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International law considerations in maritime regulation and enforcement

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Maritime regulation and enforcement issues

Maritime threats	Considerations	
<ul style="list-style-type: none">• Illegal fishing• Customs offences• Illegal immigration• Human trafficking• Drug trafficking• Marine pollution• Marine biodiversity and bio-security• Maritime security	<ul style="list-style-type: none">• Which zone?• What offence?• Use of force?• Is the cost of enforcement justified?	



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Policy questions

- What level of resources should reasonably be devoted to maritime enforcement?
- What is the best balance of effort as between air, sea and land based enforcement procedures?
- Should enforcement should be carried out by military or civilian agencies?



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Legal framework

Two interacting frameworks

- **Municipal law** - indicates when power is to be exercised, by whom and the penalties imposed for violation
- **International law** - indicates the circumstances in which the exercise of municipal law power is lawful

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Relevance of international law

Maritime law enforcement officers must take into account more questions of international law than is ordinarily required of authorities ashore because he/she is operating in a domain regulated fundamentally by international law

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Domestic law is not a defence

A State cannot use its domestic law as a justification for a breach of its international obligations

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Jurisdiction *juris dictio*: the administration of justice

Wider meaning evolved:

- The power, right, or authority to interpret and apply the law
- Describes the limits of the power of one authority against another

Critical to understand across different maritime zones

Also means:

- Delineating the competence of particular courts to hear disputes

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Jurisdiction

“Jurisdiction” in public international law:

- Describes the power or competence of a State to prescribe or enforce its laws where this will have an impact on foreign States, persons, property or interests

Prescriptive jurisdiction (legislative power)

- The making of laws and regulations

Enforcement jurisdiction (executive and judicial power)

- The taking of enforcement action

Does excessive prescription without enforcement constitute a violation of international law?

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Bases of jurisdiction

Requirements for enforcement:

1. person, entity or property to be within physical (territorial) power
2. based on legitimate prescriptive jurisdiction

Can't enforce in territory of another State unless expressly authorised in a treaty

1. Territorial principle
2. Nationality principle
3. Protective principle
4. Universality principle
5. Passive personality principle

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Maritime zone considerations

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Internal waters

- All waters on the landward side of the territorial sea baseline (Art 8)
 - lakes
 - lagoons
 - bays
 - rivers
 - ports
- LOSC does not prescribe any rules for internal waters

What is a port?

- Defined by national legislation
- Concept of "port limits"
- Common for parts of a port to extend into the territorial sea

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Jurisdiction in internal waters

Prescriptive jurisdiction

Full coastal State sovereignty

- Including construction, design, equipment, management

Enforcement jurisdiction

Criminal matters and civil matters

- Normally don't take action against persons on foreign vessels in port if it is a matter within the 'internal economy' of the ship, and thus under flag State jurisdiction (but serious offences may be prosecuted by coastal States)

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Balancing of interests in internal waters

- Coastal State has full sovereignty
 - Sovereignty not qualified by any international obligations
- Policy implications
- Coastal State has power to exclude all foreign vessels from internal waters
 - *Principle of non-discrimination*
 - Can prescribe conditions for entry into internal waters
 - Can designate ports open to international vessels

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Must ports be open?

States have right to **regulate** port access (e.g. re vessels that don't comply with SOLAS or IMO regulations, or prescribe other conditions for entry to port)

- This right is based on a coastal State's sovereignty over its internal waters, and it is **implicit in LOSC** e.g.:

Article 25

Pollution from vessels

2. *In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.*

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Must ports be open?

Article 211

Pollution from vessels

3. *States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization...*

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Must ports be open?

Article 255
Measures to facilitate marine scientific research and assist research vessels

States shall endeavour to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research conducted in accordance with this Convention beyond their territorial sea and, as appropriate, to **facilitate**, subject to the provisions of their laws and regulations, **access to their harbours** and promote assistance for marine scientific research vessels which comply with the relevant provisions of this Part.

