitted that it is unlikely that a fishery control officer is vested, under FMRA, with the relevant powers to carry out the right of hot pursuit in relation to a custom offence occurring in the territorial sea or an offence related to the security of an installation on the continental shelf or an offence of manslaughter in the territorial sea and made his escape to the high seas.

167. This limitation may constitute a serious hurdle in relation to offences falling outside the purview of the FMRA or in respect of other law enforcement agencies, such as customs or the Coast Guards in the execution of the right of hot pursuit in the maritime zones where Mauritius may exercise sovereign jurisdiction. It has to be observed that under the Maritime Powers Act of Australia, the exercise of powers under the said Act is conferred to the following maritime officers: (a) Customs officers; (b) members of the Australian Defence Force; (c) members of the Australian Federal Police; (d) other persons appointed by the Minister. The Australian provisions not only make it clear as who are entitled to exercise the right of hot pursuit but also expand the scope of the right of hot pursuit to other law enforcement officers dealing with other illegal activities at sea.

Type of Vessels

168. Another issue that needs to be analysed in the present Review Paper in relation to the right of hot pursuit is the craft that is entitled to effect the pursuit, as provided in Article 111(5) of UNCLOS. The Article refers to hot pursuit to be engaged only by "*warships or military aircraft or other ships or aircrafts clearly marked and identifiable as being on government service or authorised to that effect*".

169. As far as Mauritius is concerned, there is no "*warship or military aircraft*", therefore the fallback position is on "*other ships or aircrafts clearly marked and identifiable as being on government service or authorised to that effect*". The second category of crafts to be used for effecting hot pursuit may therefore include the coast guards, customs, fisheries

or police that are legally entrusted with the duties for the protection of the maritime zones of Mauritius. As explained above, the Maritime Power Act 2013 of Australia clearly refers to the enforcement agencies who are vested with powers to enforce the provisions of the Act. It clearly specifies that "*the powers can be used by maritime officers to give effect to Australian laws and international agreements and decisions*"[233]. Moreover, the Maritime Powers Act also provides for authorisation before powers may be exercised, see section 15 of the Act.[234]

170. It is submitted that each of these entities, namely custom officers, fisheries officers, police officers and other persons authorised by the Minister having the relevant responsibilities of matters related to the sea should accordingly be vested with powers to undertake hot pursuit. In addition, their vessels should be clearly marked and identifiable as being on government service in such manners that they are visible even on the high seas. It is important that the enactment clearly specifies and gives authorisation to these organisations so that their enforcement agents are duly authorised to act on behalf of the coastal State[235]. As far as FMRA is concerned, the Mauritian legislation is silent on the type of crafts that must be used in the conduct of the right of hot pursuit and whether there is any possibility for any other crafts to be authorised to that effect. Moreover, as the other legislations do not refer to the right of hot pursuit, it is obvious that this issue has not been considered at all.

Hot Pursuit in EEZ and Contiguous Zone

171. It is worth mentioning that by virtue of Article 111(2), the right of hot pursuit extends mutatis mutandis to violations in the EEZ or on the continental shelf provided that the domestic legislation providing for the offences are in line with UNCLOS in the zones concerned. As an example, the right of hot pursuit is limited to offences related to conservation of natural resources in the EEZ where the coastal State is entitled to exercise its sovereign jurisdiction in line with Article 56(1) of UNCLOS. The same principle will apply to the continental shelf for example in relation to the safety of installations as is

[233] See Division 2—Guide to this Act at page 3 of the Maritime Powers Act 2013.
[234] Part 2-Exercising Powers: An authorisation must be given by an authorising officer before powers can be exercised in relation to a vessel, installation, aircraft, protected land area or isolated person, at page 16 of the Act.
[235] Randall Walker, above n 214, 208.

permissible under Article 77(1) of UNCLOS which may be committed by an act of piracy or terrorists. It is, therefore, submitted that the law should specifically be drafted to include the relevant provisions to deal with the above issues.

The National Coast Guard (NCG)

172. The National Coast Guard (NCG), is a specialised unit of the Mauritius Police Force operating under the provisions of the National Coast Guard Act (NCGA). The duties performed by the NCG are listed in section 6 of the NCGA, namely for *"(a) the enforcement of any law relating to the security of the State of Mauritius; (b) the enforcement of any law relating to the protection of the maritime zones; (c) the detection, prevention and suppression of any illegal activity within the maritime zones"*. Moreover, section 12 of the NCGA provides for the *"Powers of the National Coast Guard"*. Cleary, the Act provides that the NCG is the organisation mandated to conduct enforcement action in relation to the security and the protection in the different maritime zones. It is therefore submitted that the inclusion of the right of hot pursuit in the said Act is permissible as it encompasses any illegal activity in the maritime zones.

173. Moreover, as far as logistic is concerned, the NCG is in fact the main establishment in Mauritius which is equipped with vessels capable of effecting afloat patrols in the different maritime zones. The NCG has at its disposal 5 offshore patrol vessels, namely the CGS Valiant CG 31 (2017), CGS Victory CG 32 (2016), CGS Barracuda CG 33 (2015), CGS Observer CG 71 and CGS Guardian CG 60 (1993)[236] and ten 14.5m Fast Interceptor Boats (2016). In addition, the NCG also has four aircrafts[237], namely three Dorniers and one Defender to conduct airborne patrols for the surveillance of the maritime zones of Mauritius.[238]

174. As far as human resources are concerned, the staff of the NCG is composed of Indian Naval commanders of ships and pilots as well as Mauritians capable to act as

[236] https://police.govmu.org/police/?page_id=4922 accessed on 16/03/2021 at 1740 hrs
[237] The NCG has a fleet of three HAL Dornier 228 and one Britten-Norman Defender BN-2T for search-and-rescue missions and surveillance of territorial waters.[8] The Defender entered service in 1992, the first Dornier 228 entered service in 1990, the second in 2004 and third in 2016 from https://en.wikipedia.org/wiki/Mauritius_Police_Force#Vessels accessed on 12/03/2021 at 1700 hrs
[238] https://en.wikipedia.org/wiki/Mauritius_Police_Force#Vessels accessed on 12/03/2021 at 1710 hrs

commanders of ships and aircrafts. The NCG has also trained supporting staff to conduct surveillance and protection of the different maritime zones.

175. It is therefore submitted that **there is a need to include the provision relating to the right of hot pursuit either in the NCGA or to make necessary amendments in the FMRA to extend it to other law enforcement agencies such as the NCG, Customs and the Police.**

Cooperation for the Exercise of the Right of Hot Pursuit

176. As the maritime zones of Mauritius is significantly large and due to logistical as well as human resource constraints to carry out surveillance and enforcement action, it is necessary that provisions be made in the relevant enactment for cooperation between other countries. It is worth noting that the treaty between France and Australia in respect of illegal fishing in their respective territories in the Southern Ocean has proved to be efficient in terms of surveillance and enforcement action by both countries. Their cooperation has been using different means related to technology in their surveillance and enforcement action.[239] Moreover, in the light of the proximity of Mauritius with other States, such as Reunion Island (France's territory), Madagascar and Seychelles with which Mauritius shares joint maritime zones, cooperation may be envisaged either through treaty or agreement similar to the one of Australia and France to reinforce enforcement action and surveillance at sea.

Compensation

177. One important matter that should be remembered by those deciding to launch a hot pursuit against an alleged offender of the law of a coastal State is that if it is found that the hot pursuit was not justified, Article 111(8) of UNCLOS provides for compensation for any loss or damage arising from such action. This issue should be clearly referred to in the legislation as international law does to cater for the exclusion of liability for wrongful pursuit.

[239] Randall Walker, above n 214, 203.

178. Compensation for damage may also be triggered where interception with a foreign ship on the high seas is done without justification, as provided for in Article 110(3)[240] of UNCLOS. Similarly, Article 304[241] of UNCLOS also makes provision for 'responsibility and liability damage' which the State of the foreign ships may have recourse to in case of unjustified hot pursuit in view of preventing any abuse from coastal States. The famous case ***'I am Alone'* (1935)** (Canada vs. USA)[242] provides an example of the compensation due as a result of the unjustified exercise of the right of hot pursuit. The Court, in ***I am Alone,*** held that the pursuit by the US vessel was not a hot pursuit and hence the opening fire was not justifiable. Thus, the USA was ordered to pay compensation to Canada.

179. However, it should be noted that only the State concerned may bring an action for damages in relation to the wrongful detention of its ship following an unjustified right of hot pursuit.

180. In light of the above, it is accepted that the present FMRA needs drastic amendments not only to cater for the relevant organisations to be vested with the necessary powers by Mauritius but also makes clear the different provisions of UNCLOS for a hot pursuit to be justified. There is an urgent need to clarify the law in relation to the issue of hot pursuit as without a law that is consistent with UNCLOS, arrest and prosecution of foreign vessels that violate the laws protecting the adjacent waters of a coastal State may not be possible, which, it is submitted, may have the resulting effect of furthering violations. If the coastal State, through its enforcement agencies, can prevent foreign vessels from fleeing to the high seas, and bring to justice those responsible for violations, it is obvious that the coastal State's deterrence effect will boost up.

181. Another issue that requires attention under the domestic legislation of Mauritius is the issue of piracy which is considered as a crime of universal jurisdiction under UNCLOS. Mauritius has recently embarked on the fight against piracy by assisting the international community in the prosecution of pirates captured by foreign naval forces following its

[240] Article 110(3) of UNCLOS: - If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
[241] *Article 304 of UNCLOS - Responsibility and liability for damage.*
[242] Arif Ahmed, above 39,

proliferation in the Gulf of Aden and extending to the Indian Ocean. It is, therefore, necessary to analyse the different provisions of UNCLOS as well as the relevant national legislation dealing with the issue of piracy in order to determine whether Mauritius is complying with its international obligations.

Piracy

182. The crime of piracy perpetrated by the Lukkas people on the coast of the modern Turkey[243] may be traced back to the 14th centuries BCE but the phenomenon is still alive today. Fortunately, up to now no case of piracy has been reported involving Mauritian vessels but the geographical location of Mauritius, particularly, its vicinity with the coast of Somalia is an important factor to consider and as such, the possibility for piracy attacks should not be ignored.

Piracy as a Transnational Crime

183. Even though the crime of piracy may affect a particular region, as was the case along the coast of Somalia in the Gulf of Aden, however, the phenomenon cannot be assimilated as an issue in respect of one region only.[244] Piracy may be concentrated in specific high-risk areas, which include the Gulf of Guinea in West of Africa, the coast of Bangladesh, the South China Sea, south-east Asia, South America and Africa and also in the Indian Ocean.[245] In fact, piracy affects the shipping world as a whole and is considered as a transnational crime.[246] It is on the basis of such transnational nature that the perpetrators of piracy are known as the 'enemy of all mankind'. Therefore, as provided by Article 100 of UNCLOS, there is a duty on all States to cooperate in the repression of the crime of piracy.

[243] Anete Logina, The International Law related to Maritime Security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery against Ships, *World Maritime University*, 1.
[244] Leticia M. Diaz & Barry H. Dubner, 'An Examination of the Evolution of Crime at Sea and the Emergence of the Many Legal Regimes in Their Wake', (2008).*34 N.C. J. INT'L L.* 523.
[245] R. R Churchill and A. V Lowe, above n 29, 209.
[246] Mikhail Kashubsky, 'Can an Act of Piracy be Committed against an Offshore Petroleum Installation', (2012) 26 *A&NZ Mar LJ*, 163.

The Nature of the Crime of Piracy

184. Piracy involves two types of offences; namely theft and kidnapping. In case the 'victim' of the attack is the vessel, the latter is either the subject of the theft or its cargo. The second is kidnapping, which involves the hostage-taking of either the crew and passengers or the vessel against payment of ransoms.

Reported Piracy Attacks and their Incidence

185. The number of reported cases of piracy off the coast of Somalia has drastically dropped since the upsurge in 2011 with 176 piracy attacks to 0 in 2020.[247] However, it must be stated that piracy has not been eradicated and thus the danger still lies in wait in certain regions. According to data from the International Maritime Bureau (IMB), there have been 22 incidents in the Gulf of Guinea in West Africa in 2020 with 130 crew members being kidnapped. The figure is the highest number of crew members ever kidnapped as 2019 had recorded 121 crew members kidnapped in 17 incidents.[248]

186. Piracy also threatens maritime trade and as such may affect the world. It has a direct impact on the cost of shipping, with an estimated cost of $ 10 billion yearly on global trade.[249] As a result of the surge in piracy attacks, insurance premiums have increased from US $ 20,000 in 2008 to US $ 150,000 in 2009.[250] Ships have been compelled to take alternative routes to that of the Gulf of Aden in order to avoid attacks from Somali pirates. Hence, in order to proceed to Europe and North America, ships have been urged to proceed around the Cape of Good Hope.[251] Obviously, such a longer journey would significantly increase the cost of shipping.

187. The above facts and figures indicate the impact which piracy attacks may have on shipping and how it may affect every State. It is on this basis that every State has an

[247] https://eunavfor.eu/
[248] https://www.icc-ccs.org/index.php/1305-latest-gulf-of-guinea-piracy-attack-alarming-warns-imb
[249] Milena Sterio, Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius 4(2) *Amsterdam Law Forum 104* (2012), 106.
[250] Maritime Piracy *https://www.unodc.org/documents/data-and-analysis/tocta/9.Maritime_piracy.pdf*, 198.
[251] *Ibid.*

obligation to assist the international community in the fight against the long-lasting 'enemy of mankind'. With the above in mind, each State has to ascertain that it is prepared to face the challenge and consider the necessity to review its law in order not only for such law to be in line with international norms, including compliance with international obligations but also to ascertain that its law is able to deal effectively with the issue of piracy. Hence, it is now necessary to consider the domestic legislation dealing with piracy in view of ascertaining whether it may effectively address the above issues.

Piracy in Domestic Legislations

188. As far as Mauritius is concerned, the crime of piracy was previously found in the Merchant and Shipping Act 2007 (MSA), namely, in section 213 of the Act. However, since the enactment of the MSA, no prosecution has ever been conducted under the said Act. There were also provisions in the MSA relating to 'hijacking and destroying ships' as well as 'endangering safe navigation', as per sections 214 and 215 of the said Act respectively. Again, no prosecution has ever been brought in relation to either of these two offences. These provisions have been repealed with the enactment of the Piracy and Maritime Violence Act[252], (PMVA). The new provisions in the PMVA appear to be an attempt to circumvent the provisions of Article 105 of UNCLOS relating to the restriction for the prosecution of pirates by third State. Thus, despite the nationality of the suspected pirate or the victim's vessel, as per the PMVA, universal jurisdiction may be exercised by the court of Mauritius. This issue will be dealt with in detail below.

189. In addition, the MSA neither caters for any transfer provisions in relation to captured pirates by foreign naval ships to be prosecuted in Mauritius, nor for the transfer of convicted pirates to another State. The PMVA, (see amendments made to the NCG Act and Police Act as per section 11(6) and (7) respectively), has included provisions relating to "*act of piracy or maritime attacks*".

[252] Piracy and Maritime Violence Act 2011, Gov't Gazette of Mauritius No. 112 of Dec. 17, 2011 [hereinafter PMVA], *available at* http://attorneygeneral.gov.mu/English/Documents/Recents%20Acts%20and%20Bill/2011/BXXVIIIof2011.pdf.

The Enabling Provision for Piracy under International Law

190. Article 101 of UNCLOS is an enabling provision of international law for member States to criminalise the crime of piracy. It sets out the legal parameters for its ratifying members to validly criminalise and punish the crime of piracy.[253] The main provisions dealing with piracy, namely, Articles 100 to 107 of UNCLOS, are usually reflected and given effect in the national legislation, albeit with certain modifications to meet the system of law of the State[254]. Hence, the manner in which a particular State will domesticate the international provisions into its national law will not necessarily be universally the same. This is due to the specific legal system of the State concerned.

191. In the Mauritian context, it can be seen that the definition of piracy under Article 101 of UNCLOS has been incorporated in section 3(3) of the PMVA with only minor modifications. In the light of the incorporation of the crime of piracy, as defined under UNCLOS, in the domestic legislation of Mauritius, issues related to these provisions under UNCLOS are deemed to occur. To address these issues, it is, therefore, necessary to analyse the different provisions of UNCLOS dealing with the crime of piracy.

Piracy under UNCLOS

192. As per the definition of piracy under Article 101 of UNCLOS, acts of illegal violence committed within the territorial sea, internal waters and archipelagic waters, as a matter of international law, do not fall under the concept of piracy. According to the International Maritime Organization (IMO), such offences are classified as armed robbery against ships,[255] being given that they are committed in the area of the sea where sovereignty is exercised by the coastal State. Hence, the entitlement of the coastal State to prosecute such offences under its domestic legislation.

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[253]Douglas Guilfoyle and Rob Mc Laughlin, 'The Crime of Piracy', *Downloaded from https://www.cambridge.org/core,*, 389.
[254]*Ibid*, above n 248, 393.
[255] Robert Beckman, 'International Cooperation to Combat Piracy and Armed Robbery against Ship', *(2010), World Oceans Day - Our oceans: opportunities and challenges*, 1

Elements of Piracy under UNCLOS

193. As per Article 101 of UNCLOS, the definition involves satisfying a number of elements for an act to fall under the crime of piracy. Thus, an act may be qualified as piracy where the following conditions are met. It must be:

(i) an '*illegal*' act of '*violence or detention, or depredation*';
(ii) committed for '*private ends*';
(iii) by the crew or the passengers of a '*private ship*' and directed,
(iv) '*on the high seas*' against *another ship* or person or property on board of such ship or a ship or person *'in a place outside the jurisdiction of any State'*.

194. These components require some clarifications for a proper understanding of the issues related to piracy under UNCLOS.

Illegal Act of Violence

195. Although UNCLOS does not define the word *'violence'* in Article 101 but usually the term refers to physical harm, threatened or actual, against an individual on the ship. Hence '*violence*' may cover any illegal use of force without necessarily being applied severely or culminating into a particular level of physical injury or damage. As far as violence against the ship is concerned, it is more appropriate to consider the use of the word *'depredation'* which is usually defined as plunder, pillage, robbery or damage because of its destructive nature.

196. Similarly, *'detention'* does not need to be accompanied by any violence as in the case where the crew or passengers show no resistance without any form of physical violence being exercised by the pirates. However, being locked up in a place and thereby being deprived of their freedom of movement, such an act would be sufficient to constitute detention.[256]

[256] *Ibid*, above n 248, 393.

197. As far as the word *'illegal'* is concerned, it will usually accompany the act, being given that *'illegal'* means not authorised by the State as it is for the latter to determine which act may be illegal or not. For example, an act of violence despite its *'illegal'* nature may be considered self-defence in the national law of the prosecuting State and as such the offender may be exempted from the offence of piracy.

