A murder at sea isn't just a murder! The expanding scope of universal jurisdiction under the SUA Convention

Makoto Seta

CHAPTER IV
A murder at sea isn't just a murder!
The expanding scope of universal jurisdiction under the SUA Convention

Makoto SETA[1]
Associate Professor, Association of International Arts and Science, Yokohama City University

Résumé *: L'un des traités qui donnent un rôle aux Etats côtiers (qui ne sont pas Etats du pavillon) pour maintenir l'ordre dans les océans est la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime (Convention SUA). Cette convention a été conclue à la suite de l'agression de l'Achille Lauro, il y a seulement 30 ans. Après l'incident, non seulement l'Italie, Etat du pavillon de l'Achille Lauro, mais aussi les USA, État dont la victime avait la nationalité, prétendaient exercer leur juridiction sur les suspects de l'agression. Par conséquent, de nombreux Etats ont estimé qu'il était nécessaire de coordonner les juridictions des États et à cette fin, la Convention SUA a été adoptée, comme l'une des conventions de lutte contre le terrorisme, en vue de la répression et de la prévention des activités terroristes, telle la Convention pour la répression de la capture illicite d'aéronefs (Convention de La Haye).*

Alors que dans son préambule, la Convention SUA déclare qu'elle est la Convention sur la lutte contre le terrorisme, l'article 3 de la Convention ne mentionne pas le mot « terrorisme », dans la même veine que d'autres conventions contre le terrorisme. Le paragraphe 1 de cet article criminalise un large éventail d'activités violentes sur mer. Cependant, sauf si cet acte est de nature à compromettre la sécurité de la navigation d'un navire, l'acte ne relève pas du champ d'application de la Convention. L'application de la Convention SUA à des actes distincts du type de l'acte de l'Achille

1) This work was supported by JSPS KAKENHI Grant Number 15K03180.

Lauro est confirmée dans des décisions nationales d'autres Etats, comme l'Inde et la Corée. Pour illustrer, en Inde, dans le cadre de Enrica Lexie incident, la Haute Cour du Kerala semblait admettre que les meurtres de pêcheurs indiens par des soldats italiens entrent dans le champ d'un crime prévu par la Convention SUA. En outre, les tribunaux coréens ont appliqué la Convention SUA pour des cas de piraterie somalienne. Compte tenu de ces faits, la façon large d'interpréter l'article 3 de la Convention SUA, soit dans la façon d'inclure les actes distincts du type de l'acte de l'Achille Lauro semble avoir été établi. En d'autres termes, non seulement le type d'acte de l'Achille Lauro, mais également à une tentative d'assassinat entre dans le cadre de la criminalité prévue par la Convention SUA.

La compétence d'un État de détention des suspects est expliquée sur le fondement du principe d'universalité, du point de vue de la définition de la compétence universelle et de sa justification. Dans le même temps, cette logique a un impact sur le droit de la mer, en particulier le caractère juridique de la mer territoriale, puisque la justification dilue la souveraineté des États côtiers sur leurs eaux territoriales. Cependant, la tendance actuelle de la gouvernance des océans tend à réglementer et gérer l'océan dans son ensemble, pas seulement fondée sur l'approche d'une gestion zonale. L'élargissement de la portée de la compétence universelle en vertu de la Convention SUA est conforme à cette tendance.

***Abstract**: One of the treaties which give the role to non-flag / coastal States to maintain the order of the Ocean is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention). This Convention was concluded as the result of the Achille Lauro incident just 30 years ago. After the incident, not only Italy whose flag Achille Lauro flew, but also United States, a national State of victim, claim to exercise its jurisdiction over suspects of the incident. Therefore, many States feel it is necessary to coordinate jurisdiction of States and for that purpose the SUA Convention was adopted. The SUA Convention was adopted as one of the counter-terrorism conventions which deter and punish terrorist activities, such as the Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention).*

