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Making Waves: Circumventing Domestic Law on the High Seas

Shannon Renton Wolf

I. INTRODUCTION

Historically, a state's treatment of its own citizens was purely a domestic matter. However, with the development of international human rights law and after the horrific tragedies of World War II, the international community recognized a need to create standards to regulate the conduct of a state within its own territory and the treatment of its own citizens.¹ This area of the law has led to many questions concerning the extent to which limitations may be imposed on a state's power to control private conduct within its territorial boundaries. Although state sovereignty is a basic principle underlying international law, international human rights law proclaims certain fundamental and inalienable rights for every human being.² Therefore, states have a duty to protect certain human rights of their citizens and the international community has a right and responsibility to protest if these rights are violated.³

Numerous international and regional instruments, including Article 16(1)(e) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), recognize rights concerning reproductive choice, such as the right to found a family, the right to decide the number and spacing of children, the right to family planning information and education, and the right to access family planning services.⁴ With regard to abortion, international instruments are largely

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1. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 813 (3d ed. 1999).

2. CORINNE A.A. PACKER, THE RIGHT TO REPRODUCTIVE CHOICE: A STUDY IN INTERNATIONAL LAW 1 (1996).

3. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 3 (Hurst Hannum ed., 2d ed. 1992).

4. See PACKER, *supra* note 2, at 23-41.

unhelpful.⁵ For instance, the Women's Convention provides little guidance in this area, largely because in order to achieve political consensus and accommodate a broad spectrum of cultures, the language of the family planning provisions was drafted in vague terms.⁶ Within international documents there is no explicit provision recognizing the right to abortion, yet there is no explicit denial of such a right.⁷ Therefore, international human rights texts create considerable uncertainty over whether the concept of the right to reproductive choice encompasses abortion.⁸ Some proponents of the right to abortion argue that such a right may be implied under other provisions that guarantee a right to privacy and a right to liberty.⁹ Therefore, a state may not interfere with a woman's decision concerning her pregnancy.¹⁰ In addition, some advocate a positive obligation on the state to provide access to abortion under provisions that guarantee a right to health, equality, and self-determination.¹¹ On the other hand, arguments have been made that international law mandates a ban on abortion by extending right to life provisions to protect the unborn.¹² Despite these interpretations, states have been left to determine their own policies concerning this highly charged issue that implicates deeply held views regarding family, gender, and religion.¹³

Abortion laws around the world permit abortion for four reasons: "(1) a risk to the life of the mother, (2) for 'medical reasons', (3) for medical or social reasons, and (4) on request or on demand."¹⁴ Presently, Ireland falls into the first category.

Abortion was criminalized in Ireland under section 58 of the Offences Against the Person Act of 1861.¹⁵ However, in 1981 pro-life activists pushed for an amendment to the Constitution to prevent the judiciary from interpreting a right to abortion similar to the *Roe v. Wade* decision.¹⁶ A referendum for the Eighth Amendment was held on September 7, 1983.¹⁷ A two-to-one majority approved the amendment.¹⁸ The Eighth

5. *Id.* at 72-73.

6. *Id.* at 73.

7. *Id.* at 73-74.

8. *Id.* at 73.

9. JAMES KINGSTON & ANTHONY WHELAN, *ABORTION AND THE LAW* 79-80 (1997).

10. *Id.* at 80.

11. *Id.*

12. *Id.* at 79.

13. *Id.* at 80.

14. G. Diane Lee, Comment, *Ireland's Constitutional Protection of the Unborn: Is it in Danger?*, 7 *TULSA J. COMP. & INT'L L.* 413, 438 (2000).

15. Offences Against the Person Act, 1861, 24 & 25 Vict., c.100, § 58 (U.K.) (remaining in force following Ireland's independence).

16. Amy M. Buckley, *The Primacy of Democracy Over Natural Law in Irish Abortion Law: An Examination of the C Case*, 9 *DUKE J. COMP. & INT'L L.* 275, 281-83 (1998).

17. Rachel A. Yorke, *Tiocfadh Ar La: Ireland's Struggle With Abortion*, 5 *NEW ENG. INT'L & COMP. L. ANN.* 83, 85 (1999).