198. The provisions of UNCLOS refer to *'any illegal acts of violence'*, with the word *'acts'* in the plural form. However, even if reference is made to *'acts'*, this does not imply that several acts are required to constitute the crime of piracy. One act may be sufficient, which can either be in respect of violence or detention or theft. Therefore, each of these piratical acts stands on its own and as such needs not to be interpreted cumulatively.[257]

199. It, therefore, suffices that the act is an illegal act of violence or detention or theft or any combination of any of these acts. An example will be the firing of a gun at an individual or towards a ship for the purpose of boarding, and as such may be sufficient to establish the element of *'act of violence'*.

Interpretation of the term "Private Ends"

200. The term *"private ends"* in the definition of piracy under UNCLOS indicates the aims of the person who carries out an act but not the motives of such act. Although the crime of piracy is committed for financial gain and as such, it is considered an economic crime[258] but there are also substantial contentions as to the meaning to be given to *'private ends'*. On the one hand, some authors opined that the term *'private ends'* should be against the interests of private parties and as such this rules out an act committed on the basis of political motivation. On the other hand, others expressed the view that if the approval of the State is missing, it is therefore meant for *'private ends'*. Moreover, it has to be pointed out that during the preparatory sessions in 1955, in relation to Article 15 of Convention on the High Seas, the International Law Commission (ILC), considered the term *'private ends'*. According to the ILC,[259] the term *'private ends'* is used to distinguish

[257] *Ibid*, above n 248, 394.
[258] Mikhail Kashubsky, above n 241, 164.
[259] *Yearbook of the International Law Commission* 1955, 40–43

piratical acts from activities related to civil wars, war crimes and other revolutionary incidents. Therefore, in the absence of such issues related to civil wars, terrorist attacks or State-sponsored attacks, the acts of the offenders would be deemed to be private acts.[260]

201. However, be what it may, in the absence of proof of the element of *'private ends'*, the offence of piracy falls outside the purview of UNCLOS,[261] as explained below in the case of ***Achille Lauro***. In such a case, other offence such as 'maritime terrorism' or 'armed robbery' may be contemplated. However, it should be pointed out that the aim of piracy is to obtain economic gains whereas that of maritime terrorist is to achieve political objectives. Moreover, the distinction between the term 'piracy' and other forms of violence at sea, such as "maritime terrorism" or 'armed robbery', is that universal jurisdiction can be exercised only in relation to piracy.

Against another Ship or Persons on the other Ship

202. Although the above element may, at first glance, appears simple but can be problematic as will be explained below in relation to the commission of the offence of piracy from one ship to another. This issue is considered under the 'two-ship rule'.

Two-Ship Rule: 'Pirate and Victim'

203. The definition of piracy under UNCLOS includes an act committed by the crew or the passengers of **a private ship** directed against **another ship**, or against persons or property on board of **such ship**. This is often referred to as the "*two-ship rule*", one is the pirate's vessel and the other one is the victim's vessel. The rule means that the attack must be carried out from one ship to another. In case only one ship is involved, although acts of violence have occurred on the high seas, the crime of piracy is excluded. The requirements of two ships have been explained in the case of ***Santa Maria***[262] in 1961 and

[260] Stuart Kaye, 'Legislative Responses to Maritime Crime in the Western Indian Ocean: The State of Play in East Africa', 14.
[261] Leticia M. Diaz & Barry H. Dubner, above n 236, 535.
[262] R. R Churchill and A. V Lowe, above n 29, 210.

Achille Lauro in 1985[263]. In both cases, the hijackers boarded the ship as passengers/tourists earlier at a port of call and carried out the attack later whilst the ship was on the high seas with passengers being taken as hostages[264].

204. Although the aim of the perpetrators in the case of ***Achille Lauro*** was political in nature but the issue of two-ship rule was also considered. The rationale of the two-ship rule, as per the case of ***Achille Lauro***,[265] is that a ship is under the sovereign jurisdiction of its flag State and therefore any offence committed on board of the ship falls within the domestic jurisdiction of the flag State to the exclusion of international jurisdiction. Therefore, when one ship is involved and an attack committed on board of that ship, such act will be regulated by the domestic legislation of the flag State. This is so particularly when the ship is on the high seas where the exclusive sovereign jurisdiction of the flag State prevails. However, if all the other elements are satisfied, it is submitted that piracy is an exception to the general rule that ships on the high seas enjoy the exclusive jurisdiction of their flag State.[266]

The Requirements of High Seas or 'in a Place Outside the Jurisdiction of any State'

205. As per the definition under UNCLOS, piracy is an act committed on the *'high seas'* or *'in a place outside the jurisdiction of any State'*. It is therefore imperative to assess the status of *'high seas'* as well as that of *'a place outside the jurisdiction of any State'* for the purpose of establishing the element of the crime of piracy as far as international law is concerned.

206. As per Article 86 of UNCLOS, the provisions related to the *'high seas'* apply to all parts of the sea except to the EEZ, the territorial sea or the internal waters of a State. However, the exclusion of the EEZ is qualified by the following in the same Article: *"[T]his article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58"*. In addition, Article 87of UNCLOS makes reference that *the 'high seas'* are open to all States. Moreover, while Article 88 is to the

[263] Leticia M. Diaz & Barry H. Dubner, above n 239, 535.
[264] R. R Churchill and A. V Lowe, above n 29, 210.
[265] Anete Logina, above 238, 30.
[266] Robert Beckman, above n 250, 1.

effect that the *'high seas'* are reserved for peaceful purposes, Article 89 of UNCLOS on the other side purports to prevent States to extend their sovereignty to the *'high seas'*. All these provisions show that the high seas are not subjected to the jurisdiction of a particular State but are meant for peaceful use by all States.

207. Taking into consideration the legal status and the limits of the territorial sea under Articles 2 and 3 respectively of UNCLOS, the *'high seas'* may be defined as the body of waters stretching beyond the 12-n.m territorial sea of coastal States.[267] Thus, whilst reference is made that the piratical act must be directed on *'high seas'* in Article 101(a)(i) of UNCLOS, this does not per se exclude piracy in other maritime zones. Obviously, where the State enjoys sovereignty in its internal water, territorial seas or archipelagic waters, the crime of piracy, which is a crime of universal jurisdiction, is excluded. However, as far as other maritime zones, such as the contiguous zone or the EEZ are concerned, the situation is different. This is because a State enjoys only sovereign rights in relation to certain activities in these zones while other States continue to enjoy the freedom of the high seas as specifically referred in Article 86 of UNCLOS to the effect that it *"does not entail any abridgement of the freedom enjoyed by all States in the EEZ"*, albeit that such freedom is subject to the sovereign rights of the coastal State. Therefore, the application of Articles 87, 88 and 89 of UNCLOS may be relevant in assessing the crime of piracy in the other maritime zones, including the EEZ and the contiguous zones. Thus, it may be submitted that the zones falling outside the exclusive sovereignty of a coastal State are considered as *'high seas'* and as such the offence of piracy may also be committed within these maritime zones.[268] The issue of piracy in the contiguous zone and in the EEZ will be discussed further below.

208. As far as the phrase *"a place outside the jurisdiction of any State"* is concerned, as per the Commentary to the Draft Articles of the ILC,[269] it appears that it relates to islands constituting *'terra nullius'*, that is, unoccupied territory belonging to no State, such as Antarctica. This is what was said in the Commentary of the ILC on this issue:

[267] Milena Sterio, above n 244, 108
[268] Douglas Guilfoyle and Rob Mc Laughlin, above n 248, 397.
[269] International Law Commission, *Report of the International Law Commission to the General Assembly* [8th Session 23 April–4 July 1956] [1956/II] 8 UNYBILC 253, 282.

> *"In considering as 'piracy' acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction."*[270]

209. In the light of the above, it may be submitted that the phrase *'a place outside the jurisdiction of any State'* is not related to any area of the sea at all.[271] It may also be argued that the provision of piracy in relation to Article 101(a)(ii) of UNCLOS appears to have been included for the purpose of dealing with the shores of an unoccupied territory or an island that may be created but not yet claimed by any State. Therefore, Article 101(a)(ii) may be resorted to in order to prevent a pirate ship attacking the passengers of a wrecked on the shore of such unclaimed island. Thus, such act of violence would meet the crime of piracy under UNLCOS in *'other place[s] outside the jurisdiction of any State'*.[272]

Piracy in the Contiguous Zone

210. As the contiguous zone forms part of the EEZ and the application of piracy under Article 58(2) of UNCLOS also applies to both the EEZ and the contiguous zone, a separate consideration of piracy in the contiguous zone is not strictly necessary. However, with a view of making a complete picture of the law in this sphere, this paper will also deal with the issue of piracy in the contiguous zone.

211. On the one hand, the contiguous zone is considered as an area of the sea that is contiguous to the territorial sea and in which the coastal State is entitled to exercise limited control in relation to certain activities, such as the prevention of infringement of its customs, fiscal, immigration or sanitary laws, see Article 33 (1)(a) of UNCLOS.[273] On the other hand, the other States enjoy a variety of freedoms, including freedom of navigation in

[270] Mikhail Kashubsky, above n 241, 167.
[271] *Ibid*, above n 241, 167.
[272] Douglas Guilfoyle and Rob Mc Laughlin, above n 248, 397.
[273] Leticia M. Diaz & Barry H. Dubner, above n 239, 544

the contiguous zone. It is also worth to note that in its analysis of the law of the sea, the ILC considered that the contiguous zone is seen as part of the regime of the high seas[274] due to the fact that it partly overlaps the high seas. Moreover, in its recommendations, the ILC clearly specified that the contiguous zone would be within the high seas and 'contiguous' to the territorial sea. Hence, the contiguous zone is described as a 'belt of the high seas' where the coastal State may only exercise rights instead of sovereignty. It is thus part of the high seas.[275] The recommendations of the ILC were implemented in the 1958 Convention on Territorial Sea and Contiguous Zone and the zone was codified in Article 24 of the said Convention.[276] Subsequently, the contiguous zone was recognised in UNCLOS under Article 33, which, it must be said, is a replica of Article 24 of the 1958 Convention on Territorial Sea and Contiguous Zone.[277]

212. The issue of high seas was recently considered by the Supreme Court of Mauritius following its first piracy case, particularly in relation to the limit of high seas. In the case of ***Director of Public Prosecutions v Ali Abeoulkader Mohamed & Ors [2015 SCJ 452], (DPP v A. A. Mohamed)***, the Appellate Court found that "*the high seas start outside the territorial seas, i.e., at the point that is 12 NM from the baseline of the coastal State*". Moreover, the Court further quoted the following from the book of Ian Brownlie, Principles of Public International Law, 4th Edition at page 232: "*At the outset, it must be emphasised that the term "high seas" has traditionally encompassed all parts of the sea that are not included in the territorial sea or in the internal waters of a State", and therefore comprehends contiguous zones and the waters over the continental shelf and outside the limit of the territorial sea*".

213. In the light of the reasoning of the Supreme Court of Mauritius in ***DPP v A. A. Mohamed, (supra)***, it does not appear that any doubt exists as to whether piracy may occur in the contiguous zone.[278] The same issue needs to be considered in relation to the EEZ in the light of the duties and obligations of the coastal States and the rights of other States.

[274] Donald R Rothwell and Tim Stephens, above n 24, 80.
[275] Leticia M. Diaz & Barry H. Dubner, above n 239, 544.
[276] Donald R Rothwell and Tim Stephens, above n 24, 81.
[277] *Ibid*, above n 24, 82.
[278] Douglas Guilfoyle and Rob Mc Laughlin, above n 248, 397.

Piracy in the EEZ

214. The issue as to whether piracy may take place in the EEZ is based purely on the interpretation of the relevant provisions dealing with the EEZ. Article 58(2) of UNCLOS, in relation to the legal status of the EEZ, clearly specifies: *"Articles **88 to 115** and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part"*. As Article 58(2) specifically refers the application of the *'Article 88 to 115'*, to the EEZ and being given that the matters related to piracy are found in Articles 100 to 107, that is, they fall within *'Article 88 to 115'*, this means that piracy will also apply in the EEZ.[279]

215. It has to be stated that in the case of ***DPP v A. A. Mohamed (supra),*** the Appellate Court based its reasoning on Article 58(2) of UNCLOS to say that the said provision expressly applies to the exclusive economic zone and held that *"the definition of high seas in international law is that it includes the EEZ for the purposes of repressing and prosecuting piracy"*.

216. The high seas are open to all States subject to the limited sovereign right in relation to the EEZ.[280] It may also be argued that on the basis of Article 100 of UNCLOS in respect of the duty imposed on all States to cooperate in the suppression of piracy and Article 105 of UNCLOS, which enables any State to arrest pirate ship not only on the high sea but also "in any place outside the jurisdiction of any State", and as such, it may be submitted, this would mean outside the territorial sea of the State, thus, piracy may occur in the EEZ.

217. Therefore, the issue as to whether piracy may be committed in the EEZ is now settled as it is clear that the rules on piracy under UNCLOS apply to attacks on a ship outside the

[279] Barry Hart Dubner, 'Human Rights and Environmental Disaster – Two Problems that Defy the Norms of the International Law of Sea Piracy', Vol. 23, No. 1, *Syracuse Journal of International Law*, 11-12.
[280] Leticia M. Diaz & Barry H. Dubner, above n 239, 544.

maritime zones in which the State enjoys no sovereignty, and this also includes the EEZ[281] as well as the contiguous zone.

218. Before proceeding to consider and analyse the different provisions of the domestic legislation dealing with the issue of piracy in the light of the provisions of UNCLOS discussed above, it is important to have a clear picture leading to the enactment of the PMVA as well as its purpose.

Conferment of Jurisdiction on Mauritius to Prosecute Pirates Captured by Foreign Warships

219. The rapid rise in the number of piracy attacks in the Gulf of Aden in 2008 has prompted the intervention of naval forces comprising of American, French, Russian, Indian and British warships,[282] among others, to join their efforts to curb down the phenomenon. As a result of such interventions, the arrest, detention and prosecution of Somali pirates needed immediate attention from the international community. The decision for prosecuting pirates was aimed at abandoning the previously catch-and-release policy[283] of arrested pirates. The impunity of captured pirates in relation to the catch-and-release policy has the effect of encouraging the pirates to get back in the business. Therefore, capturing and prosecution should work in pair and play a vital role in the fight against piracy.[284] This is an important step to deal effectively with the crime of piracy as it is crucial to send the proper signal in view of deterring and dissuading younger Somalis from joining piracy.

220. However, most of the States in the region affected by the surge in piracy attacks were unprepared to deal with the issue of arrested pirates. Mauritius and a few other countries in the regions were solicited by the United Nations (United Security Council Resolution)[285] to participate in the global fight against Somali pirates. The urgency to deal with the issue required the review of the national legislation to enable the

[281] Robert Beckman, above n 250, 1.
[282] Milena Sterio, above n 244, 106.
[283] *Ibid*, above n 244, 108.
[284] Sulakshna Beekarry (2013), 'Assessing Current Trends and Efforts to Combat Piracy', *46 Case W. Res. J. Int'l L. 161*,164.
[285] Security Council resolution 2015 (2011) of 24 October 2011.

prosecution of pirates arrested by foreign naval forces on the high seas, particularly in the light of Article 105 of UNCLOS which confers jurisdiction on the courts of the State which carried out the seizure and decide upon the penalties to be imposed. This issue will now be dealt with under the heading of the **'Non-Matching Jurisdictional Rules'**.[286]

Non-Matching Jurisdictional Rules

221. One of the main obstacles to bring pirates to justice outside the jurisdiction of the State which effected the capture is to be found in Article 105 of UNCLOS. As per the said provision, there is a requirement of the court of the State, which had carried out the seizure, to decide the penalties to be imposed. A reading of Article 105 of UNCLOS clearly shows that jurisdiction is conferred on the court of the State which had made the seizure and hence to prosecute the pirates.

222. UNCLOS is silent as to whether the right to prosecute pirates is transferrable to a State other than the capturing State. Debates on this issue have been numerous. One school of thought considers that UNCLOS does not prohibit[287] such transfer to a third State. Thus, L. Azubuike is of the view that jurisdiction over pirates is universal and as UNCLOS has codified customary law; prosecution of pirates by another State is likewise universal. Others opined in the contrary,[288] such as Kontrovick who argued that the *"drafting history reveals that this provision was intended to preclude transfers to third-party states"*.[289]

The Rationale for Conferment of Jurisdiction

223. An act of piracy may involve different stakeholders, such as the ship may be flying under a flag of convenience, the captain and his crew may be both from different States, the owner of the ship may be from another State, the naval force involved in the seizure may be of a different State, the pirates and the victims of the crime of piracy may also be from

[286] Milena Sterio, above n 244, 111.
[287] L. Azubuike, 'International Law Regime Against Piracy', (2009) 15 *Annual Survey of International and Comparative Law, Pg.* 54-55.
[288] E. Kontorovich, 'International Legal Responses to Piracy off the Coast of Somalia', (2009) 6 *ASIL Insights*.
[289] *Ibid*, above n 280.

different State. Generally, the principles of nationality and territoriality are the main attributions for the institution of prosecution. In the light of the panoplies of nationalities or States associated with the issue of piracy, the attribution to piracy as a universal crime is perfectly sound. Similarly, the rationale for the provisions of UNCLOS to confer jurisdiction on the capturing State for the exercise of universal jurisdiction for the prosecution of pirates on behalf of the international community[290] is also legally sound. Indeed, there are valid reasons for enabling the court of the State which had seized and arrested the pirates to adjudicate on the matter. These may be in relation to the difference between the system of law for the investigation, collection of evidence and prosecution in the court of the State that had captured the pirates. In addition, prosecution in the State that had captured the pirates may also prevent delay or issue in respect of language barrier. The conferment of universal jurisdiction in relation to the crime of piracy and jurisdiction to undertake prosecution by the court of the capturing State have created a dilemma.

224. In the light of this dilemma, it is now necessary to consider and analyse the different provisions of the PMVA to assess whether they are in line with UNCLOS and also whether there is any need for amendments to address the issues disclosed. The present analysis will consist of two parts, the first will address general issues pertaining to the PMVA while the second part will carry out a detailed analysis in relation to substantial issues in the Act.

Piracy and Domestic Legislations: General Issues

225. Although Mauritius has not been directly affected by the piratical acts committed by Somali pirates, a new Act, the Piracy and Maritime Violence Act,[291] (PMVA), has been enacted to address the issue of taking over of arrested pirates and their prosecution. Generally, jurisdiction for the prosecution of piracy by national courts arises as a result of a nexus between the attack and the State. The nexus may be related to the fact that the victim ship is flying the flag of that State, or its nationals owned the ship being subject

[290]Milena Sterio, above n 244, 111.