While in its preamble, the SUA Convention declares it is the Convention to fight against terrorism, Article 3 of the Convention does not refer the word "terrorism" at all as in the same vein as other counter-terrorism conventions. Paragraph 1 of this Article criminalizes wide range of violent activity on the sea. However, unless that act is likely to endanger the safe navigation of a ship, the act does not fall within the scope of the Convention. The application of the SUA Convention to acts distinct from the Achille Lauro type act is confirmed in a municipal court of other States, such as India and Korea. To illustrate, in India, in the course of Enrica Lexie Incident, the Kerala High Court seemed to admit the shooting of Indian fisheries by the Italian soldiers fall within the scope of a crime provided under the SUA Convention. Also, the Korean Courts applied its municipal law to implement the SUA Convention to the

case of Somali piracy. Considering these facts, the way to interpret Article 3 of the SUA Convention broadly, i.e. in the way to include acts distinct from the Achille Lauro type act seems to have been established. In other words, not only the Achille Lauro type act, but also just a murder fall within the scope of the crime under the SUA Convention.

The jurisdiction of a Custodial State is explained to be based on the universality principle from both perspectives of definition of universal jurisdiction and its rationale. At the same time, this rationale has an impact on the law of the sea, especially the legal character of the territorial sea, since the rationale dilutes the sovereignty of coastal States over its territorial water. However, the current trend of Ocean Governance tends to regulate and manage the ocean as a whole, not only based on the zonal management approach. The expanding scope of universal jurisdiction under the SUA Convention is in line with this trend.





I. Introduction

The more globalization advances and the number of ships on the seas increases, the more important the sea lane becomes as a traffic route. Simultaneously, the sea is becoming more valuable as a source of natural resources. In these circumstances, it is more essential than ever to maintain peace and order on the seas. However, due to the increase in the number of the flag of convenience and coastal States which cannot control their waters, it is becoming difficult to maintain order on the seas. Therefore, States other than the flag and coastal States are expected to contribute to keeping order.

One of the treaties which give non-flag/coastal States the responsibility of maintaining the order of the ocean is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention). This Convention was concluded as a result of the *Achille Lauro* incident 30 years ago, in which the Italian cruise ship *Achille Lauro* was seajacked by members of Palestine Liberation Front (PLF), and a US Jewish citizen, Leon Klinghoffer, was killed.[2] Therefore, the Convention was originally concluded to deter and punish the acts of violence similar to the ones committed in the *Achille Lauro* seajacking (*Achille Lauro*-type act). However, the recent practices of applying the Convention in municipal courts have targeted broader activity.

Against this backdrop, this paper first analyses how crimes provided in the SUA Convention (SUA crimes) are grasped and how they have been developed since the Convention's adoption. Second, the paper analyses universal jurisdiction under the SUA Convention by examining whether the Convention provides the universal jurisdiction or not at the outset, and if it does so, the rationale for that jurisdiction is studied.

II. The Expansion of a Crime under the SUA Convention

(1) The Crime Supposed at the Time to Conclude the SUA Convention

As mentioned above, the SUA Convention was adopted as the result of the *Achille Lauro* incident. After this event, not only Italy whose flag was flown by *Achille Lauro*, but also the United States, the national State of the victim Klinghoffer, claimed jurisdiction over the suspects in the crime. Therefore, many States felt it was necessary to coordinate the jurisdiction of States, and for that purpose the SUA Convention was adopted.[3]

---

2) As for the fact of the *Achille Lauro* incident, see Cassese A. (1989), *Terrorism, Politics and Law: The Achille Lauro Affair*, 23-43

Since the seajacking was carried out by the PLF, an alleged terrorist organization from the perspective of some States, the SUA Convention was adopted as one of the counter-terrorism conventions aimed at deterring and punishing terrorist activities, such as the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention).[4] There is no widely accepted definition of terrorism under international law because it is so difficult to define. It is often said that "one man's terrorist is another man's freedom fighter''.[5] Therefore, so-called terrorism has been regulated by obliging States to criminalize and punish certain acts provided in each treaty.[6] The SUA Convention is one such treaty.

