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The Legal Understanding of the Terms 'Ship' and 'Vessel' Under the United Nations Convention on the Law of the Sea (UNCLOS)

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Abstract

The term 'ship' appears multiple times in various UNCLOS provisions, for example, when addressing 'rules applicable to all ships' (Part II, Section 3, Subsection A). The term is also utilised by referring to the 'nationality of ships' or the 'status of ships' (Part VII, see Articles 91 and 92). However, UNCLOS does not explicitly define the potential legal limitations of the term 'ship'. In addition, the Convention also utilises the term 'vessel' frequently. There seems to be no compelling systematic reason why some UNCLOS provisions refer to 'ships' while other provisions refer to 'vessels'. Rather, UNCLOS seems to presuppose a general legal understanding of how the legal user should categorise the terms. However, this presupposition might potentially cause problems in delimiting the terms 'ship' and 'vessel' from 'installations and structures' (pursuant to Article 60 of UNCLOS) or from 'equipment' (Article

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258 of UNCLOS). For example, the existence of a 'pirate ship' could be questionable (see Articles 103–105 of UNCLOS) if the pirates launch their external attacks from an offshore 'installation' or a 'structure' at sea and then approach with small skiffs or motor-propelled rubber boats to attack another object at sea. More recently, very large constructions (purpose-built for the offshore oil and gas industry) as well as very small vehicles operating at sea (for example, underwater drones or floating marine gliders) have caused problems regarding the question of whether or not they qualify as 'ships' under UNCLOS. There seems to be no other way but to resort to possible legal definitions as agreed in other International Maritime Conventions, predominantly, under the auspices of the International Maritime Organization (IMO). But even here, the user will note a surprising multiplicity and variety of differing legal definitions of the term 'ship' and/or 'vessel'. Nevertheless, it is possible to identify a common material core of the terminology — which should then also be applicable for UNCLOS. The legal uncertainty as created by the missing definitions calls for this detailed identification. There could be serious legal consequences if a 'ship' does not fall under that common material core but is rather closer to be an offshore 'installation', a 'structure', or floating 'equipment' at sea (or if it is substantially destroyed and thus could rather qualify as a 'wreck'). Above all, the material scope of the specific ship-related provisions of UNCLOS (and other International Maritime Conventions) might not be applicable at all. Ultimately, this could have an interpretative impact for the approach under compulsory liability insurance schemes and in relation to compensation funds, in particular in the area of compensating damage to the environment resulting from marine pollution.

Keywords: Ship, Vessel, Installation, Structure, Equipment, Navigation, Compulsory Insurance

1. The Consequences of the Missing Definitions in UNCLOS and Drafting Difficulties

UNCLOS does not provide for a legal definition of the term 'ship' or 'vessel'. The International Law Commission (ILC) avoided defining the terms because — as to be discussed in this article — both the terms 'ship' and 'vessel' create a number of complications in legal drafting.[1] It has been argued that the term 'ship' is utilised in the context of UNCLOS provisions addressing navigation and status-related matters whereas the term 'vessel' appears more frequently in the context of marine environmental protection and preservation (Part XII UNCLOS).[2] This initial assessment is confirmed by the fact that Article 1(5)(a)(i) of UNCLOS defines the term 'dumping' as 'any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea' — thus not referring explicitly to 'ships' but rather to 'vessels' (and differentiating them from 'platforms'). However, the varying terminology could also be explained by the simple fact that different expert drafting groups worked on the wording of materially different UNCLOS provisions. In addition, the dispute settlement provisions of Part XV UNCLOS refer to the procedural possibility of a prompt release of 'vessels' (see Article 292 of UNCLOS), and this would also apply to situations that could have no relevance at all for the protection of the marine environment. Quite evidently, Article 292 of UNCLOS applies to 'ships' as well and not only to 'vessels'.

Thus, it seems more likely that the selected wording of either 'ship' or 'vessel' has no compelling underlying legal logic but, rather, a common

1. ILC Summary Records of the Meetings of the 7th Session, *ILC Yearbook* (1955), Vol. I, 10, as cited by Richard Barnes, Art. 17, para 9, in Alexander Proelss et al., *United Nations Convention on the Law of the Sea: A commentary* (Beck Hart Nomos 2017).

2. id.

core of shared semantics when it comes to differentiating these terms from other offshore objects, in particular, 'installations' and 'structures' at sea (as applied by Article 60 of UNCLOS).