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Port exit

- Coastal State's criminal laws apply
- Rights of arrest (e.g. pollution and customs offences)
- Detain unseaworthy vessels
- Arrest ships as security in civil proceedings
- Must promptly release foreign vessels arrested for breaches of EEZ laws: **LOSC art 73(2)**

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Territorial sea

- Laws of coastal State apply subject only to the right of innocent passage
- Coastal State has sovereignty over territorial sea including seabed and airspace



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Territorial sea – issues to consider

- Coastal State **prescriptive powers** in the territorial sea
- Coastal State **enforcement powers** in the territorial sea
 - Criminal jurisdiction
 - Civil jurisdiction

Full prescriptive and enforcement powers

Subject only to specific limitations agreed to in international law



Innocent passage

Ships "of all States" "enjoy the right of innocent passage through the territorial sea" (art 17)

Meaning of "passage"
(art 18)

- Continuous and expeditious traversing of the territorial sea (including to proceed to or from internal waters, roadsteads or port facilities)
- Includes stopping and anchoring but only if:
 - incidental to normal navigation
 - rendered necessary by *force majeure* or distress
 - to render assistance

Meaning of "innocent"
(art 19)

- Passage that is **not prejudicial to the "peace, good order or security of the coastal State"** and is in conformity with LOSC and other rules of international law

What does this mean?



Innocent passage

Prohibited activities
(art 19)

- any threat or use of force against the coastal State
- weapons exercises or practice
- launching or recovery of aircraft or military devices
- intelligence gathering against the coastal State
- research or survey activities
- interfering with coastal State communication systems
- acts of propaganda directed against the coastal State
- loading/unloading of goods/persons contrary to coastal State's customs, fiscal, immigration or sanitation laws
- wilful and serious pollution
- fishing activities
- "any other activity not having a direct bearing on passage"

What is the practical effect of these prohibitions?



Innocent passage

Submarines

- (art 20)
- must navigate on the surface and display flag



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Innocent passage

Nuclear-powered ships + ships carrying inherently dangerous substances

- (art 23)
- must carry documents and observe special precautionary measures established by international agreements for such ships



Yamal (Russian nuclear-powered icebreaker)

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Innocent passage

Coastal State prescriptive powers

art 21

- safety of navigation and regulation of maritime traffic
- protection of installations and navigational aids and facilities
- protection of cable and pipelines
- conservation of the living resources of the sea
- prevention of infringement of coastal State's fisheries laws
- preservation of the marine environment and pollution control
- marine scientific research and hydrographic surveys
- customs, fiscal, immigration and sanitary matters

Note: coastal States must "give appropriate publicity" to any known navigational dangers in their territorial seas (art 24(2))

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Innocent passage

Sea lanes and traffic separation schemes

art 22

- Foreign ships exercising the right of innocent passage may be restricted to sea lanes and traffic separation schemes designated by the coastal State
- Tankers and nuclear-powered ships and ships carrying inherently dangerous cargo may be required to confine their passage to designated sea lanes
- In designating sea lanes and prescribing traffic separation schemes, the Coastal State must consider IMO recommendations
- Coastal State must clearly indicate sea lanes and traffic separation schemes on charts and give them "due publicity"

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Innocent passage

Limitations on prescriptive powers

- Laws must be in conformity with LOSC and other rules of international law (art 21(1))
- Coastal State laws must not apply to the design, construction, manning or equipment of foreign ships unless if giving effect to IMO rules or standards (art 21(2))
- Coastal States must give due publicity to such laws (art 21(3))
- Coastal States shall not "hamper" the innocent passage of foreign ships such as imposing requirements which have the practical effect of denying or impairing innocent passage (art 24(1))
- Coastal States shall not discriminate against the ships of any State or against ships carrying cargo to, from or on behalf of any State (art 24(1)(b))

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Innocent passage

Coastal State rights of protection

- Coastal States may take "necessary steps" in the territorial sea to prevent passage that is not innocent (art 25(1))
- Regarding ships proceeding to internal waters (or a port facility outside internal waters), the coastal State can take "necessary steps" to prevent breach of conditions of entry (art 25(2))

What can lawfully be done to "prevent" breaches?