As a result, Article 3(1) of the SUA Convention provides that

1. Any person commits an offence if that person unlawfully and intentionally:
   (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
   (b) performs an act of violence against a person on board a ship **if that act is likely to endanger the safe navigation of that ship**; or
   (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
   (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
   (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
   (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
   (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

---

3) Francioni F. (1988), "Maritime Terrorism and International Law: The Rome Convention of 1988", *German Yearbook of International Law*, 31, 267-268

4) Tuerk H. (2012), *Reflections on the Contemporary Law of the Sea*, 106

5) Ganor, B. (2002), "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter", *Police Practice and Research*, 3, 287. See also Laqueur W. (1987), *The Age of Terrorism*, 302

6) Currently, there are 13 UN Conventions on Terrorisms. See Grozdanova R. (2014), "'Terrorism' – Too Elusive a Term for an International Legal Definition?", *Netherlands International Law Review*, 61, 308. At the same time, actually, there are some authors who argue that the general concept of terrorism is appearing. For example, see Karim M. (2014), "The Rise and Fall of the International Law of Maritime Terrorism: The Ghost of Piracy Is Still Hunting!", *New Zealand Universities Law Review*, 26, 87-88

While the SUA Convention declares in its preamble that it is a Convention for fighting terrorism, Article 3 of the Convention does not employ the word "terrorism" in the same vein as other counter-terrorism conventions. Paragraph 1 of this Article criminalizes a wide range of violent activity on the sea. However, unless those acts are likely to endanger the safe navigation of a ship, they do not fall within the scope of the Convention.

Article 4 of the Convention stipulates the scope of its application in terms of vessels. Paragraph 1 of Article 4 says the Convention is only applied to a vessel which "is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States". Therefore, unlike piracy which is limited to an act on the high seas, even an act on territorial waters can be considered a crime under the SUA Convention. Moreover, paragraph 2, which is in line with the Hague and the Montreal Conventions against hijacking, allows the contracting parties to apply the Convention to the case which do not fall under paragraph 1, because if a suspect is found to be a member of the contracting party, that fact has an international element.[7]

(2) Divergence from an Achille Lauro*-Type Act*

As shown above, if we interpret Article 3 literally, it can include a wide range of acts which are not similar to an *Achille Lauro*-type act. Actually, in accordance with some practices of municipal courts, Article 3 is expanded to apply to acts which are not like those that took place on the *Achille Lauro*. For example, in the Shi case, which according to Kontrovich was the first case to interpret and apply the SUA Convention,[8] the Ninth Circuit Court of the United States interpreted Article 3 broadly. In this case, a Chinese cook named Shi killed the captain and the first mate of a fishing vessel, *Full Means No.2*, which was registered in the Republic of the Seychelles that was sailing in international waters off the coast of Hawaii.[9] Following these killings, Shi was detained by other seafarers and then surrendered to the US authority, and he faced the criminal proceedings in the United States. The Ninth Circuit said that his act fell within the scope of "violence against maritime navigation" under 118 US Code 2280, which was adopted to implement the SUA Convention and sentenced him to 36 years in prison.[10] Actually, the expression of § 2280(a)(1)(b) is absolutely identical to Article 3(1)(b) of the SUA Convention, which prohibits violence endangering safe navigation.

---

7) Plant G. (1997), "Legal Aspects of Terrorism at Sea", in Higgins R. and Flory M. (eds.), *Terrorism and International Law*, 78

8) Kontorovich E. (2009), "International Decisions-*United States v. Shi*", *American Journal of International Law,* 103, 734

9) United States v. Lei SHI, 525 F.3d 709, 718 (2008)

10) Ibid., 733

Therefore, the interpretation of § 2280(a)(1)(b) is expected to contribute to clarifying the scope of a SUA crime. However, because the most contentious issue in the Shi case is whether US courts can lawfully exercise their jurisdiction, the courts have not elaborated an interpretation of § 2280(a)(1)(b), especially, the phrase the "act is likely to endanger the safe navigation of that ship". It is true that Shi did not endanger the navigation of the *Full Means No.2* as critically as the *Achille Lauro* was endangered. However, given the recent navigation practice in which a minimum number of seafarers are manned to operate a vessel, it is possible to interpret that the safe navigation of the *Full Means No.2* was endangered because it lost the captain and first mate, and ships cook, Shi, who could not but be detained. Yet, it must be noted that if this application is accepted, almost all cases can be regarded as endangering safe navigation whenever the seafarers are related to a crime.