[291] The Piracy and Maritime Violence Act 2011, Act No. 39 of 2011, Proclaimed by Proclamation No. 6 of 2012 and is in force w.e.f 1st June 2012.

to the act of piracy or its nationals have been the victims of such piracy attack[292] or the offence has been committed within its jurisdiction. It is as a result of such a nexus that the State is entitled to prosecute non-national pirates. The new Act specifically empowers the prosecution authorities in Mauritius to circumvent the said 'nexus' and to institute criminal proceedings against non-national pirates in view of assisting the international community in the fight against piracy.

226. Although the PMVA[293] has been drafted on the UNCLOS model dealing with the issue of piracy, however, the definition given in the new Act to include the meaning to be given to 'maritime attack', is a feature that is absent in UNCLOS. The Act has also incorporated the provisions such as "hijacking and destroying of ships," (section 214 of MSA) or "the act of endangering safe navigation of ships," (section 215 of MSA), from the Merchant Shipping Act 2007. It appears that **neither geographical restriction nor nationality link is imposed in relation to the offence of hijacking a ship, as per section 4(3)[294] of the new Act**. Thus, the Act empowers prosecution of offences such as hijacking and endangering safe navigation which would otherwise require universal jurisdiction.[295] These appear to be concepts that can be found in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).[296]

227. Moreover, the PMVA also encapsulates the power of prosecution in respect of offenders delivered by the Master[297] of a vessel. This provision may be seen as an attempt to curtail the exclusive sovereignty of the flag State to undertake prosecution in relation to issues arising on a ship flying its flag.[298] Hence, any person suspected of having committed an offence in relation to piracy and maritime attacks under section 3, hijacking of ships under section 4 and endangering safe navigation under section 5 of the PMVA is amenable for prosecution under section 6 upon the Master delivering the offender to the

[292] Robert Beckman, above n 250, 1.
[293] Piracy and Maritime Violence Act of No. 39 of 2011
[294] Section 4(3) of the PMVA: - Subject to subsection (4), subsections (1) and (2) shall apply –(a)whether the ship referred to in those subsections is in Mauritius or elsewhere; (b)whether any act referred to in those subsections is committed in Mauritius or elsewhere; and (c) irrespective of the nationality of the person doing the act.
[295]Stuart Kaye, above n 255, 11.
[296] Adopted 10 March 1988; Entry into force 1 March 1992; 2005 Protocols: Adopted 14 October 2005; Entry into force 28 July 2010.
[297] Section 6 of the PMVA: -Master's power of delivery.
[298] Stuart Kaye, above n 255, 11-12.

Mauritian authorities. The provision is quite broad in that there is no restriction in relation to the nationality of the offender, or the flag State of the ship.

228. What is more important in the Act is that it specifically allows the transfer of pirates captured by foreign naval forces for trials in Mauritius. Finally, the Act also caters for the transfer of convicted pirates to other States, which may include Somalia.[299] In fact, two agreements have been made in May 2012 for the transfer of convicted Somali pirates back to their homeland for serving their term of imprisonment inflicted by the Mauritian courts.[300] Moreover, provisions have been made in the agreements to ensure the protection of human rights, namely the right to life and the prohibition against torture and inhuman or degrading treatment of the convicted pirates.[301] The **PMVA represents a multipurpose legislation in respect of the types of offences that it encompasses and may be a very useful instrument in the fight against maritime crimes**.

229. However, one of the issues that may be observed in the **PMVA is that there is no provision in respect of preparatory offences**, particularly where the naval forces are in presence of evidence in respect of planning to commit the offence of piracy. Section 6(1)(c) of the PMVA is restricted to the delivery of Master and does not include arrest effected as a result of an investigation. Although the Criminal Code (Supplementary) Act of Mauritius encapsulates the offence of conspiracy in section 109,[302] however, it is submitted that this may be one of the specific recommendations that could be brought to the existing law (PMVA) to cater for such situations.[303]

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[299] Milena Sterio, above n 244, 119.
[300] Sulakshna Beekarry, above n 279, 169.
[301] *Ibid*, above n 279, 170.
[302] Section 109 of the Criminal Code (Supplementary) Act: - Conspiracy
(1) Any person who agrees with one or more other persons to do an act which is unlawful, wrongful or harmful to another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years and to a fine not exceeding 100,000 rupees.
(2) Where the agreement is to commit murder, manslaughter, an international crime as defined in the International Criminal Court Act 2011 or an offence related to terrorism under the Prevention of Terrorism Act, the person charged shall, on conviction, be liable to the same penalty as would have been applicable to an accomplice.
[Amended 27/11 (cio 15/1/12).]
[303] Milena Sterio, above n 244, 122.

230. In addition, other matters that may require to be added in the Act are the **prosecution of the organisers who make investments in the project of piracy** and the **necessity to have extradition treaties** signed with other States in order to facilitate prosecutions of pirates in the absence of MoUs with a particular capturing State. It has to be highlighted that the court of Mauritius is empowered under section 4[304] of the International Criminal Court Act to prosecute offences not only related to genocide but also those related to a person who contributes to the commission of an international crime by a group of persons acting with a common purpose. Hence, as piracy is an international crime, and as such, those who contribute in the commission of such crime may also be brought to justice under the said provision.

231. It is also clear that the provisions of the **new Act have been drafted on the model of UNCLOS not only to reflect the customary international law but also to address some of the lacunae in UNCLOS**. The recent decline of piracy attacks in the Gulf of Aden and also in the Indian Ocean is due to a number of countermeasures put in place at the international level. It appears that the decision to prosecute captured pirates and end of the 'catch and release' policy may be one of the main causes to explain this decline.

Substantial Issues related to the PMVA

232. The provisions of Articles 100-107 of UNCLOS have been incorporated in the Schedule to the PMVA. Section 3(3) of the PMVA provides for the definition of 'act of piracy'. As per the wording of the law used in section 3(3) of the PMVA, the elements are similar to those under Article 101 of UNCLOS. These elements have also been defined by the Supreme Court in the case of ***DPP v A. A Mohamed (supra).*** Thus, as per the said case, the elements constituting the crime of piracy under the PMVA may be summarised as follows: (1) an act of violence, detention or depredation; (2) committed on the high seas;

[304] Section 4(2) of the ICCA provides: Any person who – (a) directly and publicly incites others to commit genocide; or (b) contributes to the commission of an international crime by a group of persons acting with a common purpose, where such contribution is intentional and is either – (i) made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the International Criminal Court; or (ii) made in the knowledge of the intention of the group to commit the crime, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 45 years.

(3) for private ends; and (4) by the crew or passengers of one private vessel against those of another vessel.

Act of Piracy and Maritime Attack

233. As far as the elements of the offence of piracy under the PMVA are concerned, it is submitted that the same principles will apply as discussed above in relation to UNCLOS. However, the following issues related to certain provisions in the PMVA need to be analysed.

The Purpose of Defining the High Seas

234. One of the issues is in relation to the element of *'high seas'*. In fact, it may be observed that the words *'high seas'* are absent in the meaning of 'maritime attack' in the PMVA. Moreover, it also appears that by excluding *'high seas'* in the definition of 'maritime attack', the drafters of the law intend to distinguish the latter from the crime of piracy. Hence, the offence of 'maritime attack' is the criminalisation of the illegal act of violence committed within the territorial sea or the internal, historic and archipelagic waters of Mauritius.

Powers for Arresting Pirates

235. Section 3(2) vests powers of the State in a police officer. As per Article 105 of UNCLOS, the powers of seizure and arrest of pirates are vested in every State. However, it may be argued whether such powers as worded in section 3(2) of the PMVA are similar and aimed to achieve the same purpose as those provided under Article 105 of UNCLOS.

236. Section 3(2)[305] of the PMVA provides that "*a police officer may –(a) on the high seas or in the territorial sea, or the internal, historic and archipelagic waters of Mauritius; (b)*

[305] Section 3(2) of the PMVA:- A police officer may –
(a) on the high seas or in the territorial sea, or the internal, historic and archipelagic waters of Mauritius; or
(b) in any other place outside the jurisdiction of a State, stop, board, search, detain or seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, arrest any person suspected of having committed an offence under this Act and seize any property on board which is suspected to have been used in connection with the commission of an offence under this Act, and may use such force as may be necessary for that purpose.

in any other place outside the jurisdiction of a State, stop, board, search, detain or seize a pirate ship…". A reading of the above provision shows that piracy may be committed *"on the high seas or in the territorial sea, or the internal, historic and archipelagic waters of Mauritius"*. This is a marked difference when compared to Article 105 of UNCLOS where it is stated that the arrest of pirates and seizure may be effected on the *'high seas'* or *'in any other place outside the jurisdiction of a State'*. Article 105 of UNCLOS restricts the arrest of pirates to these two specific areas. Contrary to section 3(2) of the PMVA, Article 105 of UNCLOS excludes piracy in the "territorial sea or the internal, historic and archipelagic waters". In fact, section 3(2) purports that the pirate may be arrested *"in the territorial sea, or the internal, historic and archipelagic waters of Mauritius"*. It appears that there is a conflict between section 3(2) of the PMVA and the definition of piracy in Articles 101 and 105 of UNCLOS. In ***Nick M. Columa v The Magistrate of the Intermediate Court [1998 SCJ 485]***, the Supreme Court had this to say in relation to the issue of conflict between the domestic law and international law: *"We fully agree that when a text of the local law is ambiguous and capable of being interpreted in more than one way, the interpretation which brings it in line with our obligations at International law should be preferred to one which brings it in conflict with such obligations"*

237. However, where the wording of the law is clear and unambiguous and does not lend itself to any other reasonable interpretation, despite the above views of the Supreme Court in ***Nick M. Columa (supra)*** to conform to international law, the Court further said "*we may well be confirming the inconsistency of this enactment with international law*". This may be an embarrassing situation for the Court if it were to decide on the above conflict between the wording used in section 3(2) of the PMVA and that of Article 105 of UNCLOS in relation to the arrest of pirates.

238. Moreover, the PMVA appears to make a distinction between an act of violence committed on the *'high seas'* and those committed within the territorial sea, the internal waters or the archipelagic water. However, as per the dichotomy of piracy and maritime attacks, the inclusion of the offence of piracy *"in the territorial sea, or the internal, historic and archipelagic waters of Mauritius"* in section 3(2)(a) of the PMVA does not seem to have any rational basis.

239. It is therefore submitted that **provision relating to section 3(2)(a) of the PMVA may not be in line with international law as it specifically makes reference to the arrest of pirate ship and may be subjected to challenge.** This is an issue that the legislator will have to address urgently before any further prosecution under the Act is contemplated.

Piracy in the EEZ and the Contiguous Zone

240. As far as the definition of '*high seas*' in respect of piracy is concerned, it is interesting to note that section 2[306] of the PMVA defines the term *'high seas'* as having the same meaning as in UNCLOS. Moreover, the definition of '*high seas*' in the PMVA also includes the EEZ. Therefore, for all intents and purposes, an act of piracy committed in the EEZ will meet the requirement of the element of *'high seas'* for constituting the offence of piracy under the domestic legislation. It has to be stated that in the case of **DPP V A. A Mohamed (*supra*)**, one of the reasons for which the trial court dismissed the offence of piracy was related to the definition of '*high seas*' given in the PMVA, which, according to the trial court, is to the effect that the *'high seas'* mean the EEZ and as such, a reference in the PMVA to the EEZ refers only to the EEZ of Mauritius. The trial court concluded that such reference, therefore, excludes the EEZ of Somalia.

241. Such an interpretation seems erroneous both in domestic and international law. On appeal against the decision in relation to that issue, the Supreme Court of Mauritius had the following to say in that connection: - *"the trial Court erred in taking the view that the EEZ under the Act only refers to the EEZ of Mauritius and that as regards Somalia, the EEZ does not form part of the high seas"*.

242. However, the question which arises from the definition of *'high seas'*, as explained above, is whether, by implication, the contiguous zone is an area where the act of violence or depredation or theft can give rise to the crime of piracy. In fact, section 3(2) of the PMVA provides that a police officer may conduct an arrest and seizure of pirates "*on the high seas or in the territorial sea, or the internal, historic and archipelagic waters of*

[306] Section 2 of PMVA: "high seas" –(a) has the same meaning as in UNCLOS; and (b) includes the EEZ;

Mauritius". It may be observed that no reference is made to the contiguous zone in section 3(2) of PMVA. Moreover, the definition given to *'high seas'* in section 2 of the PMVA refers to the same meaning as in UNCLOS; and includes the EEZ. UNCLOS does not define high seas per se but as per Article 86 of UNCLOS, it is stated that the "*provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State*". As it can be seen, no reference is made to contiguous zone. Taking the definition of the '*high seas*' under section 2 of the PMVA and powers given to the police under section 3(2) of the PMVA into consideration, it is submitted that the omission to make reference to the contiguous zone in the above provisions of the PMVA could raise the issue that piracy may not occur in the contiguous zone as far as the domestic legislation is concerned.

243. In order to avoid issues of interpretation, there is a need to include the contiguous zone in the definition of *'high seas'* in section 2 of the PMVA. Hence, this issue will have to be addressed by the legislator, including those that will now be explained in relation to the protection to be afforded to offshore installations in the maritime zones of Mauritius.

Protection of Offshore Installation under International Law and Domestic Legislation

244. Two main issues in respect of the protection of offshore installations will be discussed having regard to both international and domestic law. These are under the headings of "Piracy: Offshore Installation and Two-Ship Rule" and "Piracy: Offshore installation and Sovereignty of Coastal State".

Piracy: Offshore Installation and Two Ship Rule

245. It has to be observed that even though section 15(1)(b)(i) of the MZA[307] provides for the establishment and use of artificial islands, installations and structures, however, neither

[307] Section 15 of MZA:- Rights, jurisdiction and duties of Mauritius in the EEZ
(1) In accordance with international law and in particular Article 56 of UNCLOS, Mauritius has in the EEZ -(a) sovereign rights -
(i) to explore and exploit, conserve and manage the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil; and

the latter Act nor the PMVA caters for the protection of offshore installations, whether fixed or mobile. It has to be stated that the crime of piracy under UNCLOS and by ricochet the PMVA contains major restrictions for the protection of offshore installations. This is due to the restriction related to the definition of piracy in respect of the element of the two-ship rule.

246. In fact, UNCLOS does not set out any definition as to the meaning of a 'ship', however, it is generally clear that offshore installations are not considered as 'ships'.[308] As two ships are required for an act to constitute the crime of piracy, the consequence of this restriction regarding the meaning of piracy under UNCLOS. As explained above, to constitute the crime of piracy, the piratical act must be committed from the pirate ship and be directed against another ship. However as offshore installations fall outside the meaning of ships, it is therefore submitted that an act of piracy is excluded in relation to offshore installations under UNCLOS. This constitutes a major lacuna in the international legal framework in dealing with the protection of offshore installations.[309]

The IMO and the 'Dual Status Approach' (DSA)

247. The IMO has attempted to provide an escape route to deal with the protection of offshore installations in its Resolution A.671 (16) in respect of the safety of such installations. The Resolution is to the effect that when offshore installations are used for the purpose of drilling operation, they are not considered as a ship. However, when they are in transit and not involved in drilling operation, offshore installations may be considered as ships[310]. This is termed as the *'dual status approach'* (DSA) of offshore installations. Thus, as per the DSA, offshore installations in transit and not conducting drilling operation may meet the element of a ship to satisfy the conditions of piracy. However,

(ii) with regard to other activities for the economic exploitation and exploration of the EEZ, such as the production of energy from the water, currents and winds;
(b) jurisdiction as provided for by international law with regard to -
(i) the establishment and use of artificial islands, installations and structures;

[308] Mikhail Kashubsky, above n 241, 167.

[309] *Ibid*, above n 241, 167.

[310] IMO, *Safety Zones and Safety of Navigation around Offshore Installations and Structures*, A Res 671(16), Agenda Item 10, IMO Doc A Res A 671(16), adopted on 19 October 1989.

when they are in operation, they cannot satisfy the element of a ship to constitute the offence of piracy.[311]

248. It is submitted that this state of affairs is quite unusual and needs urgent attention as these offshore installations need protections whether or not they are in transit or in operation. It is, therefore, submitted that there should be adequate provisions in the law to deal with the protection of offshore installations.

249. As far as the PMVA is concerned, 'ship' is defined as *"every description of watercraft, including non-displacement craft, WIG craft and seaplanes, used or capable of being used as a means of transportation over water"*. However, it is not clear whether or not an offshore installation would fall within such a definition in the light of the wording used to define a ship.

250. As per the above definition, it is unclear whether an offshore installation is a watercraft or non-displacement craft that is *used or capable of being used for transportation over water*, particularly when it is conducting its drilling operation. It is arguable that when an offshore installation is in drilling operation, such drilling activity may be considered as being used or capable of being used for transportation. If the drilling activity carries with it the notion that the offshore installation may be considered as a non-displacement craft capable of being used for transportation over water, then such offshore installation may be considered as ship. However, if this is not the case, then it is only when the offshore installation is in transit and not engaged in drilling that it will be considered as a ship. As such the DSA will find its application in relation to offence of piracy committed under the PMVA.

251. However, there is no proper answer as to whether the interpretation given in section 2 of the PMVA of a 'ship' also includes an offshore installation whether fixed or mobile and hence its interpretation needs to be clarified. It is of significant importance that the law must be clear and precise in order to avoid any issue of interpretation as it is trite law that any doubt might be interpreted in favour of the defendant.

[311] Mikhail Kashubsky, above n 241, 168.

252. It also appears from the definition of 'maritime attack' in the PMVA, as per section 3(3)(a)(i) and (ii), the element of two-ship rule will also be applicable to establish the offence of maritime attack. In fact, section 3(3)(a) of the PMVA requires the attack to be from the crew or the passengers ***of a private ship*** *directed* '***against persons or property on board a ship…***', vide 3(3)(a)(i) and 3(3)(a)(ii). Thus, it appears that the requirement of two-ship rule will also be applicable for the offence of maritime attack. This may be a major hurdle to overcome in respect of maritime attacks committed when ships are at berth in ports and that such attacks do not come from crew or passengers from private ship but from mainland.

253. Therefore, this may also be an issue under the domestic legislation as it is clear that the requirement of two ships is repeated in the domestic legislation in relation to the definition of piracy as well as in relation to the maritime attack. This should be an urgent matter for the legislator to address if ever Mauritius intends to embark in the field of oil exploitation.