In fact, the underlying definition problem is confirmed by the fact that different International Maritime Conventions and domestic laws apply varying definitions of the legal term 'ship'. One of the broadest legal definitions for the term 'ship' is found, for example, in Article 2(4) MARPOL.[3] The MARPOL Convention is, arguably and historically speaking, the most important IMO instrument for the international protection of the marine environment. It defines a 'ship' to mean 'a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.'[4] Two observations could be highlighted here: first, under MARPOL, it seems that the term 'ship' is seen as more generic than the term 'vessel' because the definition of 'ship' refers to 'a vessel of any type.'[5] In fact, the etymology of the term 'vessel', stemming from the Latin *vascellum* could speak against this approach: *Vascellum*

3. MARPOL 73/78 stands for the "International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997" <https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx> accessed 20 December 2021.

4. It should be noted that other International Conventions incorporate the ship definition of MARPOL 73/78 as well, for example, the "Convention on the Protection of the Marine Environment of the Baltic Sea Area" (Helsinki Convention), the "Convention for the Protection of the Marine Environment of the North-East Atlantic" (OSPAR Convention) and the "1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties" (Intervention Convention).

5. The same reasoning is applied by section 313 (1) (c) of the UK Merchant Shipping Act 1995 which provides that a "*ship*" includes "*every description of vessel used in navigation*"; comparable definitions can be found in the laws of Australia (Admiralty Act 1988, section 3(1)); Canada (Federal Courts Act 1981, section 2(1)); Singapore (High Court Admiralty Jurisdiction Act, chapter 123, section 2) and South Korea, Ship Act, Article 1-2.

describes (in very basic terms) simply 'a thing that serves to contain other things' — thus, not necessarily floating on water or offshore.[6] This understanding could be the reason why some 'ship' definitions, particularly under some domestic laws, turn the MARPOL approach around and treat the term 'vessel' as more generic than the term 'ship'.[7]

Second, the clear intention of the MARPOL definition is to establish the widest possible scope of application. In this context, it is remarkable that the MARPOL definition also covers 'fixed platforms' (irrespective of a temporary or permanent fixation with the seafloor). If one would apply the MARPOL approach in order to understand the meaning of a 'ship' in the context of UNCLOS, the differences between the terms 'ship', 'vessel', 'installation', and 'structure' could become rather blurred. This legal concern is explained by the fact that 'installations' and 'structures' are addressed in the very same provision (Article 60 of UNCLOS) that covers 'artificial islands'. These three terms differ from ships in the permanence of their location, i.e., their immobility.[8] Thus, according to the systematic approach of UNCLOS, the element of movement at sea does not apply to 'installations' and 'structures' — but rather to 'ships' and 'vessels'. Consequently, the MARPOL definition should be viewed with some caution in the context of UNCLOS. Rather, the approach of UNCLOS with regard to 'ships' and 'vessels' seems to align itself closer to the

6. Sarah F. Gahlen, Ship revisited: a comparative study, 20 *Journal of International Maritime Law* (2014), 252 (254).

7. This could be true, for example, in the domestic law of the United States which, obviously, does not define the term "*ship*" at all but rather works with a generic legal understanding of the term "*vessel*" (which would then include a "ship" as well), see 1 U.S.C. § 3: "*The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water*." The domestic law of India also starts with the term "*vessel*" and includes the "*ship*" in the applicable legal definition, see "The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017", Section 2(l).

8. Alexander Proelss, Art. 60, para 10, in Alexander Proelss et al., *United Nations Convention on the Law of the Sea: A commentary* (Beck Hart Nomos 2017).

approach of the 1989 International Salvage Convention[9] which excludes 'platforms and drilling units' from the scope of application 'when such […] are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.' This exclusion even applies when the platform or unit is mobile or floating at sea.

To contrast other legal definitions of the term 'ship' where the element of movement at sea plays a larger role, one could refer first to Article 1(b) of the Salvage Convention. This provision applies a straightforward (yet vessel-based) approach by defining a 'vessel' as 'any ship or craft, or any structure capable of navigation'. One could argue that the Salvage Convention focuses more specifically on the capacity for navigation itself. Second, the COLREGS Convention[10] eschews the term 'ship' almost completely[11] and rather defines the term 'vessel' generally as 'every description of water craft, including non-displacement craft and seaplanes, used or being capable of being used as a means of transportation on water'.[12] The key purpose of the COLREGS is to prevent collisions of any moveable objects at sea. Thus, it covers a variety of purpose-built objects which are floating on the water surface (whether temporarily or stationary), and which could be even used for purposes other than commercial navigation, for example, with regard to auxiliary services (such as dredging).[13]

9. The 1989 "International Convention on Salvage" <https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Salvage.aspx> accessed 20 December 2021.