With regard to the condition that the "act is likely to endanger the safe navigation", the Ninth Circuit examined in detail the injunction of 25 February 2013, which concerns the *Institute of Cetacean Research v. Sea Shepherd Conservation Society*. In this case, the District Court for the Western District of Washington, the court of first instance, concluded that the act of the Sea Shepherd did not endanger safe navigation because the Sea Shepherd had not interfered with the navigation of a whaling vessel in a way that puts human safety at risk.[11] However, according to the Ninth Circuit, the district court did not take into account the words "likely to endanger" and its decision was clearly error. The Ninth Circuit concluded that the acts of the Sea Shepherd constituted violations of the SUA Convention, given that the Sea Shepherd had sunk several other whaling vessels in the past and had attacked the vessel by using metal-reinforced prop-fouling ropes.[12] Considering the object of the Convention, that is, to guarantee the safe navigation of vessels, the acts of the Sea Shepherd fell within the scope of crimes provided by the SUA Convention more clearly than those of Shi.

The application of the SUA Convention to acts distinct from the *Achille Lauro*-type act is confirmed in the municipal courts of other States, such as India and Korea. To illustrate, in India, in the course of the *Enrica Lexie* incident, which is now pending before the compulsory dispute settlement mechanism under the Unirws Nations Conventions on the Law of the Sea (UNCLOS), the Kerala High Court seemed to admit that the shooting of Indian fishermen by Italian soldiers fell within the scope of a crime provided under the SUA Convention.[13] Similarly, the Korean courts applied

11) Institute of Cetacean Research, et al. v. Sea Shepherd Conservation Society, et al., 860 F. Supp. 2d 1216, 1235 (2012)

12) Institute of Cetacean Research, et al. v. Sea Shepherd Conservation Society, et al., 708 F.3d 1099, 1103 (2012)

13) Massimilano Latorre vs. Union of India, (29 May 2012), The High Court of Kerala, Case No. 4542, para. 20

the country's municipal law for implementing the SUA Convention to the case of Somali piracy.[14] With regard to these acts off the coast of Somalia, the United Nations Security Council (UNSC) likewise supported the idea that the SUA Convention could be applied to those acts of piracy. For instance, Resolution 1846 provides that the UNSC "(n)otes that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ('SUA Convention') provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; urges States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia".[15]

Considering these facts, a way of interpreting Article 3 of the SUA Convention broadly, that is, by including acts distinct from those such as *Achille Lauro*-type acts seems to have been established. In other words, not only *Achille Lauro*-type acts, but also murder fall within the scope of the crimes stipulated under the SUA Convention.

III. Universal Jurisdiction under the SUA Convention

(1) Jurisdiction of custodial States under the SUA Convention

As has been concluded as one of the counter-terrorism conventions for the purpose of depriving criminals of any safe heaven, Article 10 of the SUA Convention provides *aut dedere aut judicare*, under which State parties to the SUA Convention are obliged to prosecute or extradite the suspect, when he/she is found in the State's territory. Actually, *aut dedere aut judicare* stipulates obligation and not competence, such as a jurisdiction to prosecute. However, because the content of this obligation is highly related to the character of the jurisdiction of a State in which a suspect is found (a custodial State), the content must be analysed before examining the jurisdiction of a custodial State.

As for the obligation *aut dedere aut judicare*, there are two forms that derive from the different wording of conventions. On the basis of the first form, a request for extradition by the other States is a prerequisite for prosecution. Therefore, unless a custodial State does not receive such a request, it cannot prosecute a suspect.[16] However,

14) Lee S. and Park Y. K. (2014), "Korea's Trial of Somali Pirates", in Schofield C., Lee S. and Kwon M. S. (eds.), *The Limits of Maritime Jurisdiction*, 382

15) Paragraph 15 of the SC Resolution 1846 (2008), (S/RES/1846)(2 Dec. 2008)

16) David E. (2009), *Éléments de droit pénal international et europeén*, p. 245

based on the second form, a custodial State may prosecute irrespective of whether a request is made.[17]

On this point, the International Court of Justice (ICJ) characterized *aut dedere aut judicare* under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as the second form relating to the obligation to prosecute or extradite. It is *aut dedere aut judicare* under the CAT and not under the SUA Convention which was interpreted and applied in that case. However, considering that both the CAT and the SUA Convention were adopted with reference to the Hague Convention and that Article 10(1) of the SUA Convention is almost identical to Article 7(1) of the Hague Convention, *aut dedere aut judicare* under the SUA Convention is interpreted in the same vein as that under the CAT.