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Innocent passage

Coastal State rights of protection

Suspension of innocent passage

- Coastal States have the power to temporarily suspend innocent passage in specified areas if essential to protect national security (such as weapons exercises) (art 25(3))
- Cannot discriminate in form or in fact among foreign ships
- Suspension to take effect only after it has been duly published

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Innocent passage

art 27(1)

Coastal State criminal jurisdiction not to be exercised (ie to arrest a person or conduct an investigation on board a ship during its passage through the territorial sea) **unless:**

- the consequences of crime "extend" to the coastal State
- the crime is "of a kind to disturb the peace of the country or of the good order of the territorial sea"
- if assistance of local authorities requested by master or flag State
- measures are necessary to suppress drug trafficking

Exception: if foreign vessel is passing through the territorial sea after leaving internal waters (art 27(2))

If coastal State jurisdiction is exercised, the coastal State shall, if requested by the master, notify the flag State through diplomatic channels before taking any steps and shall facilitate contact between the diplomatic officer and the ship's crew (art 27(3))

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Criminal jurisdiction in the territorial sea

art 27(5)

No enforcement action to be taken against a foreign vessel for offences committed before entry into the territorial sea except:

- violations of coastal State's EEZ laws and regulations
- pollution offences
- (offences committed in internal waters: art 27(2))

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Criminal jurisdiction in the territorial sea

Issues to consider

- When do the consequences of a crime extend to the coastal State?
 - Is there an objective test?
- When does a crime disturb the peace of the country or the good order of the territorial sea?

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Civil jurisdiction in the territorial sea

art 28

General prohibition of civil enforcement except:

- obligations and liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State
 - what is meant by "waters of the coastal State"?
- it had left the coastal State's internal waters

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Immunity of warships and other government vessels

- Immunity of warships and other government vessels (art 32)
 - "warship" defined in art 29
 - no definition of "other government vessels"
- Art 30 deals with warships that do not comply with innocent passage
 - what if warship refuses to leave territorial sea?
 - what if non-compliance by other government vessels?

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Innocent passage + maritime security

- Current debate
- To what extent can a coastal State interfere with a vessel on innocent passage on the grounds of maritime security?
 - Can a coastal State lawfully board a foreign vessel on innocent passage on suspicion of carrying weapons of mass destruction or a wanted "terrorist"?

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Contiguous zone

Zone of limited sovereignty

- Art 33: Contiguous zone no more than 24 nm from baseline (1958 Convention: 12nm)
 - Note: Part of the EEZ for all other purposes
- Coastal State to exercise 'controls' necessary to prevent infringement of its
 - Customs
 - Fiscal
 - Immigration or
 - Sanitarylaws committed within its territory or territorial sea
- Coastal State to punish infringement of customs, fiscal, immigration or sanitary laws and regulations committed within its territory or territorial sea

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Fisheries

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Fisheries enforcement in the EEZ

LOSC Article 62(4)(k) (enforcement procedures)

- boarding
- inspection
- arrest
- judicial proceedings

To ensure compliance with laws and regulations of the coastal State

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Enforcement of laws of the coastal State

Art 73

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to **ensure compliance with its laws and regulations adopted by it in conformity with this Convention.**
2. Arrested vessels and their crews shall be **promptly released upon the posting of reasonable bond or other security.**
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone **may not include imprisonment**, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly **notify the flag State**, through appropriate channels, of the action taken and of any penalties subsequently imposed.

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Legal issues

- How to characterise offences under art 73?
- What is a reasonable bond?
- Does detention or imprisonment constitute a violation of art 73?
- Does forfeiture/confiscation of vessels violate the requirement for prompt release?