18. Carol Coulter, *Turbulent History of the Abortion Issue*, *IRISH TIMES*, Nov. 16, 2000,

Amendment provides, "The State acknowledges the right to life of the unborn and, with due regard to the equal life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."¹⁹

However, almost ten years later, in *Attorney General v. X* (1992), the Irish Supreme Court held that abortion is legally permissible if the pregnancy presents a real and substantial threat to the mother's life.²⁰ The facts giving rise to this case concerned a fourteen-year-old girl who was raped by her father's friend and wanted to travel to England for an abortion.²¹ The Court considered her suicidal mental state as a real and substantial risk to her health.²² All five justices recognized an unenumerated fundamental right to travel.²³ Yet three of the justices argued that such a right is subordinate to the right to life of the unborn if there is no real or substantial risk to the mother's health.²⁴

In the wake of the *X* decision, a referendum was held on the abortion issue.²⁵ The government presented three proposals: 1) guaranteeing the right to travel to other European Community states for abortions, 2) information regarding abortion would be freely available in Ireland, and 3) adding to article 40.3.3 of the Irish Constitution: "It shall be unlawful to terminate the life of the unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantive risk to her life, not being a risk of self-destruction."²⁶

The first two proposals reflected a reversal of the Irish government's position in *Society for the Protection of the Unborn (S.P.U.C.) v. Open Door Counselling and Dublin Well Woman Centre* and *S.P.U.C. v. Grogan*, restricting the right to travel and right to information on abortion.²⁷ However, the purpose of the third proposal was to narrow the holding of the *X* case by rejecting suicide as a real and substantial risk to the health of the mother.²⁸ Irish voters approved the first two proposals, however the last proposal was rejected.²⁹ Both of the approved proposals were incorporated into the Irish Constitution as Amendments Thirteen and Fourteen on December 3, 1992.³⁰

at 6.

19. Art. 40.3.3, Constitution of Ireland, 1983; see also Yorke, *supra* note 17, at 85.

20. Yorke, *supra* note 17, at 94-95.

21. *Id.* at 93.

22. *Id.* at 94.

23. *Id.* at 95.

24. *Id.*

25. *Id.*

26. Yorke, *supra* note 17, at 96.

27. *Id.*

28. *Id.*

29. *Id.*

30. Art. 40.3.3, Constitution of Ireland, (1992); Yorke, *supra* note 17, at 96-97.

The liberalization of abortion law in Ireland may be attributed to the modernizing influence of the European Court of Human Rights and the European Court of Justice, which handed down decisions in *Grogan* (1991) and *Open Door* (1993) establishing that Ireland did not have broad discretion to restrict the right to travel or the right to freedom of information if the restrictions violated European Union law.³¹ Furthermore, the *X* case illustrates that in individual cases it is difficult for Ireland to maintain a policy of moral absolutism when faced with horrific facts.³² In addition, increasing popular support in Ireland to expand abortion rights has provided an important impetus for change. A poll in March 2001 by Lansdowne Market Research indicated that 79% of the Irish people favor the availability of abortion in certain circumstances and 62% believe that in these circumstances women should be able to receive abortion services in Ireland.³³

Despite progress in Irish abortion law, the issue remains hotly contested and is by no means settled. The reluctance of politicians to risk their jobs has impeded the development of much needed legislation.³⁴ Furthermore, the Medical Council's ethical guidelines are not in accordance with the *X* ruling.³⁵ While the *X* case held that abortion is permitted if there is a real and substantial risk to the mother, the ethical guidelines prohibit abortion, except when it is a by-product of "standard medical treatment of the mother."³⁶ Much confusion remains considering the "strange state of abortion law, suspended somewhere between the 19th century Offences Against the Person Act and the Supreme Court judgment in the *X* case, which the Oireachtas [the Irish Parliament] has failed to embody in legislation."³⁷

Although women are not able to request an abortion on demand in Ireland, the abortion law clearly establishes that Irish women may circumvent domestic law and travel to European Union states that offer legal abortion services. The most obvious option is to cross the Irish Sea

31. Abigail-Mary E.W. Sterling, Note, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 406 (1997).

32. Yorke, *supra* note 17, at 101.

33. Kitty Holland & Frank McNally, *Irish Should Not Have to Travel for Abortion—Poll*, IRISH TIMES, June 1, 2001, at 5. The circumstances isolated in the poll included "when the woman's life is at risk by continuation of the pregnancy," rape or incest, where the pregnancy would cause irreparable damage to the health of the woman, when the woman was at risk of suicide, when the fetus had a disorder that was incompatible with life, when the woman believed that, for her, it was the right choice, and reasons such as family size, economic and social circumstances. *Id.* 16% of respondents said that abortion should not be available for any reason whatsoever. *Id.*