Also, the ICJ says that Article 7(1) of the CAT "requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect."[18] According to the ICJ, this conclusion is confirmed by the fact that Article 6(2) obliges State Parties to make a preliminary inquiry immediately after the suspect is found in their territory.[19] Furthermore, the ICJ clarifies that a custodial State can relieve itself of its obligation by acceding to the request for extradition. As a result, while extradition is an option for a State Party, prosecution is an international obligation under the Convention.[20] Considering this fact, *aut dedere aut judicare* as provided in Article 10(1) of the SUA Convention is irrelevant to the request for extradition by other States and is based on jurisdiction which may be exercised by a custodial State at its discretion. Therefore, similar conventions which stipulate *aut dedere aut judicare* generally provide judicial jurisdiction of a custodial State, as is set out in Article 6(4) of the SUA Convention.[21] With regard to the basis of this jurisdiction of a custodial State, the ICJ characterized such jurisdiction as "universal jurisdiction".[22] However, in its judgement, the ICJ used the term "universal jurisdiction" without clarifying its meaning or implication. At this point, it should be noted that universal jurisdiction is defined as jurisdiction exercised by a State which does not have any connection to the object of jurisdiction.[23] Based

---

17) Bassiouni M. and Wise E. M. (1995), *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, 18

18) Q*uestions concernant l'obligation de poursuivre ou d'extrader. (Belgique c. Sénégal), arrêt,. C.I.J. Recueil 2012*, para. 94

19) Ibid.

20) Ibid., para. 95

21) Article 6(4) of the SUA Convention is provided as: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article."

22) Ibid., para. 91

23) Seta M. (2014), "How do We Justify Unilateral Exercise of Port State Jurisdiction?: The Challenge

on this definition, the bases of jurisdiction of a custodial State depends on whether there is a connection between that State and the object of jurisdiction. Furthermore, when determining a connection, whether the existence of a suspect is regarded as connection or not is a mile stone.

In this light, the dissenting opinion by Judge Loder in the Lotus case is noteworthy. Judge Loder criticised the conclusion of the majority opinion which allows a State to exercise its jurisdiction over a foreign individual who commits a crime abroad.[24] According to the opinion, "(n)or can such a law extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and *the subsequent presence of the guilty person* cannot have the effect of *extending the jurisdiction of the State* (italic emphasis in the original)".[25] Certainly, Judge Loder is not referring here to universal jurisdiction. However, the suggestion that the subsequent presence of the guilty person cannot be grounds for judicial jurisdiction is important when analysing universal jurisdiction as well.

The suggestion by Judge Loder is supported by recent resarches. For example, Maierhöfer argues that in order to apply its criminal law, a State shall have a connection and he emphasizes that "the subsequent arrest of the criminal itself does not provide enough connection with States".[26] Furthermore, the report on universal jurisdiction, drafted by the Secretary-General of the United Nations at the request of the General Assembly, says that *aut dedere aut judicare* requires States to exercise jurisdiction "even if it was entirely unconnected to the crime itself".[27] Thus, it is argued that the jurisdiction of a custodial State is based on the universality principle, on the basis of a presumption that the presence of a criminal (or suspect) is not regarded as a connection between a State exercising such jurisdiction and the object of jurisdiction. Also, some States support the idea that the jurisdiction exercised by a custodial State under *aut dedere aut judicare* is based on the universality principle. To illustrate, when introducing *aut dedere aut judicare* into the Hague Convention, Austria described the jurisdiction of a custodial State as universal jurisdiction.[28] In addition, when the

---

by the EU in Protecting the Marine Environment", in Sancin V. and Dine M. K. (eds.), *International Environmental Law: Contemporary Concerns and Challenges in 2014*, 484

24) Affaire du "Lotus", Arrêt, 1927, CPIJ Série A, nº. 10, 18-19

25) Ibid., Opinion Dissidente de M. Loder, 35

26) Maierhöfer C. (2006), "*Aut dedere - aut iudicare*": *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, 30 und 42

27) Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, (A/65/181)(29 Jul. 2010), para. 21

28) International Civil Aviation Organization, *International Conference on Air Law, The Hague, December 1970*, Vol. II, (Doc 8979-LC/165-2), 94

Secretary-General drafted the report cited above, Argentine argued that "the principle of *aut dedere aut judicare* may overlap with universal jurisdiction when a State has no connection to a crime other than the mere presence of the suspect in its territory".[29] Considering these facts, the jurisdiction of a custodial State falls within the scope of universal jurisdiction.