10. The 1972 "Convention on the International Regulations for Preventing Collisions at Sea" <https://www.imo.org/en/About/Conventions/Pages/COLREG.aspx> accessed 20 December 2021.

11. The only exception is a reference to "*ships of war*" in Art. 1 (c) COLREGS.

12. See Art. 3 (a) COLREGS.

13. In this context, it should be noted that the catalogue of Art. 3 COLREGS lists several other definitions which substantiate the general understanding of the term "*vessel*" under this Convention, for example, "*power-driven vessel*", "*sailing vessel*", "*vessel engaged in fishing*", "*vessel not under command*", "*vessel restricted in her ability to manoeuvre*" (with six related sub-examples) and "*vessel constrained by her draught*".

Both the legal definitions of the Salvage Convention and the COLREGS seem to be partially helpful for an UNCLOS-focused interpretation. The element of a purposeful 'means of transportation on water' — frequently materialising in the capacity to navigate at sea — can definitely serve to differentiate a 'ship' and/or 'vessel' from an 'installation' and/or 'structure'. Some remaining drafting difficulties can still be identified, however: for example, when it comes to transit passage (see Articles 39, 54) or piracy (see Articles103–105, 107) UNCLOS prefers to make additional reference to (any kind of) 'aircraft' whereas COLREGS refers (more specifically) to 'seaplanes'. However, the technical differentiation between 'aircraft' and 'seaplanes' is not to be further analysed here.[14]

A final practical example for a ship definition — which is definitely important in the context of understanding the term pursuant to UNCLOS — can be extracted from the regulatory area of oil pollution compensation. In this context, the meaningful delimitation of the term 'ship' from other types of offshore units unfolds practical relevance in the wider context of Article 235 of UNCLOS, an important provision which addresses responsibility and liability for marine environmental damage.[15] In particular, the third paragraph of Article 235 of UNCLOS is the only provision in UNCLOS which highlights 'compulsory insurance' and 'compensation funds' as important instruments to establish criteria and procedures for payment of 'adequate compensation'.[16]

Evidently, the scope of application of both compulsory insurance and compensation funds must be defined with legal precision, otherwise legal

14. Interestingly, and in contrast to the COLREGS Convention, Australian domestic law specifically excludes "*seaplanes*" from the possibility to be legally qualified as "ships", Admiralty Act 1988, section 3(1).

15. See generally Stephens T, Commentary on Art. 235 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017).

16. ibid, paras. 22 and 23.

foreseeability (and, ultimately, insurability) could not work properly. Should the material scope include all kinds of 'offshore craft', leading to their inclusion in compensation mechanisms? While this would be desirable, it does not reflect the prevailing legal situation. In order to establish a working framework for 'adequate' financial compensation from ship-generated oil spills at sea, the International Convention on Civil Liability for Oil Pollution Damage (CLC) was adopted (first in 1969, later updated in 1992).[17]

It should be noted that the search for, and recovery of, offshore oil has led to the construction of a wide range of new types of offshore craft. For example, the oil and gas sector utilises multiple technical variations of mobile offshore units, quite frequently materialising as FPSOs (Floating Production, Storage and Offloading Units).[18] In many cases, these units are converted former oil tankers. It is possible that the means of propulsion have been removed from these units and that, initially, the units were meant to be used in navigation, but are not further designated to fulfil that service in the future, while still in operation for the industry. Article 1.1 CLC defines a 'ship' to mean:

> any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

17. See <https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx> accessed 20 December 2021 and <https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf> accessed 20 December 2021.

18. For further details see Massimiliano Musi, A Study on the Floating Units Operating in the Oil and Gas Off-shore Fields: the Need for a Juridical Placement and the Quest for the Applicable Discipline, 95-129, in: Massimiliano Musi (ed.), *The Ship: An Example of Legal Pluri-Qualification* (Bonomo Editore 2016).pdf> accessed 20 December 2021.