Piracy: Offshore Installation and Sovereignty of Coastal State

254. Another major issue in relation to offshore installations is related to the maritime zones in which the crime of piracy may be committed. On the assumption that there is no issue as to the definition of ship in respect of offshore installations in transit and not engaged in drilling operation, it is clear that the offence of piracy may be committed on the high seas or in the EEZ or in the contiguous zone, subject to the issue discussed above regarding piracy in the contiguous zone under the PMVA. However, this is not the case when the said installation is in the territorial seas or the internal waters or the archipelagic waters of the State where at the very outset the crime of piracy is excluded under international law[312]. Therefore, as far as offshore installations and the international law are concerned, the crime of piracy is ruled out when it occurs in the maritime zones where the State exercises sovereignty, namely in the territorial sea, internal waters or the archipelagic waters.[313]

[312] Mikhail Kashubsky, above n 241, 169.
[313] *Ibid*, above n 241, 169.

255. As explained above, it also appears that **the present legislation does not satisfy the legal requirements of two-ship rule for instituting proceedings when the offshore installation is in transit within the maritime zones of Mauritius where sovereignty is exercised**. The problem arising in relation the DSA of offshore installations for the purpose of piracy could be cured if the definition of ship could clearly include offshore installation in the interpretation section of the PMVA. This should be an urgent matter for the legislator to address if ever Mauritius intends to embark in the field of oil exploitation.

Other Issues

256. Moreover, the *'two-ship rule'* also precludes the commission of the crime of piracy if the act of violence is committed by the crew or passengers on the very ship that they are sailing even if the offshore installation is considered as a ship. The rationale being a ship is under the exclusive jurisdiction of its flag State and as such any act committed thereon will be under the jurisdiction of the flag State. Thus, internal seizure or hijacking committed on the high seas or EEZ or contiguous zone by its crew or passengers on the offshore installation (considered as a ship) does not give rise to the commission of the crime of piracy under UNCLOS.[314]

257. It is clear from the above, that the crime of piracy under UNCLOS as well as under the domestic legislation may have limited application for the protection of offshore installations. It would, therefore, be imperative to clarify the law to include the offence of piracy in respect of offshore installation whether fixed or mobile for the purpose of providing protection to such installations. Thus, the definition of piracy under the PMVA may include the following relevant wording: *'artificial island, installation and structure'*. This will evidently dispel any doubt as to the application of piracy in respect of offshore installations. Maybe suggestions should also be made for the amendment of Article 101 of UNCLOS in that respect as well.

[314] *Ibid*, above n 241, 170.

Other Recommendations in relation to Piracy

258. Besides the suggestions that have been made above, the followings may also help to improve the existing domestic legal framework to deal with the issue of piracy.

259. It has to be observed that no reference is made to piracy in the SUA Convention but it is noted that the latter contains provisions for criminalising a number of acts that constitute maritime violence.[315] The offences that may fall under the umbrella of the SUA Convention are acts related to the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage the ship. The SUA Convention model may serve as a means to address the lacunae in UNCLOS and by ricochet the PMVA as explained above. These lacunae include, for example, the requirement of high sea or the issue of 'private end' or the issue of two-ship rule in respect of the offence of piracy.

260. Subject to the issues explained above, it appears that the manner in which the PMVA has been drafted may be seen as including both the traditional approach of piracy under UNCLOS and to some extent the broader approach encapsulated in SUA Convention.[316] Moreover, under the SUA Convention, the obligations of the contracting State are that it should either prosecute the suspected offender or extradite him. However, despite the fact that it appears that there is a mixture of provisions related to UNCLOS as well as SUA Convention in the PVMA,[317] it is emphasised that further amendments are required to deal with the issues depicted above. As far as issues related to prosecution by State other than the captured State is concerned, in view of the legal issue under Article 105 of UNCLOS, it is submitted that a broader interpretation should be given to the said provision on the basis that the law of the sea does not specifically prevent the capturing State to transfer the pirates to a third State for prosecution. Moreover, as there are no similar legal impediments in international conventions such as SUA Convention to restrict prosecution of pirates to the capturing State, it may reasonably be more convenient that the transfer of pirates to third States, including Mauritius, is effected

[315] Milena Sterio, above n 244, 121.
[316] Milena Sterio, above n 244, 118.
[317] Stuart Kaye, above n 255, 11.

under such conventions[318] in the absence of MOUs between Mauritius and other capturing States.

261. Another important issue to be addressed is related to marine pollution which affects all coastal States.

[318] The International Convention Against the Taking of Hostages, the International Convention for the Suppression of the Financing of Terrorism, and the United Nations Convention Against Transnational Organized Crime.

PART IV: SAFEGUARDS UNDER MAURITIAN LEGISLATION FOR PROTECTION OF THE ENVIRONMENT

262. Although maritime pollution is an issue which affects the whole world, including Island State like Mauritius, however, it is regrettable to say that such issue attracts attention only after the occurring of the disaster. Although over 80% of marine pollution comes from land-based sources, however, one of the most recognised sources of marine pollution is vessel sourced pollution, be it by oil spills, routing shipping, runoffs or dumping.[319] It is estimated that an amount of about 600,000 to 1,750,000 tons of oil is dumped into the sea on a yearly basis[320]. The discharge may be from the operation of the ship or as a result of accident. In whatever way the discharge may occur, the resulting effect is that it causes significant damage to the marine environment. Thus, the grave lesson provided by pollution incidents appears to have served no purpose because the calamities still persist around the world.[321]

263. Before going any further, it is proposed to have a look at a few cases which have retained attention of the international community[322] following maritime casualty related to marine pollution, namely the case of ***Torrey Canyon, Exxon Valdez*** and ***Prestige***. These cases have triggered certain reactions from the international community, particularly the US, the UK and the EU. This will be followed by an analysis of the different provisions under the frameworks of UNCLOS dealing with the protection of marine environment and how UNCLOS approaches the issue of marine pollution. Finally, the law of Mauritius will be assessed in respect of its compatibility with the international law to ascertain whether or not there is any need for amendments.

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[319] Kola O. Odeku and Bapela M. Paulos, 'Prohibition of pollution of marine environments: challenges and prospects', *(2017) Environmental Economic*), 8(3), 130.
[320] *Ibid*, above n 314, 131.
[321] Donald R Rothwell and Tim Stephens, above n 24, 393.
[322] Florencio J. Yuzon, Full Speed Ahead: International Law concerning Marine Pollution and the United States Navy - Steaming towards State Responsibility and Compliance, *9 Pace Int'l L. Rev. 57 (1997), 61*

Cases of Pollution at Sea

Torrey Canyon

264. In March 1967, the vessel ***Torrey Canyon*** ran aground near the Isles of Scilly and released its cargo of about 120,000 tons of crude oil into the sea. The incident caused significant impact and generated important changes to marine pollution regulations[323] as the international community had understood that there was a serious issue that required urgent attention.[324]

265. In fact, the ***Torrey Canyon*** incident has been the catalyst of the 1969 Convention on the High Seas in Cases of Oil Pollution Casualties (1969 Intervention Convention).[325] The ***Torrey Canyon*** incident raised another important issue in respect of the intervention of the British in bombing the vessel with a view to prevent pollution by incinerating and dissipating the fuel cargo.[326] It has also been argued that the measures taken by the British in the bombing intervention of the ***Torrey Canyon*** may be considered as an emerging rule of customary international law which has been crystalised in the Intervention Convention and Article 221 of UNCLOS.[327]

266. As a result of the Intervention Convention, despite the exclusive jurisdiction of flag State on the high seas, it is possible for coastal States to take measures that may be necessary on the high seas to prevent, mitigate or eliminate *'grave and imminent dangers'* which their coasts may be exposed to in relation to pollution or threat of such pollution.[328]

[323] *Ibid*, above n 317, 95.
[324] Mark Szepes, 'MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution' Vol 2:73 *Manchester Student Law Review*, 79.
[325] Donald R. Rothwell, above n 24, 392.
[326] *Ibid*, above n 24, 392.
[327] R. R. Churchill and A. v Lowe, above n 29, 355.
[328] Donald R. Rothwell and Tim Stephens, above n 24, 392.

Exxon Valdez

267. The collision of ***Exxon Valdez*** with a navigation hazard caused an oil spillage of 11 million gallons of crude oil into Alaska's Prince William Sound on March 24, 1989. The ***Exxon Valdez*** oil slick covered 1,300 miles of coastline and caused a significant number of deaths among living mammals and seabirds.

268. The extent of the oil disaster caused by ***Exxon Valdez*** triggered the enactment of the Oil Pollution Act 1990 by the USA.[329] The Act banned access to the single-hull tankers in the ports of the USA. The unilateral action by the USA may be considered as the exercise of its jurisdictional sovereignty in its internal waters and as such may appear to be consistent with both international customary law and UNCLOS. This argument is based both on Articles 25(2) of UNCLOS in respect of conditions for admission of foreign ships in internal waters and 211(3) of UNCLOS regarding the requirements for prevention of pollution as a condition of entry of foreign vessels in the internal waters and ports.

Prestige

269. In 2002, ***Prestige***, a vessel with 77,000 tons of heavy fuel oil on board, facing difficulties at sea was denied a place of refuge by the Spanish. At some point in time, whilst asking for a place of refuge, the vessel was only 5 nm off the Spanish coast but denial of access was maintained. Strong arguments have been made that if access was given when requested, the vessel could have been repaired and its fuel unloaded.[330] Unfortunately, the vessel was forced to leave the Spanish water. Access was also denied by the French and subsequently by the Portuguese when the vessel approached their EEZ. After 6 days, ***Prestige*** broke into two off the coast of Spain leaking out 60,000 of fuel causing oil spillage extending to the coasts of France and Spain. As a result of the catastrophe, serious damage was caused to the marine and coastal environment. As a first reaction,

[329] Buh, Emmanuel Ndze, "Balancing coastal state jurisdiction and international navigational rights: a vessel-source marine pollution perspective" (2004). *World Maritime University Dissertations*, 50.
[330] Dominik Andreska, Coastal State Jurisdiction in Preventing Vessel Source Pollution To Preserve Marine Environment or Freedom of Navigation? 9

the disaster prompted the ban of single-hull tanker into the internal waters of Spain, France, Italy and Portugal.[331]

270. The sinking of ***Prestige*** brought to light a series of issues associated with international legal frameworks dealing with the prevention of vessels source pollution. These issues relate to the use of single-hull tanker, denial of a place of refuge and the opposite interests of flag state, on the one hand, and the coastal State and port State on the other.[332]

271. The above cases of pollution give a clear indication of the destructive effect of oil pollution to the marine environment[333] and as such, there was an urgent need to address the issues to prevent and reduce the occurring of such calamities. However, issues related to vessel-source pollution raise the different competing interests between the coastal and maritime interests. The coastal State interests in respect of the preservation and conservation of the marine environment require the imposition of stringent environmental standards and greater power of control over vessel having access to their maritime zones. The maritime interests are related to freedom of navigation and the requirement not to cause undue delay to the ships.[334] These competing interests also need to be addressed in dealing with these issues.

272. The frameworks dealing with the issue of marine pollution have to take on board the conflicting goals and objectives prevailing between the coastal State and the other States, including their flagged ships. Both UNCLOS and the International Convention for the Prevention of Pollution from Ships,[335] (MARPOL 73/78), contain provisions for the imposition of important marine pollution standards on vessel source pollution. Hence, the substantive provisions, namely the frameworks under UNCLOS in relation to marine pollution need to be analysed first.

273. As reference is being made to different terms that will be used throughout the present analysis, it is worth to briefly explain three of them. Thus, a *'flag State'* is the state to

[331] *Ibid*, above n 325, 10 and 116.
[332] *Ibid*, above n 325, 11.
[333] Florencio J. Yuzon, above n 317, 62.
[334] *Ibid*, above n 317, 69.
[335] Signature was open on 2 November 1973, as amended by the Protocol, London 1 June 1978. In force on 2 October 1983. 1340 UNTS 61.

which a ship is flagged and registered. A '*coastal State*' is a state which has territorial waters due to its location bordering an ocean or sea. Finally, a *'port State'* is the state where a ship calls into port for any purpose.

Frameworks for the Protection of Marine Environment under UNCLOS

274. Part XII of UNCLOS specifically deals with the protection and preservation of the marine environment. Moreover, section 5 of Part XII provides the mechanisms both at the level of international and national law to address the issue related to the prevention, reduction and control of pollution of the marine environment.

275. As far as pollution from vessels is concerned, this is dealt with by Article 211 of UNCLOS. It requires States to establish international rules and standards for the prevention, reduction and control in relation to vessel-source pollution. However, such rules are to be developed through the IMO as will be explained below.

276. As far as the protection of the marine environment is concerned, it is argued that UNCLOS contains three main frameworks to achieve its objectives. The frameworks are divided into (1) generality and comprehensiveness, (2) uniformity of rules and (3) obligation for States to cooperate in the protection of marine environment.[336] A brief description of the basis of these frameworks is required to understand how they operate within UNCLOS.

277. The concept of '*generality*' used in UNCLOS in addressing the issue of protection of the marine environment is reflected in its Article 192 which requires all States to protect and preserve the marine environment. As regards the term *'comprehensiveness'*, this is shown by the fact that it covers all sources of pollution affecting the marine environment. These terms impose obligations on all States to achieve the objective of protection of the marine environment, see Article 194(1)[337] of UNCLOS.

[336] *Ibid*, above n 325, 64.
[337] *Ibid*, above n 325, 65.

278. The use of terms such as *'international rules', 'standards', 'practices and procedures'*, not only denote their worldwide application in respect of the standard of protection to be afforded to the marine environment but also reflect the uniformity of the rules[338]. Although minimum standards are referred in UNCLOS, nonetheless these are not to be found in said instrument (UNCLOS). These *'international rules', 'standards', 'practices and procedures'* are to be found either from the international competent authorities, such as the IMO, or approved by it or from *'general diplomatic conference'*. Hence, it may be argued that States are obliged by UNCLOS to indirectly follow rules prescribed by the IMO.

279. As far as international standards referred to by UNCLOS in relation to marine pollution are concerned, they are those respectively set out in Article 211 (1) and (2) of UNCLOS for both coastal and flag States to follow. These international standards are considered as "*generally accepted international rules and standards established through the competent international organisation or general diplomatic conference*". Hence, by virtue of Article 211 (1) and (2) of UNCLOS, it is incumbent on both the coastal and flag States to adopt laws and regulations which are equivalent to *'generally accepted international rules and standards'* in relation to ships respectively having access to their ports and internal waters and those flying their flag. Thus, both the coastal States and flag States are empowered under UNCLOS to set out the requirements of maximum standards as conditions for ships to pass through their marine jurisdictional areas.[339]

280. In relation to global or regional cooperation, Article 197 of UNCLOS gives effect to the requirements of cooperation on international or regional basis for the purpose of elaborating international rules or standards for the protection of marine environment.[340] Article of 195 of UNCLOS deals with the issue of protection of the marine environment and it reads as follows: "*[I]n taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another*". In fact, Article 195 of UNCLOS may be said to prohibit the *'push the ticking*

[338] R. R. Churchill and A. V Lowe, above n 29, 346.
[339] Dominik Andreska, above n 325, 72.
[340] *Ibid*, above n 325, 66.

bomb' away into other jurisdictional areas or further away from its own coastlines. Article 195 of UNCLOS requires States to cooperate to tackle the issue of environmental hazards. As explained above, this was the situation leading to the sinking of ***Prestige*** where Spain, France and Portugal have systematically denied a place of refuge[341] in violation to the provisions of Article 195 of UNCLOS.

281. The protection of marine pollution is also vested in flag States in relation to their flagged vessels under UNCLOS. The main provisions dealing with the jurisdiction of flag States over their vessel source pollution are to be found in the different Articles[342] of section 5 of Part XII of UNCLOS. This provision identifies six types of source pollutions to marine environment. These include pollution (1) from land-based sources, (2) from seabed activities subject to national jurisdiction, (3) from activities in the Area, (4) by dumping, (5) from vessels and (6) from or through the atmosphere.[343]

282. Although UNCLOS imposes obligations on coastal States to set an effective legal regime to deal with issues related to marine pollution, however, the provisions of MARPOL are considered as more specific than UNCLOS.[344] Before proceeding to conduct the analysis in relation to the competing interests of coastal, port and flag States and their implementation in our law, it is necessary to have an overview of the application of MARPOL 73/78.

MARPOL 73/78

283. The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78), was issued under the aegis of the International Maritime Organization (IMO) to prohibit all ships from discharging wastes at sea, and thus causing pollution of the marine environment. Further amendments have been brought in 1992 in respect of the design and construction of new and existing

[341] *Ibid*, above n 325, 67.
[342] Articles 207, 208, 209, 210, 211 and 212 of UNCLOS.
[343] Dominik Andreska, above n 325, 67.
[344] Florencio J. Yuzon, above n 317, 101.

tankers for the reduction of environmental damage through the requirement of double-hull. The amendments came into force in July 1993.[345]

284. MARPOL 73/78 is a specialised regulatory convention with universal application and aimed at setting out generally applicable international rules and standards as well as imposing obligations of compliance on States, shipbuilders and ship operators.[346] MARPOL 73/78 applies to oil tankers, cruise ships, general cargo and container vessels, tugs, ferries, yachts and small pleasure crafts. The ultimate objective of the convention is to reduce the volumes of harmful materials entering the world's ocean and affecting the marine environment. In view of its objectives, MARPOL 73/78 requires the retention of such wastes on board ships for discharge in reception facilities at ports. Hence, MARPOL also requires States to provide adequate reception facilities in all of their ports.[347]

285. MARPOL 73/78 attempts to strike a balance between the competing interests[348] of enforcement measures by the coastal State and the interest for non-obstructing shipping by the constant use of *'not causing undue delay to the ships'* in several of its Regulations as may be found in Regulations I/10, I/12, II/7, V/5, V/6 and VI/17[349]. However, MARPOL 73/78 recognises three exceptions[350] in which discharge may be 'permitted', namely in situation of (i) force majeure in order to save life at sea or securing of the safety of the ship; (ii) discharge resulting from damage to the ship and (iii) discharge is relation to fighting an existing pollution.

286. It is proposed to analyse the different provisions of UNCLOS in respect of the control and prevention of marine pollution from ship source pollution. This will be followed by the application of MARPOL 73/78 in relation to the prevention of marine pollution as well as its application in the domestic legislation. Finally, one of the legislations of

[345] Andrew Griffin, 'MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?' *Indiana Journal of Global Legal Studies*; Vol 1; issue 2, Article 10, 490.
[346] Dominik Andreska, above n 325, 84.
[347] https://documents.worldbank.org/en/publication/documents-reports/documentdetail/860841468330898141/marpol-73-78-international-convention-for-the-prevention-of-pollution-from-ships
[348] Andrew Griffin, above n 340, 490.
[349] Dominik Andreska, above n 325, 79.
[350] MARPOL Regulations I/11, II/6, IV/9 and VI/3.

