

# Contents

Abbreviations .....	XIII
Introduction .....	1
Chapter I: The perpetual conflict between freedom and security in the Law of the Sea .....	5
A. The freedom of navigation – cornerstone of the Law of the Sea .....	5
I. Freedom of navigation – an instrument of common sense rather than a legal argument .....	6
II. Exclusive Flag State Jurisdiction – from an instrument to maintain maritime power to a key to liberalize maritime transport .....	9
III. Free navigation for worldwide economic growth and development .....	12
B. Security concerns brought forward to interfere with navigation.....	16
I. Piracy – an ancient, but persistent business .....	17
II. Terrorism and weapons of mass destruction – the new dominant concern.....	25
1. Scenarios of terrorist attacks on maritime trade .....	26
2. Potential economic impact of terrorist attacks on maritime trade.....	28
3. Preventive and repressive measures to combat maritime terrorism.....	29
a) Ship and port security .....	29
b) Interception operations .....	32
III. Undocumented Migration .....	36
IV. Narcotic drugs and psychotropic substances.....	39
V. Illegal fishing .....	44
VI. Pollution.....	47
VII. Fading away and back-up grounds for interferences.....	49
C. Legal limits for interferences and the role of State responsibility .....	51
Chapter II: Principles drawn from the treaty provisions on State responsibility for interferences with navigation on the high seas .....	57
A. Treaty interpretation .....	58
I. Interpretation of the wording .....	60
II. Interpretation of the context.....	61

## VIII Contents

---

III. Object and purpose .....	63
IV. A hierarchy of methods under Art. 31 VCLT .....	64
V. Supplementary means of interpretation .....	65
B. An individual right to claim compensation? .....	67
I. The ordinary meaning of the relevant provisions .....	68
II. Context .....	70
1. The structure of the Law of the Sea Convention .....	70
2. The conventions succeeding the Law of the Sea Convention .....	71
3. Subsequent practice .....	72
4. Rules of general international law .....	75
5. Invocation of State responsibility by private entities in maritime matters .....	79
6. The primary right affected by the interference .....	84
a) Freedom of navigation: a right of the flag State or of the “ship”? .....	84
b) The relevance of the right to property .....	88
7. Conclusion .....	91
8. Meaning of “the ship” .....	91
III. Object and purpose .....	93
IV. Preparatory work .....	94
1. The Law of the Sea Convention .....	94
2. The Intervention Convention .....	97
3. The Straddling Fish Stocks Agreement .....	101
4. The Migrant Smuggling Protocol .....	104
5. The 2005 Protocol to the SUA Convention .....	106
V. Conclusion .....	111
C. The act entailing responsibility: requirement of wrongfulness? .....	112
I. Art. 110, para. 3 LOSC, the prototype of liability for lawful conduct in the Law of the Sea .....	113
II. Hot pursuit under Art. 111, para. 8 LOSC .....	115
III. The seizure of pirate ships under Art. 106 LOSC .....	116
IV. Interferences under the Intervention Convention .....	118
V. Liability for interfering with the navigation of fishing vessels under the Fish Stocks Agreement .....	120
VI. Interferences in order to combat Migrant Smuggling .....	120
VII. Terrorism interdiction operations under the 2005 SUA Protocol .....	122
VIII. The effect of the special nature of the compensation provisions .....	123
IX. Conclusion .....	125
D. Responsibility for attempted interferences .....	126
E. The liable entity – particularly in situations of multilateral boardings .....	127
I. Bilateral boardings .....	128
1. The few indications in the analyzed provisions .....	128

2.	The principles in the general law on State responsibility .....	130
a)	Attribution .....	130
b)	Participation.....	132
(1)	Aid and assistance.....	133
(2)	Direction and control .....	133
(3)	Vicarious liability for internationally lawful conduct? .....	134
3.	Joint and several liability?.....	135
II.	Interdictions within the framework of International Organizations .....	139
1.	The scope of interferences involving International Organizations .....	140
2.	Responsibility of the international or regional organization? .....	143
a)	The United Nations.....	144
b)	Regional organizations enforcing embargoes on the seas .....	146
c)	Operation Enduring Freedom .....	148
d)	Conclusion.....	149
3.	Responsibility of member States for wrongful acts by an International Organization.....	149
4.	The applicability of the compensation provisions to International Organizations .....	153
5.	Conclusion .....	156
F.	The effect of conduct by the boarded party .....	156
I.	Clean Hands Doctrine .....	156
II.	The limited reception of the doctrine in international maritime conventions .....	161
III.	Contributory negligence in the general law on State responsibility.....	162
IV.	Contributory negligence in cases codified by maritime conventions.....	164
G.	Consensual boardings .....	165
H.	The extent of responsibility .....	170
I.	A comparison of the different provisions.....	170
1.	The link between the conduct by the responsible State and the damage .....	170
2.	Qualification of the damage .....	173
a)	“Any loss or damage” .....	173
b)	“Any damage, harm or loss”.....	175
II.	The provisions and the general law on State responsibility .....	176
III.	Types of damages which may be claimed and their calculation .....	179
1.	Delay of the vessel .....	179
2.	Expected profits .....	182
3.	Value of the vessel and cargo.....	184
4.	Detention and mistreatment of the crew.....	186
5.	Punitive damages .....	189

6. Interest .....	192
a) Starting date.....	193
b) When does the interest stop to run?.....	195
c) The interest rate.....	195
7. Currency of the compensation .....	196
8. Damage to the flag state.....	197
9. Costs and expenses.....	198
10. The ability of the respondent State to compensate.....	199
IV. The Intervention Convention: distinction between disproportionate and proportionate damages? .....	200
J. Some procedural issues.....	203
I. The onus of proof.....	203
II. Competing claims of protection.....	207
III. An obligation to forward the compensation award to the victim? .....	210
Chapter III: The U.S. strategy: 28 bilateral treaties and the Proliferation Security Initiative.....	215
A. The 1924 Liquor Treaties .....	216
B. The 1981 Exchange of Notes.....	217
C. Bilateral anti-drugs and migration agreements .....	219
I. Shipboarding.....	222
II. Shipriders.....	223
III. Entry-to-investigate and pursuit.....	224
IV. Conclusion.....	225
D. Liability under the loose framework of the Proliferation Security Initiative .....	225
E. Ship Boarding Agreements within the framework of the Proliferation Security Initiative .....	227
F. United States law on State Liability .....	229
Chapter IV: Compensation for interferences in international conflicts .....	233
A. The law of naval warfare .....	233
I. Three views concerning the legality of visit and search of neutral vessels in times of war .....	234
II. Compensation under the traditional law of naval warfare .....	236
III. Liability under the San Remo Manual .....	241
IV. The restrictive view and its consequences for State responsibility .....	242
V. The development of the damages covered in the law on State responsibility and its consequences for the law of naval warfare .....	242
VI. Conclusion .....	244
B. Interdictions authorized by the United Nations Security Council.....	244

Chapter V: Conclusions and outlook.....	249
A. Major conclusions.....	249
B. Outlook to the future of the liability regime concerning interferences with navigation on the high seas .....	251
Annex 1: Relevant compensation provisions .....	253
Annex 2: Bibliography .....	255
Annex 3: Table of cases .....	279