Since the correct interpretation of this legal definition has stirred up both scholarly legal debate and even applicable case law,[19] it might serve as the best guidance to identify a common core to understand the term 'ship' also in the context of UNCLOS (taking into account the vital objectives of marine environmental protection and preservation pursuant to Part XII UNCLOS), leaving out, however, oil trade-specific details.

2. Identifying a Common Interpretative Core for Defining the Terms 'Ship' and 'Vessel' Under UNCLOS

The discussion above has revealed an initial dilemma: UNCLOS utilises the terms 'ship' and 'vessel' interchangeably, without following a strict legal logic. International Maritime Conventions apply different legal definitions. Depending on their key regulatory objectives, they might either establish a wider scope of application or they might follow a more narrow approach. Different domestic laws offer a stunning variety of legal 'ship' definitions: sometimes they take the 'ship' as a starting point; sometimes they hold 'vessel' to be the more generic term. Some definitions as applied under domestic laws might be based on historic case law whereas other definitions have only been recently created (or updated) by the relevant legislative bodies. Nevertheless, the contrast to immobile 'installations' or 'structures' (Article 60 of UNCLOS) allows a first conclusion for UNCLOS: the understanding of a 'ship' (or 'vessel') implies mobility at sea. The question is whether the element of mobility can be

19. See Timagenis & Stavroulakis, Areios Pagos (Greek Supreme Court: Full Session) Case No. 23/2006 (the "*Slops*" Case), *Aegean Rev Law Sea* 2010, 141 et seq.; Peplowska, What is a ship? The Policy of the International Fund for Compensation for Oil Pollution Damage: the effect of the Greek Supreme Court judgment in the Slops case, *Aegean Rev Law Sea 2010*, 157 et seq.

narrowed down further. Initial aspects in that regard have been defined in academic literature as:

- floatability,
- capability of controlled movement on water,
- capability in the carriage of persons or goods beyond its own mass; and
- seagoing capability.[20]

However, the question remains as to whether all four elements should be cumulatively required under UNCLOS (or whether another element is potentially missing). One difficult interpretative example would be an object which is 'floating' at sea without any capability of carrying goods or persons, yet with the technical option to be remotely controlled (from land) and potentially being manoeuvred from its current location (seagoing). This question could arise in the context of maritime autonomous surface vehicles, for example, unmanned navy drones operating at sea. In this context, the challenges of legal interpretation under domestic laws usually have at least one advantage compared to UNCLOS as there is usually the benefit of applying an applicable legal definition. For example, under United States law and in an administrative context, it was possible to objectively disqualify a 'houseboat' from being construed as a 'vessel', despite clearly floating on a navigable waterway.[21] One should take a moment to ponder the fact that this question ultimately had to be brought to the United States Supreme Court to put an end to the differ-

20. Sarah F. Gahlen, Ship revisited: a comparative study, 20 Journal of International Maritime Law (2014), 252 (255 et seq).

21. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 2013 AMC 1 (2013), see in particular, p. 12 of this judgment: *"[…] we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose."*

ing legal views. Additionally, and for good reasons, English courts have explicitly denied qualifying 'jet skis' as being 'ships' — but more than one case of that kind had to be litigated on that subject matter.[22]

To provide one final example: the Greek Supreme Court actually qualified a decommissioned single-hull tanker (the *Slops*) — which was solely used as a storage facility for waste oil in the port of Piraeus and which had been stripped of all means of self-propulsion — as a 'ship' pursuant to Article 1(1) of the 1992 CLC.[23] This was despite the fact that the *Slops* was not carrying oil *as cargo* on a voyage (rather, she was permanently at anchor and held about 5,000 m³ of separated oily water) and had not been moved from its position for about five years.[24] It was this case in particular that triggered extensive interpretative activity. This included the commissioning of a specific legal expert opinion on the matter at the level of the International Oil Pollution Compensation Funds (IOPC).[25] The IOPC Funds is the international body which gov-

22. See R v Goodwin, Lloyd's Law Reports [2006], Vol. 1, 432 et seq; Steedman v Scofield, Lloyd's Law Reports [1992], Vol. 2, 163 et seq.

23. For details see Timagenis & Stavroulakis, Areios Pagos (Greek Supreme Court: Full Session) Case No. 23/2006 (the "Slops" Case), Aegean Rev Law Sea 2010, 141 et seq.; Peplowska, What is a ship? The Policy of the International Fund for Compensation for Oil Pollution Damage: the effect of the Greek Supreme Court judgment in the Slops case, Aegean Rev Law Sea 2010, 157 et seq.