(2) The Rationale for Universal Jurisdiction over a Crime of the SUA Convention

Given that universal jurisdiction can be exercised by a State which does not have any connection with the object of jurisdiction, the rationale for universal jurisdiction must be considered in a different way from other grounds for jurisdiction, such as the territorial principle or the personality principle. Generally speaking, universal jurisdiction may be exercised only when the interests of the international community are violated.[30] As States do not have any connection to or grounds for exercising their jurisdiction, they are required to justify their use of this authority due to the indirect violation of their own interests.[31] Consequently, as an SUA crime is subject to universal jurisdiction, the crime is presumed to violate the interest of international community.

In this regard, although there is no authoritative definition of terrorism under international law, the crimes provided under counter-terrorism conventions are often said to violate such interests. For example, Steenberghe says "the crimes dealt with in those [counter-terrorism] treaties were likely seen as a potential threat for *any state party* and, therefore, as automatically affecting the interests of all state parties and not just the interest of specific states (emphasis added)".[32] Indeed, it is not impossible to argue that a SUA crime has a character that violates the interests of the international community only because the SUA Convention is a counter-terrorism agreement. However, given that such conventions cover a wide range of acts from hijacking to the financing of terrorists, each treaty should be analyzed individually and rigorously.

To focus on a SUA crime, it includes a violent act on the vessel as stipulated in Article 3(1)(b); however, even if it is a solely violent act, as in the same case of

---

29) Permanent Mission of the Argentine Republic to the United Nations, (N.U.141/2011)(29 Apr. 2011), p. 2, *available at* <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Argentina%20(S%20to%20E).pdf> (last visited 30th Oct. 2015)

30) Steiner H. J. (2004), "Three Cheers for Universal Jurisdiction - Or Is It Only Two?", *Theoretical Inquiries in Law*, 5, 223

31) See Marks J. H. (2003), "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council", *Columbia Journal of Transnational Law*, 42, 465

32) Steenberghe R. V. (2011), "The Obligation to Extradite or Prosecute: Clarifying its Nature", *Journal of International Criminal Justice*, 9, 1113

piracy, it can violate the interests of the international community if it is carried out on the high seas.[33] However, in accordance with Article 4(1) of the SUA Convention, the Convention is applied to not only a vessel navigating on the high seas but also a vessel which has not navigated beyond the maritime area of one State, if that vessel is scheduled to navigate beyond that area. In this respect, although the practice may vary from States to States, when a vessel navigates beyond the maritime area of one State, that ship usually tends to have an international character, such as a flag of convenience and manning of multinational citizens. Therefore, it is not impossible to suppose that violating the freedom of navigation enjoyed by such an internationalised vessel is formulated as a violation of the interests of the international community.

The application of Article 4(2) under which a suspect who commits a SUA crime on a vessel that is navigating within the maritime area of one State escapes to a State which does not have any connection to that crime, is more problematic. For example, a French national X kills another French national Y on a French vessel which is navigating from Nantes to Calais. Then, when X flees to a State A, this State may exercise its jurisdiction over that person. It is true that, as a result of the perpetrator's fleeing from one State to another State, the incident has an international element. Yet, at the same time, the incident can be regarded as falling within the scope of a purely domestic matter of France. Given this fact, to justify universal jurisdiction over a SUA crime wholly, it is necessary to regard a ship's navigation even in territorial waters as being in the interests of the international community. In this respect, however, as Article 2 of the UNCLOS provides, the sovereignty of a coastal State extends to the territorial seas.

Despite this fact, however, there are three grounds for considering that navigation in territorial waters is protected as an interest of the international community. First, it is noted that with a focus on protecting the interest of navigation, it should be protected wholly but not separately. Actually, within the anti-piracy framework, the interest of navigation on the high seas is separately protected due to the narrow scope of piracy, which by definition only occurs on the high seas.[34] However, recent State practices for combating piracy demonstrate that this approach is not practical. The UNSC admits that a State should police pirates within the territorial sea as well as on the high seas for the purpose of effectively arresting them.[35] This approach is confirmed by the preamble of the SUA convention which the occurrence of unlawful acts against

33) Bowett D. W. (1982), "Jurisdiction: Changing Patterns of Authority over Activities and Resources", *British Year Book of International Law*, 53, 12

34) Geiâ R. and Petrig A. (2011), *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, 147

35) For example, see paragraph 7 of the SC Resolution 1816 (2008), (S/RES/1816)(2 Jun. 2008)

the safety of maritime navigation is a matter of grave concern to the international community as a whole, without distinguishing maritime areas.