Australia dealing with the issue of marine pollution will be considered together with an overview of the legislation of the Republic of South Africa. Both Australia and South Africa have implemented MARPOL 73/78 in their national legislations.

Coastal States: Scope of Pollution and Protection of Marine Environment

287. The main part of UNCLOS that deals with the protection of the marine environment is Part XII. Article 192 of UNCLOS relates to the general obligation on all States to protect and preserve marine environment and is the basis for establishing the legal frameworks to deal with the issue of pollution in the different maritime zones.

288. As explained earlier, the competing interests emerging from the interests of security, marine resources and ship source pollution have prompted coastal States, including port State to prone for sovereignty while the interests of freedom of navigation or access to resource remain the priority interests of flag States. The competing interests are ongoing. However, it is submitted that the notion of *'due regard'* should also be considered as a result of those competing interests between coastal States, port State and flag States, bearing in mind that the risks attributed to vessels in respect of pollution resulting from maritime accident represent a permanent threat to coastal State and port State.

289. However, it should be noted that the concept of *'due regard'* has been left undefined in UNCLOS but its meaning is generally accepted that in the exercise of its own rights, duties and freedoms, the State has to have *'due regard'* to those rights, duties and freedoms of other States.[351]

Coastal States: UNCLOS and the High Seas

290. Article 221 of UNCLOS[352] provides that any State is entitled to intervene and enforce jurisdiction in relation to a marine incident taking place beyond its territorial sea. Thus, the jurisdiction extends to the coastal State's EEZ and the high seas. It is submitted that the provisions of Article 221 are rather similar to the 1969 High Seas Intervention Convention (Intervention Convention).[353] Since UNCLOS is stated to have codified

[351] Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' Jan 2018, *Ocean Yearbook*, 28.
[352]Intervention conferred vide Article III of the 1969 High Seas Intervention Convention
[353] Donald R. Rothwell and Tim Stephens, above n 24, 392.

customary law, it is submitted that the Intervention Convention is considered as having the status of customary international law[354] and as such its principles may apply in relation to intervention on the high seas as well as in the EEZ.

Intervention on the High Seas

291. Intervention on the high seas for the purpose of dealing with marine pollution may be conducted by the States but consideration should also be given to the freedom of navigation as well as the exclusive jurisdiction of the flag States in relation to the ship flying their flag. However, as UNCLOS does not provide any indication in respect of the manner in which the intervention should be carried out, the principle underlying the approach taken under the Intervention Convention may be applied, particularly in the light of competing interests of the flags State and the coastal State. Thus, as per the Intervention Convention, there is an obligation of notification and consultation with the flag State, including the affected States, before any intervention is contemplated.[355] However, as per the Intervention Convention, where urgency dictates that such consultation and notification cannot be complied with, they may be dispensed of. This is so, particularly where the oil-pollution incident seriously threatens the interests of the coastal State.

292. In addition, the Intervention Convention also provides that measures taken must be proportional to the threat. Furthermore, the measures taken should be notified to the IMO. Finally, although UNCLOS as well as the Intervention Convention recognise a right of intervention by coastal States to deal with maritime casualties on the high seas, however, the former requires intervention in case of *'actual or threatened damage'*, while the latter requires the higher threshold of *'grave and imminent danger'*.[356] It is for this reason that arguments have been made to the effect that the threshold of the Intervention Convention is higher than that of UNCLOS.[357]

[354] R. R. Churchill and A. V Lowe, above n 29, 216.
[355] *Ibid*, above n 29, 354.
[356] Donald R. Rothwell and Tim Stephens, above n 24, 392.
[357] *Ibid*, above n 24, 392

Coastal States: UNCLOS and the EEZ

293. In respect of its EEZ, the coastal State may enact laws for the prevention, reduction and control of pollution from vessels[358] so that such vessels may conform and give effect to the 'generally accepted international rules and standards established through the competent international organisation', vide Article 211(5) of UNCLOS.

294. As for the protection of the marine environment in the EEZ, Article 56(1)(b)(iii) of UNCLOS specifically empowers the coastal State to exercise jurisdiction for the protection and preservation of the marine environment.

295. In addition, in line with Article 211(5) of UNCLOS, the requirement of *'generally accepted international rules and standards'* has to be established through the competent international organisation for the coastal State to exercise its jurisdiction in the EEZ in relation to the protection and preservation of its marine environment. Although such a requirement indeed limits the authority of the coastal State in the exercise of control as it needs the concurrence of the competent international organisation or general diplomatic conference to do so,[359] but it also ensures that the coastal State does not include in its law, provisions which may have an impact on the freedom of navigation in the EEZ. Such balancing of interests is important, particularly, as the coastal State does not have the right of arrest of foreign ship in relation to a pollution violation committed its EEZ until the foreign ship enters into its port or its internal waters, as per Article 218 of UNCLOS. In fact, prohibition of arrest of a foreign ship by the coastal State in respect of marine pollution in its EEZ results from the exclusive jurisdiction of the flag State over its flagged ship.[360] However, it appears that the flag State is entitled to arrest its flagged ship in relation to a pollution violation in the EEZ of another coastal State.[361]

[358] Buh, Emmanuel Ndze, above n 324, 40.
[359] *Ibid*, above n 324, 41.
[360] R. R. Churchill and A. V Lowe, above n 29, 348.
[361] *Ibid*, above n 29, 348.

Contiguous Zone

296. As far as the contiguous zone is concerned, coastal State has limited enforcement jurisdiction as provided under Article 33 of UNCLOS. These are related only to customs, fiscal, immigration and sanitary law in respect of outbound ships coming from the territorial sea whereas for inbound ships, such jurisdiction is exercised through prevention.[362] It is submitted that jurisdictional right under Article 33 of UNCLOS cannot be used by the coastal State to extend its jurisdictional enforcement for pollution offence into the contiguous zone. Arguments have been made to the effect that the coastal State may, on the basis of its enforcement jurisdiction in relation to sanitary law, have jurisdiction for the enforcement of violation of pollution from ships as the effects of the discharges may affect the territorial sea or the coast of the coastal State. However, others are of the contrary view and argued that such approach is inconsistent with UNCLOS.[363]

297. Although, as per the wording of Article 33 of UNCLOS, it appears that the coastal State does not have prescriptive jurisdiction per se in the contiguous zone, however, it should be noted that such prescriptive jurisdiction does exist under the EEZ powers. The rights which exist in the contiguous zone should be viewed with the freedom of navigation in the EEZ and the high seas as it is submitted that both the EEZ and the high seas extend to the edge of the territorial sea.[364]

Territorial Sea

298. Under customary international law, a coastal State is entitled to legislate any law in respect of pollution committed by foreign ships subject to the right of innocent passage.[365] However, it should also be mentioned that as far as law enacted by the coastal State in its territorial sea is concerned, its application is subjected to the sovereign immunity that is extended to warships, including submarine in the territorial sea in

[362] Donald R Rothwell and Tim Stephens, above n 24, 460.
[363] Domink Andreska, above n 325, 103: Confer discussion on the topic by MOLENAAR. P. 277, in note 11. And HAKAPÄÄ. P. 212-213.
[364] Donald R Rothwell and Tim Stephens, above n 24, 461.
[365] R. R. Churchill and A. V Lowe, above n 29, 344.

relation to matters related to the protection and preservation of marine environment, vide Article 236 of UNCLOS.[366]

299. Prescription of pollution regulations against ships during their innocent passage in the territorial seas of the coastal State may be made provided that such regulations are not in relation to the *'design, construction, manning or equipment of foreign ships'* except where they are consistent with *'generally accepted international rules and standards'*, as provided under Article 21(2) of UNCLOS. In addition, such regulations should not only be publicised but should also be non-discriminatory in nature, as per Articles 21(3) and 24(2) of UNCLOS. Finally, as per the provisions of Article 221(4) of UNCLOS, the law adopted for the prevention and control of maritime pollution in the territorial sea must not hamper the innocent passage of the foreign vessels in the territorial sea.[367]

300. As provided under Article 19(2) (h) of UNCLOS, a *'wilful and serious pollution'* may turn the innocent passage into a 'non-innocent' one[368] and may therefore trigger the coastal State unlimited enforcement jurisdiction[369] in its territorial sea. In fact, Article 25 of UNCLOS empowers the coastal State to take actions in its territorial sea to prevent passage which is non-innocent.

Application of MARPOL 73/78 in the Territorial Sea of the Coastal State

301. As far as the application of MARPOL 73/78 in the territorial sea is concerned, any State which is a party to MARPOL is obliged to enact its provisions (MARPOL) in respect of all vessels in its territorial sea. It is noted that the term *'jurisdiction'* is used instead of **'territorial sea'**, in Article 4(2) of MARPOL.[370] In addition, MARPOL also imposes an obligation on its members to undertake proceedings against the arrested foreign vessel in respect of pollution violation committed in its territorial seas or to refer the matter, including evidence gathered to the flag State of the vessel for the institution of proceedings if evidence established a pollution violation, as provided in Articles 4(2),

[366] Donald R Rothwell and Tim Stephens, above n 24, 170.
[367] Donald R Rothwell and Tim Stephens, above n 24, 347.
[368] Dominik Andreska, above n 325, 104.
[369] Donald R Rothwell and Tim Stephens, above n 24, 349.
[370] R. R. Churchill and A. V Lowe, above n 29, 344.

6(3) and (4) of MARPOL.[371] Due to exclusive jurisdiction of flag State over it flagged ships, coastal State can only enforce jurisdiction in relation to discharge of oil by foreign ships in its territorial sea. Although the coastal State has powers of investigation under Article 218 (1) of UNCLOS in relation to discharge beyond the territorial sea, however such powers should be exercised only when the foreign vessel is voluntarily in its ports. Moreover, such power is also limited to the discharge affecting other State. The coastal State also has power to carry out investigation only upon request made either by the affected State or the flag State in relation to discharge outside its EEZ, territorial or internal waters. In the absence of a request from an affected State, the only avenue for the coastal State is monitoring and reporting of oil pollution violation committed by foreign ships to their flag State.[372]

302. Similarly, as for the provisions of UNCLOS,[373] warships are exempted from the application of the provisions of MARPOL[374] as they are protected from jurisdiction of any States on the basis of the principle of sovereign immunity attached to them.[375]

Port State

303. The nature of the jurisdiction of coastal State in its territorial sea may be similar to that in its ports. This is so as ports are usually within the internal waters of the coastal State, as provided under Article 11 of UNCLOS. However, there is a significant difference between the jurisdiction in the territorial sea and port. In the territorial sea, a ship has a right of innocent passage under international law but given that in the port, the ship has voluntarily entered therein (its port) means that it has acquiesced to be subjected to the jurisdiction of the port State, particularly in respect of prescriptive jurisdiction.[376]

[371] R. R. Churchill and A. V Lowe, above n 29, 345.
[372] Andrew Griffin, above n 340, 506.
[373] See Article 236 of UNCLOS conferring sovereign immunity to warships in respect of the protection and preservation of the marine environment.
[374] See Article 3(3) of MARPOL.
[375] Florencio J. Yuzon, above n 317, 102.
[376] Dominik Andreska, above n 325, 72.

304. Under customary international law, port State is allowed to enact any law in relation to pollution in relation to any foreign vessel in its port. Moreover, the observance of such law may be made a condition of entry to the port State.[377]

Application of MARPOL 73/78 in the Port State

305. In respect of the application of MARPOL, the port State may also exercise enforcement jurisdiction of a pollution violation committed in its port against foreign vessels. Articles 5(2) and (3), Articles 6 and 7 of MARPOL provide for the right of inspection of foreign ship, its detention in case of substandard and referral to flags State in relation to a violation of MARPOL.[378]

306. Inspection is one of the three methods under MARPOL 73/78 for the prevention of marine pollution. If a ship is in the port State and does not have an International Oil Pollution Prevention Certificate (IOPP), the port State is empowered to conduct a full inspection.[379]

307. The two others methods are respectively the monitoring of ship compliance with discharge standards and sanction regime for violation of standards.[380] A port State also has authority under MARPOL 73/78 to conduct discharge inspection through the monitoring of oil record book and discharge monitoring equipment to ascertain the normal amounts of dirty ballast or oily residues.[381] Discrepancies may provide evidence of discharge.

308. Moreover, MARPOL 73/78 may also be said to be supplemented in the prevention of marine pollution and substandard ships through Port State Memorandum of Understanding (MOU) of the region in respect of "Regional Co-operation in the control of Ships and Discharges".

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[377] R. R. Churchill and A. V Lowe, above n 29, 345.
[378] *Ibid*, above n 29, 345.
[379] Andrew Griffin, above n 340, 500.
[380] *Ibid*, above n 340, 500.
[381] *Ibid*, above n 340, 502.

MOU: Regional Co-operation in the control of Ships and Discharges

309. The regional co-operation for the establishment of MOUs for the prevention, reduction and control of pollution of the marine environment as a condition of entry for foreign vessels into ports stems from Article 211(3) of UNCLOS. In 1991, Regional Co-operation in the Control of Ships and Discharges was triggered through Resolution 682(17) for the establishment of agreements between States on the application of port State Control together with the IMO.[382] Thus, the port State control may also be effected through Memorandums of Understanding on Port State Control. Eight regional MOUs have come in existence around the globe for the exercise of port State control.[383] The main objectives of those MOUs are mainly to eliminate substandard ship and prevent marine pollution.

The Indian Ocean Memorandum of Understanding (IOMOU)

310. The Resolution prompted regional co-operation between the States in the Indian Ocean rim, in order to address the issue of substandard ships in the region. Mauritius participated in the first preparatory meeting in October 1997 in Mumbai together with 17 other States[384] and also in second preparatory meeting and the signature of the MOU in June 1998 in Pretoria.[385] The MOU was kept open for signature at the headquarters of the Secretariat in Goa, India between 05/06/98 to 22/01/99. During the first meeting in Goa in January 1999 only Australia, Eritrea, India, Sudan, South Africa and Tanzania signed the acceptance of the MOU while the other States[386] were subjected to acceptance by their respective representatives, including Mauritius.[387] Mauritius acceded to the MOU on 15/10/99. Subsequently, other States, namely Sri Lanka, Iran, Kenya, Maldives, Oman, Yemen, France, Bangladesh, Comoros, Mozambique, Seychelles, Myanmar and

[382] Mehrotra, Dilip, "Memorandums of understanding on port state control: the need for a global MOU?" (2000). *World Maritime University Dissertations*, 4.
[383] *Ibid*, above n 377, 7.
[384] Australia, Bangladesh, Djibouti, Eritrea, Ethiopia, India, Kenya, Maldives, Mauritius, Mozambique, Myanmar, Oman, Seychelles, Singapore, South Africa, Sri Lanka, Tanzania and Yemen
[385] Sudan also participated in the meeting in Pretoria.
[386] Djibouti, Eritrea, Ethiopia, India, Iran, Kenya, Maldives, Mauritius, Mozambique, Seychelles, South Africa, Sri Lanka, Sudan, Tanzania and Yemen.
[387] Mehrotra, Dilip, above n 377, 9.

Madagascar acceded to the MOU. However, it is stated that only Australia, Sri Lanka, India, Sudan, Mauritius, Tanzania, Eritrea and South Africa are the full-fledged members of the MOU.[388] The MOU is in force since 01/04/99.[389]

UNCLOS and Port State Control

311. It is worth pointing out that Article 25(2) of UNCLOS empowers the coastal State to take actions in relation to any breach of the conditions for admissions to its internal water when a foreign ship is proceeding to its internal waters or port.

312. Subject to Article 226 of UNCLOS, Article 218 of UNCLOS is the main provision dealing with the power of the coastal State, including the port State, to carry out investigation in relation to suspected violation of any discharge from vessels even if the said discharge has occurred outside the internal water or the territorial sea or EEZ of the coastal State. This investigation may lead to the institution of proceedings if evidence disclosed any offence in relation thereof. Such investigation may also be conducted upon request by another State in relation to any discharge occurring in its internal, territorial seas or EEZ. The institution of proceedings against violations related to pollution may be contemplated under Article 228 of UNCLOS with a preference given to the affected State rather than the flag State in the light of Articles 218(4) and 228 of UNCLOS. In addition, Article 219 prevents unseaworthy vessel from leaving the port State except when they are proceeding for repairs. This provision is aimed at eliminating substandard ship[390] and at the same time preventing pollution which may arise as a result of the use of such ship. As per the IMO,[391] a "*substandard ship*" is defined as "*a ship whose hull, machinery, equipment or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformity with the safe manning document*"[392]. Furthermore, Article 220 of UNCLOS authorises the coastal State to undertake proceedings in respect of violation of its law and regulations for prevention,

[388] *Ibid*, above n 377, 10.
[389] https://www.iomou.org/ accessed on 04/03/2021 at 1845 hrs.
[390] Dominik Andreska, above n 325, 74.
[391] See IMO Resolution A.787 (19) in Chapter 1.6.9. with a view to eradicating substandard ships, the Assembly of the IMO adopted in November, 1991 Resolution A.682 (17) "Regional Co-operation in the Control of Ships and Discharges, 8.
[392] See paragraph 1.7.11 of A 31/Res.1138 Annex, page 7 of IMO, Resolution A.1138(31) Adopted on 4 December 2019.

reduction and control of pollution from vessel which has occurred in the territorial sea and EEZ.

Jurisdiction of Flag States over their Ships

313. According to Article 92 of UNCLOS, generally a ship has only one flag State and is given its nationality. Thus, flag States have extensive jurisdiction over their flagged ships in relation to prescriptive and enforcement jurisdiction. The relationship between a flag State and the ships flying its flags is connected with the concept of *'genuine link'* and as such the flag State is given exclusive jurisdiction over such ship, vide Article 91 of UNCLOS.

314. Similarly, as for coastal States, jurisdiction of a flag State in relation to vessel source pollution is also to be found in Article 211(2) of UNCLOS in relation to the adoption of laws and regulations for the prevention of marine pollution based on the principles of *"generally accepted international rules and standards established through the competent international organisation or general diplomatic conference"*. Article 217 of UNCLOS provides for the enforcement of jurisdiction by the flag States to ensure that the ship is seaworthy.

315. Although flag States have exclusive jurisdiction and control over their ships but this depends on the maritime zones in which such ships may be found. It is a rule of thumb that such jurisdiction and control by flag States diminishes as a ship approaches further to the coasts of coastal States. It is for this reason that in the internal waters, a foreign ship is under the full sovereignty of the coastal State.