24. The "Slops" was registered with the Piraeus Ships Registry in 1994. She was originally designed and constructed for the carriage of oil in bulk as cargo. The vessel underwent a major conversion in 1995 where its engine was sealed and propeller shaft removed, at which time it was indicated that the purpose of the sealing of the engine and the removal of the propeller was to convert the status of the craft from a ship to a floating oily waste receiving and processing facility. She had been permanently at anchor since May 1995 without propulsive equipment and had been operating as a waste oil storage and oil separation unit. However, at the time of the incident in 2000, the Slops still remained registered at the Piraeus Ships' Registry, see OPC/OCT13/4/3/1 of 04 September 2013, para 3.4.

25. See Appendix I of the document IOPC/OCT11/4/4 of 14 September 2011 (*"Consideration of the Definition of "Ship"* – Note by the Director).

erns the application of the 1992 CLC. Ultimately, the IOPC Funds is one of the best working examples of the practical application of Article 235(3) of UNCLOS.[26]

Leaving most technical specifications aside, the general legal conclusions of the IOPC Funds differed from the approach of the Greek Supreme Court. The IOPC Funds view highlighted that the definition of the term 'ship' in Article 1(1) of the 1992 CLC was deliberately linked [sic] to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of the ship on a voyage. In sum and in conclusion, the elements of carrying some kind of physical good at sea (in this case oil) and undertaking a voyage were deemed to be the key elements that had to be present in order to qualify as a 'ship' pursuant to Article 1(1) of the 1992 CLC. The floating element of an object at sea, in itself, was not enough. As a result, floating storage units could not be qualified as ships generally speaking. Nevertheless, human inventiveness necessitates some degree of flexibility and case-by-case discretion: for example, barges being towed by ships navigating on sea voyages (or temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress) could generally qualify as ships. Purpose-built floating storage units that have their own independent motive power and

26. UNCLOS itself does not establish a regime for responsibility and liability for damage to the marine environment but Art. 235 (3) UNCLOS includes a specific reference to the establishment of "*compulsory insurance or compensation funds*". In that regard, the 1992 CLC is a sector-specific example for this approach with regard to compensating oil pollution from oil tankers via compulsory insurance, strict liability for oil tanker owners and the establishment of a compensation fund. Generally, the International Tribunal for the Law of the Sea (ITLOS) has endorsed the approach of trust funds for environmental compensation purposes. In the Advisory Opinion on the "*Responsibilities and Obligations of Sponsoring States*", ITLOS even proposed to ponder whether more trust funds could be introduced in the future to compensate other forms of environmental damages, see Tim Stephens, Commentary on Art. 235 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017), para 23.

steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo can generally qualify as ships. Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to floating storage units, with capacity to navigate at sea under their own power and steering retained, can generally qualify as ships.[27] Ultimately, one has to admit that the features and functions of man-made objects will vary from case to case. One floating unit may satisfy the CLC definition of a 'ship', whereas another floating unit, with slightly different technical specifications, may fall outside of the scope of application. This is a reality of discussing the term 'ship' and confirms the serious complications which the UNCLOS negotiators potentially faced during the drafting of the UNCLOS text from 1974–1982. Maybe it was, in fact, wise to leave the term undefined. But what is there to conclude then, in view of the lack of an applicable 'ship' definition under UNCLOS?

3. Conclusion

It has been stated in the applicable academic literature that 'horizontal and vertical inconsistencies render the word "ship" a word of many meanings'.[28] One has to agree with this assessment — the more one engages in legal research on existing legal definitions and interpretations of the word 'ship', the more potential variations can be identified. For the understanding of the term under UNCLOS, one could propose the following approach: first, it has to be accepted that the UNCLOS text

27. ibid, para 3.10.