Second, an interest which would be violated if universal jurisdiction over the SUA crime were exercised must be considered. In this sense, the violated interest would not only be an interest of a flag State but also an interest of a coastal State over its territorial waters. It is often pointed out that universal jurisdiction over piracy is accepted partly because its scope is limited to the high seas, where no State has sovereignty. However, as previously mentioned, a coastal State has sovereignty over the territorial seas. Yet the difference between sovereignty over land territory and over territorial waters must be taken into account. While land territory is one of the prerequisites for Statehood and the origin of sovereignty, sovereignty over territorial waters is functional[36] and cannot be an origin of sovereignty, as is demonstrated in the principle "the land dominates the sea".

Third, it should be pointed out that under customary international law, the interest of navigation has been shared with non-coastal States by admitting the right of innocent passage.[37] While UNCLOS recognizes the sovereignty of a coastal State over its territorial waters, it obliges a coastal States to guarantee the right of innocent passage enjoyed by foreign ships. Regarding the relationship between this sovereignty and the right of innocent passage, two positions have arisen since 1932 when the arbitral award between Panama and United States concerning the collision of the *David* and the *Yorba Linda* was rendered. One position that is taken by the majority of arbitral committees considers the right as an exception to the sovereign principle of a coastal State.[38] The other position, which is argued by Panamanian commissioner Alfaro, regards the right of innocent passage as the prolongation of the freedom of navigation on the high seas.[39] In other words, the right of innocent passage is not granted by a coastal State *ex gratia*, but is a right in the strict sense. Considering that the following development is reflected in Article 20 of the Convention on the Territorial Waters and Article 28 of the UNCLOS, it is difficult to say that the majority opinion is still plausible. Actually, since just after the award was rendered, the majority opinion has been criticized. For example, Borchard says, "Innocent passage historically is not an 'exception' to sovereignty nor is the burden on the passing ship to prove such an 'exception.' The privilege of innocent passage, it is believed, has as solid a legal

36) See O'Connell D. P. (1982), *The International Law of the Sea*, Vol. I, 82-83

37) Generally speaking, passage is regard as one form of navigation. Ngantcha, F. (1990), *The Right of Innocent Passage and the Evoluation of the Internaitonal Law of the Sea: The Current Regime of 'Free' Naviation in Coastal Waters of Third States*, 43-56

38) Compañia de Navegación Nacional (Panama) v. United States, Award, (1933), *Reports of International Arbitral Award*, Vol. VI, 384

39) Ibid., 386

standing as territorial 'sovereignty'."[40] Considering these facts, the right of innocent passage is a right in strict sense, and this fact dilutes the sovereignty of a coastal State over its waters.

IV. Conclusion

Thus, the jurisdiction of a Custodial State is explained as being based on the universality principle from both the perspectives of the definition of universal jurisdiction and its rationale. At the same time, this rationale has an impact on the law of the sea, especially the legal character of the territorial sea, because the rationale dilutes the sovereignty of a coastal State over its territorial water. However, the current trend in ocean governance tends to regulate and manage the ocean as a whole, and is not based solely on the zonal management approach.[41] The expanding scope of universal jurisdiction under the SUA Convention is in line with this trend.

It is true that the expansion of a crime under the SUA Convention is not universally confirmed and supported. To establish this expansion, we have to wait to ascertain other State practices which follow the current trends. However, even at the current moment, we can expect that the SUA Convention can effectively govern human activity on the seas.

40) Borchard E. M. (1935), "The United States-Panama Claims Arbitration", *American Journal of International Law*, 29, 104; Also, see Jessup P. C. (1933), "Civil Jurisdiction over Ships in Innocent Passage", *American Journal of International Law*, 27, 750

41) For example, see Tanaka Y. (2008), *A Dual Approach to Ocean Governance: The Case of Zonal and Integrated Management in International Law of the Sea*, 18, footnote 71 and 21