316. Moreover, as per Article 94 (1) of UNCLOS, there is a duty on the flag State for the 'effective exercise' of jurisdiction[393] over their flagged ships. However, it is questionable as to whether flag States, particularly those known as flag of convenience, effectively exercise jurisdiction and control in administrative, technical and social matter over ships flying their flag. It appears that the only recourse for coastal States to question jurisdiction and control of ships is to report the matter to the 'flag State', as provided

[393] Dominik Andreska, above n 325, 69.

under Article 94(6). The said Article imposes an obligation on the flag State to investigate the matter and take necessary action. However, it should be noted that in 1992, the United States reported 111 violations of the provisions of MARPOL to the flag States but a response was received in only 35 cases and out of which only 2 cases in which actions had been taken in terms of fine.[394] Therefore, the issue of effective jurisdiction and control by flag States over their flagged ships remains questionable.

317. With regard to the application of MARPOL in relation to flag States, the latter are considered as the primary enforcement agents over their flagged ships. Thus, under MARPOL 73/78, the flag States have exclusive right and obligation in relation to inspection and certification of their vessels as well as investigation and prosecution for violations under MARPOL.[395] In addition, the flag States also have an obligation under MARPOL, vide its Articles 3 and 4 to apply its pollution standards[396] in relation to all ships flying their flag. Moreover, there is also the requirement of the ship to meet several technical standards. It is thus the responsibility of the flag State to ensure that its flagged ships meet the standards through inspections before the issue of any International Oil Pollution Prevention Certificate (IOPP). Hence, the responsibility rests on the flag State to ensure that its ships comply with the requirements under MARPOL 73/78.[397]

318. As for the application of MARPOL 73/78 in the Mauritian context, ratification is an important step for its implementation and will now be analysed.

Implementation of UNCLOS: The Merchant Shipping Act (MSA)[398] and MARPOL

319. **Mauritius is a party to MARPOL 73/78 and as such it is incumbent on it to create and enact domestic legislations which will implement the convention**. Section 228 (1)(c) of the MSA, states that "*the Minister may, for the purposes of this Act, make such regulations as he thinks fit, including regulations—for giving effect to any international*

[394] Donald R. Rothwell and Tim Stephens, above n 24, 341.
[395] Andrew Griffin, above n 340, 506.
[396] R. R. Churchill and A. V Lowe, above n 29, 344.
[397] Andrew Griffin, above n 340, 500.
[398] Merchant Shipping Act, 26 of 2007 – 1 June 2009.

Convention to which Mauritius is a party". As per section 228(2)(b) of the MSA, there is also provision in relation to the penalties to be imposed.[399]

Ratification of MARPOL 73/78

320. Mauritius has ratified the six Annexes of MARPOL 73/78[400] and therefore it is clear that the provisions of MARPOL 73/78 have been incorporated in the Mauritian legislation through the MSA. In fact, several regulations pertaining to the application of the six Annexes of MARPOL 73/78 have been made[401]. It is submitted that being given that MARPOL is an emanation of the IMO, which for all intents and purposes, is a competent international organisation[402] and since *"the generally accepted international rules and standards"* are attributed to MARPOL, the Regulations in respect of the obligations of Mauritius in respect of the protection of marine environment appear to be in line with international law, including UNCLOS. The Merchant Shipping Regulation relating to MARPOL 73/78 may therefore be applicable for the protection of the marine environment of the different maritime zones of Mauritius, including pollution arising in the EEZ when the ship is in its port or internal waters.

Issues in Domestic Legislation

321. It is submitted that **apart from the Regulations made under section 228 of the MSA, namely the Merchant Shipping (Prevention of Pollution by Oil and Noxious Liquid Substances in Bulk),[403] Regulations which gave effect to MARPOL and Merchant Shipping (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form) Regulations 2020,[404] there does not seem to exist any other relevant legislations dealing with the issue of marine pollution *per se***. Other domestic

[399] (2) Regulations made under this Act may—(b) provide that any person who contravenes them shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and imprisonment for a term not exceeding 5 years.
[400] https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
[401] Date of signature 6 April 1995, Date of entry or deposit of into force instrument or succession: 6 July 1995
[402] Mark Szepes, above n 319, 82.
[403] Regulations which came into operation on 1 March 2019 and gave effect to MARPOL
[404] Merchant Shipping (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form) Regulations 2020 GN No. 298 of 2020, came into operation on 15 December 2020

legislations such as Environment Protection Act[405] broadly empowers the Minister to make regulations for the purpose of preventing and controlling marine pollution, while the FMRA and the MZA make no reference to control and prevention of marine pollution. The Port Act contains only one provision[406] in respect of 'Power to inspect International Oil Pollution Prevention Certificates' for the purpose of preventing unseaworthy ship to "*proceed to sea without presenting an unreasonable threat of harm to the marine environment*".

322. However, it is noted that there is no provision in the domestic legislation in relation to the enforcement jurisdiction conferred on the coastal State in its EEZ by Article 220(3) and (5) of UNCLOS. In fact, Article 220(3) empowers the coastal State to request the ship to provide information[407] if there are *'clear grounds for believing'* that it has committed a violation in relation to international rules and standards for prevention and control of pollution in the EEZ. Failure to provide the required information under Article 220(3) of UNCLOS gives the coastal State further right for triggering the physical inspection of the ship. The violations relate to both the discharge and the international rules and standards.[408] In addition, Article 220(6) of UNCLOS provides for the institution of proceedings against the violator as well as for the detention of the ship.

323. Although there is a requirement under international law to take measures for the purpose of preventing marine pollution, however, **it does not seem that any law has been**

[405] Section 51(2) of the Environment Protection Act (e) the control and prevention of pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines, and outfall structures; (f) the control and prevention of pollution of the marine environment arising from, or in connection with, seabed activities and from artificial islands, installations and structures in the maritime zone;

[406]Section 59 of the Ports Act:- Power to inspect International Oil Pollution Prevention Certificates

(1) (a) Where a vessel is in a port, the Authority shall have power to inspect the vessel for the purpose of verifying that there is on board a valid International Oil Pollution Prevention Certificate in the form prescribed under the International Convention for the Prevention of Pollution from Ships.

(b) Where there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially to the particulars of that certificate, or where the vessel does not carry a valid certificate, the Authority shall (i) take such steps as it may consider necessary to ensure that the vessel shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment;

[407]The information required to be provided under Article 220(3) of UNCLOS relates to identity of the ship, its port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

[408] Dominik Andreska, above n 325, 92.

enacted in Mauritius incorporating the provisions of Article 221 of UNCLOS for intervention on the high seas as reflected in the Intervention Convention.

324. If a law is to be drafted for the purpose of intervention beyond the territorial sea of Mauritius, it is submitted that the law, as contemplated under Article 221, should make proper reference to the principles of the Intervention Convention which sets out the parameters within which an intervention may take place outside the territorial sea of Mauritius. It has to be observed that several countries have asserted the said principles in their national legislations, including the Merchant Shipping Act, 1995 of UK.[409] It is also submitted that it is unlikely that conditions set out in the Intervention Convention in the domestic legislation would be challenged in view of the protection of its coastline and as such may assist Mauritius to fulfil its international obligation to prevent marine pollution.

325. It is submitted that these enforcement jurisdictions are essential for the purpose of protecting the marine environment and as such, it is vital to make necessary amendments in the law to confer sovereign rights for the protection of the marine environment beyond the territorial sea. The law should clearly provide for the power to order the ship to proceed to a Mauritian port where it may be inspected upon entry, and if violation is confirmed, detention should be ordered and the ship charged with the said violation.

326. In addition, Mauritius should provide for adequate reception facilities in ports in order that the discharge of the ship may be effected as in the absence of same, the likelihood of discharge in the sea to continue is real.

327. The above analysis shows **an absence of law to deal with issues of marine pollution beyond the territorial sea, particularly in respect of inspection and detention of ship.** It is therefore proposed to conduct an overview of the legislation of a foreign country dealing with the issue of marine pollution.

[409] R. R. Churchill and A. V Lowe, above n 29, 216.

Protection of the Marine Environment under the Australian Law

328. It is proposed to have an overview of a foreign law which has implemented MARPOL in its domestic legislation followed by a brief of its evaluation. The proposition is in relation to one particular legislation of Australia dealing with the issue of marine pollution, namely the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POS). Few comments will also be made in relation to the legislations of the Republic of South Africa.

329. POS has been enacted by Australia with a view to implement the provisions of MARPOL 73/78 in its domestic legislations. The Act contains a series of enforcement measures as well as the incorporation of certain provisions of UNCLOS. It also clearly sets out the strict liability nature attached to some of the offences and as such there is no need for the prosecution to establish the criminal culpability of the offender and thus remove any doubt in the proceedings.

330. Hereunder is a brief summary of the different provisions of the POS:

- Section 6 of the POS[410] extends the application of the Act to the EEZ;
- Section 26G of the POS[411] provides for the requirements of foreign ships to give information;
- Section 27A of the Act enables the detention of foreign ships suspected of involvement in pollution breaches. It clearly sets out the different level of belief in the different maritime zone, including ports (internal waters), territorial sea and the EEZ ranging from *'clear grounds for believing'* of a breach in port and territorial sea to *'clear objective evidence'* in the EEZ. It also provides for the release of the ship immediately upon the posting of a bond;

[410] Section 6 of the POS provides: This Act applies both within and outside Australia and extends to every external Territory and to the exclusive economic zone.

[411] Section 26G of the POS provides:Power to require information

(1) If: (a) a foreign ship is navigating in the territorial sea or the exclusive economic zone; and

(b) there are clear grounds for believing that an act or omission that constitutes a contravention of this Act has occurred in relation to the ship while in the exclusive economic zone; the Authority may require the master of the ship to give to the Authority such of the information referred to in subsection (2) as the Authority requires.

- POS also deals with escort of the ship to port following its detention;[412]
- There is also a provision[413] to ensure that proceedings in Australia against a foreign ship for a pollution breach will be suspended if proceedings for the same pollution breach are taken in the flag State of the ship;
- There are also provisions of specific powers relating to inspection of ships suspected of having caused a pollution breach in the EEZ;[414]
- The Act also provides for the requirement for an Australian ship that is in the territorial sea or the EEZ of a foreign country to provide information required by that country to determine if a pollution breach has occurred, as per section 27C;
- POS also provides for the right of inspection of ships in the EEZ in case of clear grounds for believing that the act or omission constituted a substantial discharge or disposal causing maritime pollution or where the information provided is manifestly at variance with the factual situation;
- The Act specifies the time limits[415] for instituting proceedings in connection with a pollution offence and the circumstances in which such proceedings may be terminated in line with the provisions under Article 228 of UNCLOS;
- POS also specifies the strict liability nature of offence related to discharge of oil and as such there is no issue in respect of the proof of guilty mind;[416]

[412] Subsection 29(1):- If the ship is detained under paragraph (1)(b) or (c), the Authority may escort it to a port.

[413] Section 29(2):- 2) If the prosecution relates to an act or omission that involves a foreign ship: (a) the prosecution must not be brought more than 3 years after the act or omission; and (b) the prosecution must be suspended if under paragraph 1 of article 228 of the Law of the Sea Convention the prosecution is required to be suspended, and must be terminated if under that paragraph the prosecution is required to be terminated.

[414] 27 Powers of inspectors

[415] Article 29 of the POS: Time limits for prosecution

(1) Subject to subsection (2), a prosecution for an offence against this Act may be brought at any time.

(2) If the prosecution relates to an act or omission that involves a foreign ship:

(a) the prosecution must not be brought more than 3 years after the act or omission; and

(b) the prosecution must be suspended if under paragraph 1 of article 228 of the Law of the Sea Convention the prosecution is required to be suspended, and must be terminated if under that paragraph the prosecution is required to be terminated.

[416] Article 10 of the POS: Prohibition of discharge of oil residues into sea

(3) If: (a) an oil residue is discharged from an Australian ship into the sea; and (b) such a discharge cannot occur without the commission of an offence against subsection 9(1B) or of an offence against a law of a State or Territory; the master, the charterer and the owner of the ship each commit an offence punishable, on conviction, by a fine not exceeding 20,000 penalty units.

(4) An offence against subsection (3) is an offence of strict liability.

- It also establishes the duty on the master of the ship to report certain incidents involving oil or oily mixture under pain of penalty;[417] and
- In case the ship is abandoned, the duty to report rests on the owner, charterer, manager or operator of the ship or an agent of the owner, charterer, manager or operator of the ship.

331. As it can be seen, relevant provisions of UNCLOS and MARPOL have been incorporated in the Australian legislation. The legislation specifies the nature of offences which are considered as strict liability and thus facilitate prosecution. It also deals with issues in respect of providing information in line with Article 220(3) of UNCLOS and contemplates for physical inspection where information is in variance with evidence available.

332. Australia also has other legislations for the implementation of MARPOL such as the *Navigation Act 2012* and the Protection of the Sea (Prevention of Pollution From Ships) (orders) regulations, which, however, will not be considered in the present Review Paper.

Protection of the Marine Environment under the South African Law

333. It has also to be observed that certain countries, like the Republic of South Africa, have given the protection of environment constitutional status. In fact, the protection of the environment is given a prominent place in section 24(a) of the Bill of Rights of the Constitution of the Republic of South Africa. The said section provides that "*everyone has the right to an environment that is not harmful to their health or well-being.*" This constitutional status given to the protection of the environment at the very outset is a clear indication of the importance attached to the issue of environment. What the said provision seems to achieve is that both the individuals and the State are given the responsibility to protect the environment, and may both be amenable in terms of section 24 of the Constitution for making the environment harmful to the health or well-being of other people.

[417] Article 11 of the POS: Duty to report certain incidents involving oil or oily mixture

334. The Republic of South Africa has also enacted several legislations to give effect to the provisions of MARPOL in order to ensure for the protection of the marine environment. These include the Marine Pollution Act 6 of 1981 which is meant for regulating pollution from ships, tankers and offshore installations and also deals with the prevention of pollution of the sea by oil. It further addresses the issue of liability in respect of loss or damage arising from the discharge of oil from ships, tankers and offshore installations and the appropriate penalties to be imposed in case of conviction under the Act. Another relevant legislation dealing with the issue of maritime pollution in South Africa is the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 (MPPS). The main issues that the MPPS tackles are related not only to the protection of the sea from pollution by oil and other substances but it also caters for the setting up of marine minimum standards and measures of policing the design, building and operation of tankers. In addition, criminal liability upon conviction does not rest on the master of the vessel incriminated only but may also include the owner of the ship, tanker or offshore installation. Moreover, MARPOL1973/78 also finds its application in the MPPS as per the Schedule to the Act. Thus, it applies indiscriminately to all South African ships wherever they may be and also to foreign ships within the territorial waters or the EEZ of the Republic of South Africa.

PART V: RECOMMENDATIONS

335. Although a coastal State has a discretion in respect of the methods to be employed for the measurement of its maritime zones, however, this discretion is subject to international law. The issues related to the use of straight baselines have been addressed in the present Review Paper and it appears that the requirements of UNCLOS have not been met regarding the drawing of the straight baselines, as per the provisions of UNCLOS. The circumstances and the restrictive use of straight baselines have been established in the ***Fisheries Case*** and reaffirmed in ***Qatar v Bahrain***[418] and as such its interpretation and implementation appears to be settled.

336. In addition, as far as the historic bay in relation to Mathurin Bay in Rodrigues is concerned, again it appears that under customary international law, the basis on which the claim for historic bay has been made, may give rise to a challenge to be brought concerning its legality under international law. Therefore, the Maritime Zones (Baselines and Delineating Lines) Regulations may need to be amended to exclude the same as a historic bay.

337. Concerning the right of innocent passage in the maritime zones where sovereignty is exercised, there is an urgent need to make necessary regulations to designate sea lanes as well as the traffic separation schemes, particularly in relation to foreign nuclear-powered ships as well as for vessels engaged in the transportation of radioactive materials. In addition, provision should also be made for the innocent passage of warships, submarines and underwater vehicles in the territorial sea.

338. Moreover, the right of hot pursuit appears to be restricted to illegal fishing when in fact it may constitute an important tool to deal with different types of illegal activities at sea. Hence, it is suggested to bring relevant amendments giving powers to the different enforcement agencies dealing with illegal activities at sea in the light of the emerging trends of maritime crimes. There is also a requirement for capacity building so that law enforcement agents are conversant with their duties and responsibilities in engaging in a

[418]Sam Bateman and Clive Schofield, above n 73, 19.

justifiable hot pursuit, particularly as any unjustified hot pursuit may give rise to claim for damages by the aggrieved State. In addition, regional cooperation is vital in order to assist Mauritius in the surveillance of its vast maritime zones.

339. As regards issues related to piracy, it is submitted that there may be a need to amend the law to circumvent the issue of the two-ship rule[419] because it appears that under the present legislation both piracy and maritime attack fall under the said rule. Moreover, section 3(2) of the PMVA should be amended to exclude the following words in relation to the powers of arrest in connection with a piratical attack: "*or in the territorial sea or the internal, historic and archipelagic waters of Mauritius*". Moreover, the definition of ship should clearly specify and include offshore installations in order to provide protection to such installations.

340. The issue of transfer of pirates to a third country for prosecution in the light of Article 105 of UNCLOS has not yet been trashed out in international court and as such, it remains in limbo. It has to be pointed out that in 2010 the High Court of Kenya ordered the release of pirates[420] arrested by Germany and handed over to Kenya for trial on the ground that there was no nexus between the court in Kenya and the offence of piracy.[421] The High Court of Kenya was of the view that Kenya did not have jurisdiction to try those cases as the offence did not occur in Kenyan territorial water in the light of section 5 of the Kenyan's Penal Code providing jurisdiction within its territorial waters only and as such it also has an impact on the piracy provision of section 69 which criminalises the offence of piracy in both the territorial waters as well as the high seas.[422] Although on appeal in 2012, the decision was reversed[423] and prosecution started anew, however, an international court may ultimately decide that there is a breach to the provisions of UNCLOS under Article 105. Therefore, the possibility of prohibition of transfer of pirates to a third State for prosecution may exist in light of jurisdictional issues under international law[424] and as such it would be advisable to err on the safe side by having recourse to international conventions where such restrictions do not exist, as in the

[419] One is the pirate's vessel and the other one is the victim's vessel.
[420] *Ex parte Mohamud Mohammed Hashi & 8 Others* [2010] eKLR.
[421] Stuart Kaye, above n 255, 6-7.
[422] Milena Sterio, above n 244, 114.
[423] *Attorney-General v Mohamud Mohammed Hashi & 8 Others* [2012] eKLR
[424] Milena Sterio, above n 244, 112-113.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). However, it is noted that Mauritius has already acceded to the SUA Convention on 21/07/2004[425] but the ratification of the convention is necessary for the same to have legal effect in Mauritius, as explained in ***Pierce v Pierce (supra).***

Other International Instruments dealing with Maritime Offences

341. It should not be forgotten that there are other avenues that may be explored for the prosecution of piracy. Besides the SUA Convention,[426] as explained above, other international instruments such as the 1979 International Convention against the Taking of Hostages[427] (Hostages Convention), or the 2000 UN Convention on Transnational Organized Crime[428] (UNTOC) are worth referring to. Indeed, under the Hostages Convention, the taking of passengers or crew as hostage against payment of ransoms may amount to human trafficking[429] and as such may also be an alternative route for prosecution. Moreover, activities of criminal nature involving organised criminal groups will fall under the purview of 2000 UNTOC. Both the SUA Convention and the Hostages Conventions are useful in that they are both applicable in respect of attacks committed within the territorial sea and impose an obligation on members to take measures for cooperating in relation to the prosecution of criminals. As far as 2000 UNTOC is concerned, it allows for the prosecution of accomplices in third countries, including those involved in financing the pirates or those who launder their money collected as ransoms.[430]

342. As far as marine pollution is concerned, there is an absence of specific law to address issues of marine pollution, particularly in respect of inspection and detention of ship in order to enable Mauritius to carry out its enforcement obligations under UNCLOS and also to protect it marine environment. It is, therefore, submitted that Mauritius may

[425]See the list of Conventions which Mauritius has signed/ratified/acceded at https://attorneygeneral.govmu.org/Documents/Documents/14-CONTREAT%20%281%29.pdf accessed on 17/03/2021 at 17.00 hrs

[426] Acceded on 21/07/2004

[427] Adopted by the General Assembly of the United Nations on 17 December 1979 and entered into force on 3 June 1983. Ratified on 17 October 1980

[428] Open for signature on 15 November, in force on 29 September 2003.