28. Lawrence Dardani, The Definition of "Ship": A Question of Method, 1 (7), in: Massimiliano Musi (ed.), *The Ship: An Example of Legal Pluri-Qualification* (Bonomo Editore 2016).

does not establish enough criteria to differentiate the terms 'ship' and 'vessel' with legal precision against any other potential mobile offshore object. Only the systematic difference between mobility and immobility provides some guidance. For example, a fixed platform will not qualify as a 'ship' under UNCLOS — for as long as it remains attached to the seafloor. This legal view was confirmed in the 2015 Award on the merits of the *Arctic Sunrise* case.[29] The Award clearly stated that it is an essential requirement of Article 101 of UNCLOS for an act of piracy to be directed 'against another ship.'[30] Since the case involved an alleged illegal activity at sea that was directed against a fixed platform (the *Prirazlomnaya*), the initial attempt to address the events under the purview of piracy had to be quickly dropped. The criminal charges were requalified to include 'hooliganism' and attempted damage to property. Under UNCLOS, it is thus not possible to commit piracy against an immovable object at sea. As a result, and as long as the discussion relates to a mobile object at sea, there is some degree of discretion for all UNCLOS ratifying States to unilaterally decide on the 'ship' criteria that should apply, as long as the approach is not in blatant contradiction of the general understanding of the terms as applied in International Maritime Conventions.

Second, there is some persuasive argument to link the understanding of a 'ship' or a 'vessel' to the general capacity to navigate at sea and to perform a function at sea. Any interpretative criteria should reflect that fact if the term 'ship' appears in the context of exercising navigational rights under UNCLOS (such as transit or innocent passage). It will be more difficult to accept the qualification as 'ship' or 'vessel' for any kind of 'craft' that is incapable of navigating at sea. However, this conclusion is not completely unthinkable. Navigation at sea does not neces-

29. The Arctic Sunrise Arbitration (Netherlands v. Russia) (Case No. 2014-02), Award on the Merits, 14 August 2015, <https://pca-cpa.org/en/cases/21/> accessed 20 December 2021.

30. ibid, para 238.

sarily equate with the capacity to navigate under a 'craft's' own power and steering. It seems reasonable to conclude that a craft which is being towed by a tug could still be navigating on a sea voyage (in the widest sense of the meaning). And evidently, the fact that a craft is temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress does not immediately disqualify this object at sea to be a 'ship' pursuant to UNCLOS.

Finally, the legal qualification as a 'ship' or 'vessel' should be linked to operational requirements that are accepted and expected in the UNCLOS system: does the 'craft' sail under a flag? Is it duly registered in a national ship registry (see Article 91 of UNCLOS)? If not, the craft could technically still be a 'ship', but it might fall under a special category. For example, if it does not fly a flag at all, it could be a ship without nationality (or a pirate ship within the meaning of Article 103 of UNCLOS). Generally, the UNCLOS system clearly indicates that submarines and other underwater vehicles can be 'ships' as well — Article 20 of UNCLOS (which addresses both types) appears under the systematic heading: 'rules applicable to all ships' (Part II, Section 3, subsection A UNCLOS). In cases of doubt, there is no other way but to resort to the systematic context of other UNCLOS provisions in question. For example, in the context of marine research, small unmanned underwater vehicles (UUVs) could be qualified as 'equipment' (pursuant to Article 258 of UNCLOS) rather than 'ships'.[31] But there are, potentially, many remaining cases of doubt, depending on the size of the object, on its operational patterns, and the purpose-built functions of those vehicles. This underlines the urgent necessity for specific future regulation in the twenty-first century, especially with regard to (semi-) autonomously op-

31. See generally Irini Papanicolopulu, Commentary on Art. 258 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017), paras. 5-7.

erating 'maritime drones' (no matter if they are deployed to operate underwater or on the water surface).

In any case — and given the global importance of UNCLOS as a 'Constitution for the Oceans' — UNCLOS will demand a certain minimum threshold of operational control. Floatability of an object as such will not be enough. Rather, there must a degree of human navigational control or oversight (whether on board or remotely). Finally, this control or oversight will have to be exercised in the context of a purposeful (and lawful) utilisation of rights and obligations at sea. It is submitted that the freedom of navigation provides, again, the best practical example. But the lack of an applicable legal 'ship' definition necessitates some degree of discretion and interpretative flexibility — only this approach allows managing potential technical borderline questions on a case-by-case basis. But ultimately, one might have to fall back to the famous expression of United States Supreme Court Justice Potter Stewart (describing his threshold test for obscenity in *Jacobellis v Ohio* (1964)): 'I know it when I see it.' Taking into account that there are many supplementary legal definitions available to support the argumentation, a comparable 'gut reasoning' might very well be workable for 'ships' and 'vessels' under UNCLOS.

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