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Use of force

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Use of force

- Substantial aspect of maritime enforcement relies on the use of force
- The extent to which a State may resort to force to enforce its sovereignty or sovereign rights is regulated by rules of international law

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Caroline principles

The Caroline Case
Canadian rebellion in 1837. Rebel leaders enlisted the support of the US vessel, the *Caroline*, which was used to attack British ships. Later British seized the *Caroline* at an American port, and destroyed it (set alight and cast adrift over Niagara Falls)



US position
Force might have been justified by the necessity of self-defence, but such necessity did not exist

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Necessity

“overwhelming necessity, leaving no choice of means”

- Instant necessity to take measures to protect the basic fundamental values of your State: “no moment for deliberation”

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Proportionality

Two tests:

- Legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by the seriousness of the danger
- The act justified by self defense must be limited by that necessity and kept clearly within it

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MV SAIGA case (ITLOS)

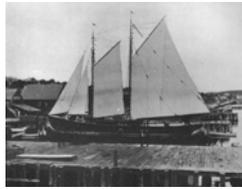
“The Convention considers a **ship as a unit**, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention.

Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.” [Para 106, Meris].

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The *I'm Alone* incident (1929)



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The *I'm Alone* incident (1929)

- Prohibition era in USA
- *SS I'm Alone* – Canadian Schooner running liquor into USA (had 2800 cases on board) by off-loading to smaller vessels off the coast of Louisiana
- 22 March 1929 – *I'm Alone* pursued by US Revenue Cutters (US Coast Guard) *Wolcott* and *Dexter*
 - Pursuit started at 10.8 nautical miles off shore (US claim) / 14 nm off shore (Skipper Randall claim)
 - Under a treaty between US and Great Britain (1924):
 - Out to 3 nm was US Territorial Sea
 - Out to '1 hours sailing distance' (Treaty) / 3-12 nm (US Traffic Act) – US authority to board, search and seize

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The *I'm Alone* incident (1929)

- Pursuit out to approx 200 nm from Louisiana coast
- *Wolcott* and *Dexter* fired into *I'm Alone* with admitted intention of sinking her
- *I'm Alone* sank
- UK argued that hot pursuit could only occur if it commenced inside the 3 nm limit, and had to end at the 12 nm limit
- US argued that hot pursuit could commence within the 12 nm limit, and continue on to the High Seas

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The *I'm Alone* incident (1929)

- In accordance with the Treaty – 2 Commissioners appointed to examine the incident (1 x US; 1 x Canadian)
- Joint report:
 - The hot pursuit, if commenced from within the 3-12 nm zone, was lawful (did not say this expressly, but it can be inferred)
 - Can use reasonable and necessary force for the purpose of effecting boarding, searching, seizure, and bringing into port
 - If sinking should occur incidentally as a result of reasonable and necessary force for such a purpose, 'the pursuing vessel might be entirely blameless'
 - The intentional sinking of the vessel was unlawful

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The *Red Crusader* incident (1961)



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The *Red Crusader* incident (1961)

- 1959 Agreement between Faroe Islands (Denmark) and UK – '6 + 6' fisheries arrangement around Faroe Islands
 - Inner 6nm from straight baselines – exclusive Faroese fishing
 - 6-12 nm zone – UK fishing permitted
- 29 May 1961 – 4 UK trawlers reported as inside the 6nm zone
- Danish Warship *Niels Ebbesen*:
 - Approached *Red Crusader*
 - Gave several stop signals by siren and light
 - When *Red Crusader* still refused to stop, fired blank 40mm shot in front of the bow
 - Sent Officer and rating to board *Red Crusader*
 - Skipper Wood went with them to *Niels Ebbesen*, was told his vessel was arrested, then returned with them to *Red Crusader*
 - *Red Crusader* ordered to follow *Niels Ebbesen* to Thorshavn (Faroese port)
 - *Red Crusader* complied for a time, but then altered course to make for Aberdeen, with the Danish Navy Boarding Party still on board

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The Red Crusader incident (1961)