[429] Leticia M. Diaz & Barry H. Dubner, above n 239, 566.

[430] Robert Beckman, above n 250, 3.

properly address the issues of marine pollution in its maritime zones as well as on the high seas and the EEZ, by considering the provisions of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POS) of Australia and certain provisions of the South African model together with enforcement powers in line with the principles set out in the Intervention Convention. In addition, the proposed Act may include the offence of obstructing inspection or refusal to cooperate in relation to marine pollution control and also for recidivism.

343. As Mauritius is a relatively small State but has a vast maritime zone, thus regional cooperation is a must in order to deal with issues such as the preservation of the marine environment, Illegal, Unreported and Unregulated (IUU) fishing, pollution discharge and other issues affecting the sea. Article 237[431] of UNCLOS provides for regional cooperation through agreements between regional States for protection and preservation of the marine environment, provided that such agreements are consistent with the 'general principles and objectives of the Convention'.[432] Thus, Mauritius may build up on previous agreements which have been made with other States not only for capacity building but also in terms of logistic support and equipment to deal with issues such as marine pollution and IUU fishing which it must say are becoming recurrent in the region.

Recommendations by UNODC (United Nations Office on Drugs and Crime)

344. The United Nations Office on Drugs and Crime (UNODC) has been at the forefront of international efforts to tackle issues related to drugs, crime, and terrorism. In its endeavour to address maritime challenges, the UNODC organised two pivotal workshops in 2023. The first, held from 18-22 September 2023, was centred on 'Port Security and Safety of Navigation'. This workshop delved deep into the intricacies of ensuring secure and safe maritime navigation, a cornerstone for global trade and commerce. It also provided a platform for different stakeholders to come together and propose recommendations for the enhancement of our laws in regards to maritime crimes. The subsequent workshop, conducted from 17-19 October 2023, focused on 'Legislative Reforms on Maritime Crime', highlighting the pressing need for robust legal frameworks

[431] See Article 237(2) of UNCLOS.
[432] Alan Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change, Chapter 3, in The Law of the Sea; Progress and Prospects, 2009, Oxford University Press, 53.

to combat maritime threats and also, the workshop consolidated the recommendations emanating from the first workshop.

345. It is noteworthy to mention the excellent working relationship between the Law Reform Commission of Mauritius and the UNODC. This collaboration has been marked by several constructive meetings, reflecting a shared commitment to enhancing maritime security and legal frameworks. Such synergies underscore the importance of collaborative efforts in addressing the multifaceted challenges in the maritime domain.

346. During the two abovementioned workshops, all the stakeholders present agreed on the following series of recommendations in order to strengthen and to enhance Mauritius legal framework in relation to maritime crimes and Port security:

Establishment of a National Technical Legal Committee (NTLC)

347. In light of the discussions and deliberations at the workshops organised by the UNODC, there's a pressing need for Mauritius, akin to other nations in the Indian Ocean West (IOW) region, to establish a National Technical Legal Committee (NTLC). The primary aim of the NTLC would be to foster a coordinated approach towards maritime challenges, serving as a pivotal platform for congregating all pertinent stakeholders in Mauritius's maritime domain. This would facilitate in-depth discussions and the proposal of concrete actions in the law of the sea for its domestic legislation and jurisdiction. Furthermore, the specific members of the NTLC and its initial mandate will be determined in due course, with a list of proposed members and a brief description of the potential initial mandate to be discussed. Additionally, the necessary Terms of Reference for the creation of the NTLC and a potential Memorandum of Understanding (MoU) with other agencies will be deliberated upon.

348. The NTLC's coordination efforts would be three-tiered. At the domestic level, it would engage all relevant stakeholders in the maritime domain within Mauritius. At the regional level, collaboration with centres such as the RMIFC in Madagascar and the RCOC in Seychelles would be paramount. Lastly, at the inter-national level, the NTLC would ensure coordination amongst the future NTLCs of all countries in the IOW region. Given the escalating complexities of maritime challenges and the imperative for a unified

approach, the inception of the NTLC would mark a significant stride forward, streamlining efforts within Mauritius and bolstering collaboration with regional and international partners.

349. The tentative list of proposed stakeholders is as follows:

(i) The Attorney General's Office (AGO);
(ii) The Office of the Director of Public Prosecution (ODPP);
(iii) The Mauritius Police Force/National Coast Guards (MPF/NCG);
(iv) The Mauritius Ports Authority (MPA);
(v) The Mauritius Revenue Authority (Customs) (MRA);
(vi) The Anti-Drug Smuggling Unit (ADSU);
(vii) The Ministry of Foreign Affairs, Regional Integration and International Trade;
(viii) The Ministry of Blue Economy, Marine Resources, Fisheries and Shipping;
(ix) The Ministry of Environment, Solid Waste Management and Climate Change;
(x) The Independent Commission Against Corruption Mauritius (ICAC);
(xi) The Asset Recovery Investigation Division (Financial Intelligence Unit);
(xii) The Institute for Judicial and Legal Studies Mauritius (IJLS); and
(xiii) The Law Reform Commission (LRC)

SOP for the National Coast Guards and other law enforcement agencies

350. The National Coast Guards (NCG), under the provisions of the National Coast Guards Act 1988, wield extensive powers, notably encapsulated within section 12. Recognising the expansive nature of these powers, there's a pressing need to draft a comprehensive and detailed Standard Operating Procedure (SOP). It has come to attention, during the workshops, that a new SOP is currently under preparation by the NCG. It should be noted, however, that the SOP for the NCG is confidential to them. It would be prudent for this SOP to incorporate pivotal sections of the United Nations Convention on the Law of the Sea (UNCLOS) pertaining to maritime laws. By doing so, the SOP would not only serve as a guiding document, delineating the scope and manner of exercising these powers, but also ensure that the operations of the NCG are in harmony with international maritime standards, enhancing both the effectiveness and transparency of their operations.

351. Furthermore, it's equally crucial to establish clear SOPs for other maritime crime law enforcement agencies. These procedures will serve as a guiding framework, ensuring that all agencies operate cohesively, with clarity on roles, responsibilities, and jurisdictions. Such standardisation will undoubtedly enhance the efficiency, transparency, and accountability of maritime operations across the board.

Accurate Record-Keeping of Maritime Operations, Investigations and Prosecutions

352. To bolster transparency, accountability and efficiency in maritime operations, it is imperative that a meticulous record of all operations at sea, investigations and subsequent prosecutions be maintained. Such comprehensive record-keeping not only aids in the review and analysis of past operations, enhancing future strategies and tactics, but also ensures that the country's maritime activities are in line with international best practices. Furthermore, an accurate and up-to-date record can serve as a valuable tool for training and capacity-building within maritime agencies. This would also aid in fostering inter-agency cooperation and information sharing, ensuring a cohesive approach to maritime challenges.

Establishment of a witness protection programme and assistance to victims

353. To effectively combat transnational organised crimes, especially those involving violent maritime crimes such as piracy, trafficking in persons, terrorism at sea, drugs and arms trafficking, a robust approach is imperative. While current measures, such as safeguarding identities during trials and non-disclosure of witnesses and victims offer some level of protection, they are often deemed insufficient in the face of the sophisticated and ruthless tactics employed by transnational criminal syndicates.

354. Therefore, the establishment of a comprehensive witness protection programme is recommended. Such a programme should go beyond the mere protection of identities during legal proceedings. It should encompass relocation, identity change and other necessary measures to ensure the safety of witnesses and victims, both before and after trials. Additionally, there should be provisions for psychological and social support,

ensuring that victims and witnesses are not only protected but also rehabilitated and reintegrated into society. This holistic approach will not only bolster the confidence of witnesses to come forward but also strengthen the overall integrity of the judicial process in dealing with maritime crimes.

To amend the national legislation to include the possibility of interception and prosecution of flagless in the Exclusive Economic Zone (EEZ), particularly in relation to drug and arms trafficking

355. For the purposes of reinforcing the fight against drug and arms trafficking within the Indian Ocean West (IOW) region, it is imperative to address the legal gaps that currently exist in the jurisdiction of Mauritius. As it stands, Mauritius' jurisdiction predominantly covers its internal waters, archipelagic waters and territorial sea. This limitation potentially offers a safe haven for flagless vessels involved in illicit activities within the Exclusive Economic Zone (EEZ).

356. Hence, it is recommended that the national legislation be amended to extend Mauritius' jurisdiction, allowing for the interception and prosecution of flagless vessels involved in drug and arms trafficking within its EEZ. Such an amendment would not only enhance Mauritius' capacity to combat maritime crimes but also facilitate collaboration with foreign naval forces patrolling the region, including entities like the EU NAVFOR. This collaborative approach, underpinned by a robust legal framework, would significantly deter criminal activities in the IOW region, ensuring a safer maritime environment for all.

Establishing bilateral and regional agreements on Article 17 of the 1988 Vienna Convention on drugs.

357. The international maritime domain remains a critical conduit for the illicit trafficking of drugs, posing significant challenges to nations striving to combat this menace. Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, commonly referred to as the Vienna Convention on Drugs, offers a strategic avenue for nations to strengthen their efforts in this fight.

Specifically, it empowers countries to forge bilateral and regional agreements, enhancing cooperation and coordination in countering drug trafficking by sea.

358. However, it is noteworthy that Mauritius, despite being a signatory to the Vienna Convention, has yet to capitalise on the provisions of Article 17. As of now, Mauritius has not entered into any such bilateral or regional agreements as envisaged by this Article.

359. In light of the persistent challenges posed by drug trafficking, it has been recommended that Mauritius actively seeks and establishes these agreements. Such proactive measures would not only amplify Mauritius' capacity to combat drug trafficking but also foster stronger regional ties, ensuring a collective and coordinated response to this transnational threat.

Compulsory AIS System for Vessels Flying the Flag of Mauritius

360. The Automatic Identification System (AIS) is a tracking system used on ships and by vessel traffic services (VTS) for identifying and locating vessels by electronically exchanging data with other nearby ships, VTS stations, and satellites. It provides information such as a vessel's unique identification number, position, course and speed, enhancing maritime safety by facilitating real-time information sharing.

361. Given the paramount importance of maritime safety and security, especially in the context of the vast oceanic expanse surrounding Mauritius, it is necessary to ensure that vessels operating in and around its waters are easily trackable and identifiable. To this end, it is recommended that Mauritius amends its maritime legislation to make it mandatory for all vessels flying the Mauritian flag to be equipped with the AIS system.

362. Furthermore, to deter and penalise acts that compromise maritime safety and security, it is also recommended that the intentional deactivation or tampering of AIS transceivers on international ships and vessels within Mauritius' territorial sea, contiguous zone and EEZ be criminalised. Such a measure would not only enhance the monitoring capabilities

of maritime authorities but also act as a deterrent against potential illicit activities or maritime misconduct.

Adoption of a Comprehensive Act on Combating the Smuggling of Migrants

363. Mauritius, with its strategic geographical positioning and proximity to Reunion Island (France/EU) and other regional nations, finds itself at a potential crossroads for the smuggling of migrants. While Mauritius has commendably established a robust legislative framework to combat human trafficking, there remains a conspicuous gap in its legislation when it comes to addressing the distinct offence of migrant smuggling. The two crimes, though related, have distinct legal nuances, as underscored by the existence of separate protocols under the United Nations Convention against Transnational Organized Crime (UNTOC).

364. The smuggling of migrants, by its very nature, is a complex crime that transcends mere transportation. It encompasses a range of activities, from the provision of fraudulent documents to the exploitation of the migrants upon arrival. As such, a mere criminalisation of the act, while essential, is insufficient. Mauritius needs a holistic legislation that not only defines and penalises the act but also addresses the multifaceted challenges associated with it.

365. A comprehensive Act on combating the smuggling of migrants should encompass provisions for the protection and assistance of victims, ensuring they are treated as victims of a crime rather than as criminals themselves. It should also provide for stringent border control measures, mechanisms to verify the authenticity of documents and robust procedures for evidence gathering. Furthermore, given the transnational nature of the crime, the legislation should facilitate the sharing of information and intelligence with regional and international partners.

366. In essence, Mauritius stands at a pivotal juncture. By adopting a comprehensive legislation on the smuggling of migrants, it can fortify its borders, protect vulnerable individuals and further its commitment to upholding international legal standards.

Implementation of MARPOL Annexes IV and V with Adequate Penalties

367. In order to strengthen the nation's commitment to preserving the marine environment, it is imperative for Mauritius to fully implement the provisions of MARPOL Annexes IV and V. These annexes, which address the prevention of pollution by sewage from ships and garbage from ships respectively, are critical in ensuring that our oceans remain free from harmful pollutants.

368. Furthermore, the penalties associated with violations of these annexes should be commensurate with the gravity of the offences. It is not just about penalising the immediate perpetrators but also ensuring that the entities behind these operations, such as the operating companies, are held accountable. This can be achieved by imposing substantial fines on the operating companies, thereby ensuring that they too have a vested interest in adhering to the stipulations of MARPOL. Such a measure would not only act as a deterrent but also underscore the nation's unwavering commitment to marine conservation.

Criminalising the Act of "Blockage"

369. Given the potential threats and disruptions that "blockage" can cause to maritime operations and security, it is paramount for Mauritius to elevate the act of "blockage" to a criminal offence. This would involve amending or introducing legislation that specifically makes it illegal to intentionally obstruct or hinder the passage of vessels in Mauritian waters. The act of blockage can have significant implications for maritime safety, freedom of navigation and the flow of international trade.

370. In line with the ISPS Code's section 15.11 – 8 which states that "the PFSA (Port Facility Security Assessment) should consider all possible threats, including blockage; of port entrances, locks, approaches etc", the penalties imposed for this offence should be directly proportional to the damage caused. By doing so, it ensures that those responsible for causing significant disruptions or damages are held accountable to an extent that reflects the severity of their actions. Such a legislative move would not only deter

potential offenders but also reinforce Mauritius's commitment to ensuring the safety and security of its maritime domain.

Enhance the penalty in the Merchant Shipping Security of Ships Regulations 2019

371. The Merchant Shipping Security of Ships Regulations 2019 provides for the security measures and protocols to be followed by ships under the Mauritius flag. Regulation 38 of the document stipulates that any ship operator or master of a ship who fails to comply with these regulations shall be liable, upon conviction, to a fine not exceeding 50,000 rupees.

372. Given the increasing threats and challenges in maritime security and in light of the discussions and insights gained from the workshops organised by the UNODC, there is a pressing need to enhance the penalties stipulated in the Merchant Shipping Security of Ships Regulations 2019. This is crucial to ensure greater compliance and to deter potential breaches of the regulations.

373. An increase in the monetary penalty would serve as a stronger deterrent for potential violators. Enhancing the penalties will not only ensure better compliance with the regulations but also underscore the commitment of Mauritius to uphold the highest standards of maritime security. Given the strategic importance of maritime routes and the potential security threats, it is imperative that the penalties are commensurate with the risks involved.

To enact legislation in combatting specifically the terrorism at sea

374. The recommendation to enact legislation specifically targeting terrorism at sea addresses a gap in Mauritius' current legal framework. While existing laws focus on land-based terrorism, there's a need for distinct provisions addressing maritime terrorism. This includes defining offenses related to terrorist acts at sea, specifying aggravating circumstances, and establishing jurisdiction over such acts. Additionally, enhancing port security and detailing responses to maritime terrorism are vital. This legislation would

strengthen Mauritius' capacity to prevent and respond to terrorist threats in its maritime zones, aligning with international maritime security standards.

To create a biological and chemical protocol at the Port (15.11 – 9 of ISPS Code)

375. In the context of enhancing port security, the recommendation for Mauritius to create a specific biological and chemical protocol at the port, in alignment with Section 15.11 - 9 of the ISPS Code, is a pivotal enhancement to its existing Port Facility Security Assessment. This initiative would focus on addressing the nuanced and complex threats posed by biological and chemical substances, which are becoming increasingly relevant in the realm of maritime security.

376. The development of this protocol necessitates a detailed assessment of biological and chemical threats specific to Mauritius's port environments. This would involve identifying potential sources of these threats, evaluating the likelihood of their occurrence, and understanding their potential impact. Building upon the general framework provided by the existing Port Facility Security Assessment, this targeted approach would ensure that the unique characteristics and risks associated with biological and chemical threats are comprehensively addressed.

377. The more so, the dynamic nature of security threats, coupled with advancements in technology and changes in maritime operations, underscores the need for these protocols to be regularly reviewed and updated. Collaborative efforts with international bodies experienced in maritime security, specifically pertaining to biological and chemical threats, would be beneficial. By aligning with international best practices and standards, Mauritius can fortify its maritime security infrastructure against a broad spectrum of threats, thereby safeguarding its ports and contributing to the safety and security of international maritime trade.

Mauritius to sign and ratify the 2005 SUA Protocol

378. The recommendation for Mauritius to accede to the 2005 Protocol to the 1988 SUA Convention represents a significant stride in enhancing maritime security. It has to be

noted that although the Republic of Mauritius has signed the 1988 SUA Convention, it has not signed the 2005 SUA Protocol. This protocol extends the scope of the original SUA Convention, addressing contemporary maritime threats, including terrorism and the transport of weapons of mass destruction (WMDs). By adopting this protocol, Mauritius would expand its legal framework to cover a broader range of maritime offences, including the use of ships as weapons and the transport of materials related to weapons of mass destruction WMDs. This move would also empower Mauritius with greater jurisdictional and prosecution capabilities over such offences, essential for an island nation with vast maritime zones.

379. Joining the 2005 SUA Protocol offers multiple advantages for Mauritius. It would increase the country's maritime security, crucial for protecting its economic interests and environmental resources. The protocol will strengthen Mauritius's capacity to counter maritime terrorism, providing a robust legal and operational framework to prevent and respond to threats, including the transport of BCN (Biological, Chemical, and Nuclear) weapons.

380. The emphasis on preventing the transport of BCN weapons is particularly pertinent. The protocol's provisions would enable Mauritius to effectively prevent, detect, and act against threats related to the proliferation of such weapons through maritime channels. This aligns with global non-proliferation efforts, ensuring Mauritius does not become a transit point for BCN weapons. In essence, Mauritius's accession to the 2005 SUA Protocol would significantly enhance its legal authority and operational capability to address contemporary maritime threats, fostering a safer and more secure maritime domain.

To evaluate the possibility and interest of creating a specialised unit/department for maritime and Port crimes

381. This is a significant step for Mauritius in strengthening its maritime security and law enforcement capabilities. This evaluation begins with an assessment of the need for such a unit, considering the nature, frequency and complexity of maritime and port-related

crimes in the region. Understanding the specific challenges these types of crimes present is crucial in determining the necessity and scope of the specialised unit.

382. The core advantage of a specialised unit lies in its focus on maritime and port crimes, bringing together expertise and resources tailored to this specific field. The unit would be comprised of individuals trained in maritime law, familiar with international maritime regulations, and adept at operating in the unique conditions of maritime environments. Additionally, this unit would serve as a central point of coordination among various national agencies, such as the coast guard, customs and environmental agencies, and foster collaboration with international law enforcement for transnational crime issues.

383. An essential part of the evaluation process is conducting a thorough cost-benefit analysis. This analysis would weigh the financial implications of establishing and maintaining the unit against the expected benefits, such as enhanced security, better crime prevention and prosecution, and protection of the nation's economic interests in its maritime domains.

384. Moreover, assessing the potential impact of the specialised unit on improving maritime security is critical. The creation of such a unit could significantly enhance Mauritius's ability to effectively tackle maritime and port crimes, but this decision must be backed by a detailed understanding of the current maritime crime landscape and a clear vision of the unit's role in enhancing national security.

To create a specific maritime crime cell within ADSU with investigators having expertise and/or followed training in law of the sea/Maritime Law

385. Creating a specific maritime crime cell within the Anti-Drug and Smuggling Unit (ADSU) in Mauritius represents a strategic enhancement in addressing maritime-related criminal activities. The formation of this specialised unit is predicated on the unique nature of maritime crime, which encompasses complex legal and jurisdictional challenges that differ significantly from conventional land-based criminal activities.

386. The key to the effectiveness of this maritime crime cell lies in the expertise of its investigators. These professionals should either possess a deep understanding of

maritime law and the law of the sea or receive specialised training in these fields. This expertise is crucial for effectively navigating the complexities inherent in maritime crime, which can include nuanced issues of international waters, territorial jurisdictions, and adherence to various maritime conventions.

387. Continuous training and development for the personnel of this cell are paramount. Staying abreast of the latest developments in maritime law, evolving investigative techniques specific to maritime crimes and aligning with international best practices in maritime law enforcement are essential for maintaining the efficacy of the unit. Given Mauritius's strategic position in the Indian Ocean, the role of this cell is critically important in safeguarding the nation's maritime security and economic interests.

388. Furthermore, effective collaboration and coordination with other national and international entities, such as the coast guard, customs and global maritime organisations, are crucial for successful law enforcement and intelligence sharing. The integration of this specialised maritime crime cell within the ADSU would significantly enhance Mauritius's capabilities in tackling maritime crimes, ensuring the protection and security of its maritime domain.

To enhance the existing Maritime Crime Unit within the Office of the Director of Public Prosecution with specialised mandate and comprising prosecutors who have existing expertise and/or followed training in law of the sea/maritime law

389. This enhancement involves granting the unit a specialised mandate focused on maritime crime, including piracy, illegal fishing, drug trafficking and maritime terrorism. Such a mandate necessitates a deep understanding of maritime law, which often differs from general criminal law due to its unique complexities and international dimensions.

390. One important aspect to this recommendation is the development of a team of skilled prosecutors. These legal professionals should either already possess expertise in maritime law or be provided with specialised training in this field. Their role is critical in navigating the intricacies of maritime legal cases, ensuring effective prosecution and establishing a strong legal deterrent against maritime crimes. The specialised knowledge

and skills of these prosecutors would be instrumental in upholding justice and maintaining the rule of law in maritime contexts.

391. In addition to enhancing individual skills, the recommendation underscores the importance of ongoing training and professional development. This would keep the unit abreast of the latest developments in maritime law and practices. Furthermore, fostering international collaboration is crucial. By engaging with global maritime organisations and counterparts in other countries, the unit can share best practices, participate in joint exercises, and enhance its capacity for cross-border investigations and prosecutions. Overall, this enhancement of the Maritime Crime Unit would significantly improve Mauritius's ability to tackle maritime crimes effectively, contributing to the safety and security of its maritime domain and beyond.

Enhancing the maritime safety and environmental protection of Mauritius through the implementation of the Indian Ocean Memorandum of Understanding (MOU) on Port State Control (PSC)

392. This would involve several key steps. Firstly, the implementation of the Indian Ocean MOU signifies Mauritius's commitment to upholding international maritime safety and environmental standards. This regional agreement focuses on the elimination of substandard shipping practices through cooperative port state inspections, ensuring that foreign vessels adhere to global norms.

393. Improvement in Port State Control (PSC) inspections is another crucial aspect. This involves not only updating administrative and technical procedures but also adopting international best practices to ensure comprehensive and effective inspections. The aim is to align Mauritius's inspection processes closely with international standards, thereby enhancing maritime safety and environmental protection in its waters.

394. Training personnel and designating qualified Port State Control Officers (PSCOs) is a critical component of this recommendation. Personnel training should encompass a broad range of areas including maritime safety, pollution prevention and crew welfare, ensuring that the PSCOs have a well-rounded understanding of the various aspects of maritime

operations and regulations. These trained professionals will be responsible for conducting the actual inspections, playing a vital role in enforcing maritime standards.

395. Moreover, Mauritius is encouraged to ratify key international conventions relevant to the Indian Ocean MOU. These include focusing on maritime safety; the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001, aimed at preventing the use of hazardous substances in ship paints; and the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BWM 2004), which addresses invasive species in ships' ballast water. Ratification of these Conventions would align Mauritius with international efforts to ensure maritime safety and protect the marine environment.

396. By taking these steps, Mauritius would not only strengthen the safety of maritime operations within its jurisdiction but also contribute significantly to regional efforts in maintaining high standards of maritime safety and environmental protection in the Indian Ocean.

To carry out a general review of penalties and sanctions in relation to non-compliance with customs and custom regulations to increase the penalties and fines

397. This is a crucial step towards reinforcing maritime law and order. The primary objective of this review would be to assess the effectiveness of the current penalties and sanctions in deterring customs violations. This involves a critical examination of whether the existing fines and sanctions adequately discourage illegal activities like smuggling and ensure compliance with customs regulations.

398. In the event that the review identifies the need for stronger deterrents, Mauritius may consider increasing the penalties and fines. The rationale behind this move is to emphasise the seriousness of customs violations and to encourage adherence to legal requirements. When revising these penalties, it is essential to align them with international standards and best practices in customs enforcement. This alignment ensures that the revised penalty structure is not only effective in deterring violations but also fair and consistent with global norms.

399. However, any increase in penalties should be balanced and proportionate to the severity of the violations. This balanced approach is crucial to ensure fairness and justice. Alongside the penalty restructuring, a parallel focus on public awareness and education about customs regulations and the consequences of non-compliance is vital. Educating stakeholders, including businesses, maritime operators and the general public, about these changes and their significance in maintaining a lawful and secure trading environment would complement the legal measures effectively.

400. By conducting this review and potentially revising the penalty structure, Mauritius aims to strengthen its enforcement capabilities against customs-related offences. This move is not only about imposing stricter penalties but also about upholding the integrity of maritime and trade laws, thereby safeguarding the nation's economic interests and contributing to regional maritime security.

To reinforce the necessary control within the contiguous zone in compliance with section 13 of the Maritime Zone Act 2005

401. The recommendation is about strengthening maritime surveillance and enforcement in the zone adjacent to its territorial sea. In line with section 13 of the Maritime Zone Act 2005, which provides that the Prime Minister is empowered to enact regulations, inter alia, for maintaining necessary controls in the contiguous zone. These regulations aim to prevent and penalise violations of customs, fiscal, immigration, or sanitary laws within Mauritius, including its archipelagic waters, internal waters, and territorial sea.

402. The contiguous zone, extending up to 24 nautical miles from the baseline, allows a coastal state like Mauritius to prevent or punish infringements of customs, fiscal, immigration or sanitary laws within its territory or territorial sea. Enhancing control in this zone would enable Mauritius to more effectively manage and safeguard its maritime interests, particularly in countering illicit activities such as smuggling, illegal fishing and environmental violations. This would involve deploying resources like maritime patrol vessels and surveillance technology, and potentially collaborating with regional and international partners for capacity building and operational support.

To regulate in the national legal system (of Mauritius) the carrying out of bunkering and STS in waters under the jurisdiction of Mauritius in accordance with international law

403. Regulating bunkering and Ship-to-Ship (STS) transfer operations within Mauritius's jurisdiction, in line with international law, is an essential step towards bolstering maritime safety and environmental protection. The development of clear and comprehensive regulations for these operations is critical. These regulations should encompass detailed operational procedures, safety standards, environmental protection measures and emergency response protocols. Such regulatory frameworks are vital in managing the inherent risks associated with the transfer of cargo like oil, chemicals, or liquefied gas between ships.

404. The alignment of these regulations with international standards and best practices is equally important. Adhering to conventions and guidelines set by bodies like the International Maritime Organization (IMO), particularly those relating to pollution prevention during STS operations, ensures that Mauritius's regulations are globally compliant. Additionally, implementing a robust system for licensing and monitoring service providers will ensure that only operators meeting stringent safety and environmental standards can operate in Mauritian waters.

405. Effective enforcement mechanisms, including regular inspections, audits, and stringent penalties for non-compliance, are essential for ensuring adherence to these regulations. By taking these measures, Mauritius will not only enhance the safety and efficiency of maritime activities like bunkering and STS operations but also demonstrate its commitment to protecting the marine environment and aligning with international maritime safety and environmental conservation efforts.

Capacity building

406. The capacity building and training recommendation for Maritime Law Enforcement (MLE) agents and police officers in Mauritius encompasses several key areas, each tailored to enhance the handling of maritime crimes and security in port facilities.

407. Firstly, training Maritime Law Enforcement agents, such as Coast Guards, in crime scene management is essential. This training would focus on the initial approach to a crime scene, ensuring that evidence is preserved correctly for court admissibility. Given that these agents are often the first responders, their ability to correctly handle a crime scene is pivotal for the success of subsequent investigations.

408. Additionally, Maritime Law Enforcement agents must be trained in maintaining the chain of custody for evidence. This includes procedures for handling, documenting, storing, and transferring evidence to preserve its integrity and admissibility in legal proceedings. Correct chain of custody procedures is crucial in preventing evidence tampering and ensuring its validity in court.

409. Training Maritime Law Enforcement agents in legal statement writing is another critical aspect. Agents need to be adept at documenting facts clearly, concisely and using appropriate legal expressions. This skill is vital as these statements often form a crucial part of the evidence presented in court.

410. There is also a need for specialised training for investigators handling crimes in maritime environments and port facilities. These environments have unique challenges and complexities, requiring an understanding of maritime law, jurisdictional nuances, and the specific nature of maritime and port facility crimes. Police officers working in port facilities require specific training on the International Ship and Port Facility Security (ISPS) Code. This training would focus on the application and enforcement of the ISPS Code's provisions, which are critical for maintaining maritime security.

411. Lastly, training in the evaluation and detection of potential nuclear, biological, and chemical (NBC) threats is essential for Maritime Law Enforcement agents. Given the

severe risks these threats pose in maritime contexts, agents need to be equipped with the knowledge and skills to identify and respond effectively to such threats.

412. Overall, this comprehensive training and capacity-building program is designed to significantly enhance Mauritius's capabilities in addressing the complexities and challenges associated with maritime crimes and port facility security. By equipping MLE agents and police officers with specialised skills and knowledge, Mauritius can ensure a more secure and effective response to maritime security threats.

CONCLUSION

413. "*Thálatta! Thálatta!*", shouted the 10,000 Greek mercenaries,[433] when they saw Euxeinos Pontos (the Black Sea) from Mount Theches in Trebizond, after participating in Cyrus the Younger's unsuccessful march against the Persian Empire in the 401 BCE. "*Thálatta*" in Greek means "sea". Since late antiquity, the sea played a major role in people's lives, and rapidly emerged maritime law, which was first documented in Ancient Egypt.[434]

414. Made up of all the rules relating to the use of maritime spaces by subjects of international law, foremost among which are States, the law of the sea has the particularity of being one of the oldest elements of this law, if we consider the appearance of its first standards, and one of the most modern too, since it has been the subject of a total and recent overhaul. Sources of income and geopolitical positioning in a globalisation increasingly marked by the challenge of environmental security, marine spaces give rise to claims, if not conflicts, in the continuity of what was current for land territories, in particular following decolonisation's and independence in the twentieth century, but with differences linked to military traditions in these maritime spaces, the open nature of the marine environment, or technical and anticipation issues that the underwater world arouses.

415. The United Nations Convention on the Law of the Sea (UNCLOS) provides an international legal framework for global governance of the sea and the exploitation of maritime natural resources. Its scope is wide and covers the entire marine space and its uses. The Convention specifies the different categories of maritime spaces over which coastal States can claim their sovereignty: internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ) and the continental shelf (submarine extension of the territory state up to 200 nautical miles). Beyond, the waters and the seabed come under the regime of the high seas. Each coastal state thus exercises its sovereign rights up to 200 miles from the coast.

[433] According to Greek historian Xenophon in his *Anabasis*.
[434] https://www.navy.gov.au/sites/default/files/documents/IntSP_1_Ancient_EgyptSP.pdf

416. According to Section 3 of our Maritime Zone Act, notwithstanding any other enactment, UNCLOS shall have force of law in Mauritius.

417. As it is, alas, well known, an oil spill affected the south-eastern coasts of Mauritius from August 6, 2020, following the environmental disaster caused by the grounding of the bulk carrier *MV Wakashio*. Mauritius has not so far applied to designate any area as a Particularly Sensitive Sea Area (PSSA). This tragedy has put in the spotlight the importance of maritime regulations and has acted as a wake-up call for the necessity to grasp certain concepts, like "innocent passage" for instance. We have seen that the obligations of Mauritius under UNCLOS relate to the requirements to domesticate its law to provide for the right of innocent passage in its territorial sea, as stipulated in Article 21(1)-(4) of UNCLOS.

418. Mauritian legislation, in many respects, complies with the UN Convention, for instance with regards to the Exclusive Economic Zone. However, there are many lacunae which have been spotted, resulting in Mauritius falling short of its international obligations.

419. Thus, it appears that basepoint M2[435] is not in conformity with UNCLOS and hence the use of such basepoint for drawing the straight baselines may be questioned. Moreover, although UNCLOS neither specifically refers to the number of islands that will constitute a "fringe of islands" nor how close these islands should be, however, it may be argued whether two islands would be sufficient to constitute a fringe of islands. Furthermore, the recent claim by Mauritius of Mathurin Bay as a "historic bay" may be challenged on the basis that its exercise of authority was not for a long term, especially if there is no acquiescence by other States.

420. As for the notion of "innocent passage", which have spilled nearly as much ink as oil, Mauritius ought to specifically provide for a clear meaning of same. It is also to be deplored that there is no provision in our domestic legislation in respect of the passage of submarines and other underwater vehicles in the territorial seas of Mauritius as far as "innocent passage" is concerned. It is therefore, necessary to amend the law to enact that

[435] Mentioned in Maritime Zones (Baselines and Delineating Lines) Regulations 2005.

submarines and other underwater vehicles could only exercise the right of innocent passage in the territorial/archipelagic waters on the surface and showing their flag.

421. We have also observed the failure to incorporate in our legislation provisions relating to the designation of sea lanes and traffic separation scheme, thus the provisions of UNCLOS for the exercise of the right of innocent passage in the internal waters, archipelagic seas and territorial seas cannot be made effective.[436]

422. Article 303(2) of UNCLOS extends the jurisdiction of the coastal State in relation to the removal of archaeological and historical objects found on the seabed of the contiguous zones, about which our legislation is silent. It was also submitted that the provisions of the MZA should make it clear that all States are entitled to lay submarine cables and pipelines on the continental shelf, and that hot pursuit, as envisaged under Article 111 of UNCLOS, cannot be assimilated to illegal fishing only.

423. Besides, there is a need to include the provision relating to the right of hot pursuit either in the NCGA or to make necessary amendments in the FMRA to extend it to other law enforcement agencies such as the NCG, Customs and the Police.

424. Concerning Piracy, the PMVA has been drafted on the model of UNCLOS not only to echo customary international law but also to address some of the lacunae in UNCLOS. Nonetheless, the PMVA does not make provision in respect of preparatory offences. Also, the said legislation appears to make a distinction between an act of violence committed on the "high seas" and those committed within the territorial sea, the internal waters or the archipelagic water. There would also be a need, in order to avoid issues of interpretation, to include the contiguous zone in the definition of "high seas" in section 2 of the PMVA.

425. Finally, it must be stressed that our legislation is silent regarding issues of marine pollution beyond the territorial sea, particularly in respect of inspection and detention of ship.

[436] It was also noted that Mauritius may be in breach of Article 53(1) of UNCLOS in relation to its obligation to designate sea lanes for allowing innocent passage by foreign ships within its internal waters, archipelagic waters and territorial sea.

426. UNCLOS is, "in many respects, an amazing treaty. Hailed as possibly the most significant legal instrument of [the twentieth] century, UNCLOS strikes a delicate balance between freedom of navigation and utilisation of the oceans on the one hand, and on the other, sovereign rights and control over the ocean and its resources".[437] Mauritius should do its best to conform to the largest extent possible to this crucial piece of international instrument and to remedy to deficiencies in its compliance with the Convention and its protocols, which would be in the best interest of our maritime safety and economy as well as the reputation of the country.

[437] Norris, CDR Andrew J. "The "Other" Law of the Sea" Naval War College Review. Vol. 64, No. 3 (Summer 2011): 78-97.