- *Niels Ebbesen* undertook hot pursuit
 - Warning shots
 - Then fired mix of machine gun rounds into radar and mast, then 40 mm solid shot into the stem
 - This took place whilst *Red Crusader* was still in the Faroese Territorial Sea
 - *Red Crusader* continued on out into the High Seas
 - UK Warship *HMS Troubridge* placed herself between *Niels Ebbesen* and *Red Crusader*
 - Danish Boarding Party returned to their ship
 - Danes then sent another Boarding Party to try to re-board *Red Crusader* – not successful
 - *Red Crusader* returned to Aberdeen
- Commission of Inquiry established – reported 23 March 1962

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The Red Crusader incident (1961)

- *Red Crusader* was inside the 6 nm zone (trawl deployed, but not conclusively found to be fishing)
- *Niels Ebbesen's* signalling from outside the 6 nm zone was valid
- *Red Crusader* deliberately tried to escape, and intentionally kept the Danish Boarding Party onboard
- *Niels Ebbesen's* firing of solid shot into the *Red Crusader's* bows 'exceeded legitimate use of armed force on two counts':
 - Firing solid shot without warning
 - *Niels Ebbesen* did warn that he would fire at the hull, but did not say with what sort of shot, and did so only after use of machine gun fire at radar and mast, but before 40mm shot at the stem
 - Creating danger to human life in *Red Crusader* without proved necessity
- *Red Crusader's* flagrant violations of lawful orders to stop etc, and in escaping with the Danish Boarding Party still on board, could not justify the Danish response

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The MV SAIGA case (1997)



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The MV SAIGA case (1997)

- *Saiga* (oil tanker) 28 October 1997, drifting at southern limit of Guinean EEZ, waiting to supply gas oil to fishing vessels
 - Flag – St Vincent and the Grenadines
- Guinean Patrol Boat P35 fired on *Saiga*; Officers from P35 and P328 then boarded and arrested the vessel, and steamed her to Conakry
 - Fired into *Saiga* (including bridge area) with solid shot from large calibre automatic weapons
- Some crew released; Guinean authorities took the cargo of gas oil (4,941 tons); Master and 6 crew remained with *Saiga* in Conakry until the vessel was released 28 February 1998
 - Master convicted in Guinea of importing diesel oil into the Guinean ‘customs radius’ in breach of Guinean law, and refusing to comply with directions of Guinean Navy
- Matter submitted to ITLOS – prompt release issue (amongst others)



The MV SAIGA case (1997)

- ITLOS:
 - Application of customs laws in the EEZ (beyond the Contiguous Zone) is not compatible with the LOSC 1982
 - Therefore the arrest and seizure of the vessel, and conviction of the Master etc, were not compatible with the LOSC
 - Hot Pursuit:
 - Article 111 conditions are cumulative – each has to be satisfied for the hot pursuit to be legitimate under LOSC
 - Recall of the pursuing vessel, prior to recommencing the pursuit, constitutes a clear interruption of the pursuit (and thus its end)
 - There was no legal basis for the pursuit to have commenced at all



The MV SAIGA case (1997)

- Use of force (in Hot Pursuit)
 - Use of force must be avoided as far as possible
 - Where unavoidable, it must not go beyond what is reasonable and necessary
 - ‘Considerations of humanity must apply in the law of the sea, as they do in other areas of international law’
 - Need for signalling etc first, then escalate to shots across the bow
 - Escalation of force procedures
 - **Only if this fails may force be used, as a last resort, and only after warnings and if all efforts are made to ensure life is not endangered**
 - Guinean officers also used excessive force once onboard – firing weapons indiscriminately, using gunfire to stop the engine, causing considerable damage to equipment, and severely injuring 2 crew



The *MV SAIGA* case (1997)

- Separate Opinion of Judge Anderson:

*P35 did not approach the *Saiga* in the accepted manner for law enforcement vessels. Instead, P35 fired live rounds which...broke bridge and cabin windows on board the *Saiga*....

[F]orce must be resorted to only in the last resort after warnings (including shots across the bow) have been given. Even then, any live shots must be fired in such a way as to avoid endangering the lives of those on board

In order to ensure respect for these standards, law enforcement officers should receive adequate training in maritime practices and, if armed, should be provided with specific Rules of Engagement