34. Yorke, *supra* note 17, at 97.

35. Coulter, *supra* note 18, at 6.

36. *Id.*

37. Fintan O'Toole, *Abortion Hearings are Calm but no Consensus is in Sight*, IRISH TIMES, May 6, 2000, at 8.

and go to a clinic in England. In 1999, it was reported that over 6,000 women with Irish addresses had abortions in Britain.³⁸ However, this number does not indicate the number of women who want to terminate their pregnancies but cannot afford to travel considering that a typical journey to England costs about \$1,150.³⁹

In response, Dr. Rebecca Gomperts, a Dutch abortion doctor, came up with a rather radical idea to address the inaccessibility of abortion services in countries such as Ireland. Dr. Gomperts created a non-profit organization, Women on Waves,⁴⁰ and raised funds in order to sail a Dutch-registered ship to countries where abortion is either illegal or difficult to obtain. To circumvent domestic law she planned to perform abortions in international waters.⁴¹ Since abortion is legal in the Netherlands and the law of the flag state applies in international waters, the abortions would be lawful, according to Dr. Gomperts.⁴²

Dr. Gomperts' mission became a reality when she set sail on the *Aurora* and arrived in Dublin's port on June 15, 2001.⁴³ However, when the Dutch Justice Minister Albert Korthals announced that the medical team had not obtained the correct license to conduct abortions, her plans collapsed.⁴⁴ Instead, Gomperts and her team were only able to provide family planning advice, despite the estimated 250 women desperate for abortions.⁴⁵ Although Dr. Gomperts was not able to carry through with her initial plans, she hopes to obtain more funds, complete the necessary paperwork, and return to Ireland.⁴⁶

The Women on Waves organization raises a host of issues involving international law, state sovereignty, the law of the sea, and human rights. Although there are a variety of substantive legal questions that follow in light of the European Human Rights Convention and European Union Law, this Note will focus primarily on whether Ireland even has legal authority to assert jurisdiction over Irish nationals or Dutch nationals aboard the "abortion ship." Part II of this Note will provide a legal background on the traditional bases of jurisdiction in international law, customary and conventional international law of the sea (focusing on the 1982 Law of the Sea Convention), and Irish law of the sea. Part III will analyze the potential arguments that Ireland may raise in asserting jurisdiction and the

38. Frank McNally, *Record Number of Irish Abortions in Britain*, IRISH TIMES, June 7, 2000, at 5.

39. Sara Corbett, *The Pro-Choice Extremist*, N.Y. TIMES, Aug. 26, 2001, § 6 (Magazine), at 22.

40. Women on Waves, *For a Safe and Legal Choice*, at <http://www.womeonwaves.org> (last visited May 1, 2003).

41. Corbett, *supra* note 39, at 22.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

counter-arguments that may shield those on board the abortion ship from legal action.

II. LEGAL BACKGROUND

Within international law, jurisdictional issues are usually distinguished between the jurisdiction to prescribe law and the jurisdiction to enforce law.⁴⁷ Recently however, international law jurisdiction has been more narrowly defined to include a third category, jurisdiction to adjudicate, which is the authority of a state to subject persons or things to its judicial system.⁴⁸ The jurisdictional issue discussed in this Note is whether Ireland has the jurisdiction to prescribe its laws, or whether Irish substantive law is applicable.

A. INTERNATIONAL BASES OF JURISDICTION

There are five customary principles of prescriptive jurisdiction within international law: 1) territorial principle, 2) nationality principle, 3) passive personality principle, 4) protective principle, and 5) universal theory.⁴⁹

The territorial principle recognizes exclusive jurisdiction to prescribe and enforce law regarding conduct that occurs within the state's borders.⁵⁰ Therefore, a state may assert jurisdiction over criminal conduct that occurs within the sovereign state's territory despite the nationality of the perpetrator.⁵¹ Consequently, aliens cannot escape jurisdiction except in instances in which there is some special immunity that does not subject the alien to local law, or the local law is not in conformity with international law.⁵² However, these are very limited exceptions.⁵³

Under the nationality principle, sovereign states have the authority to define the conduct of their own citizens and assert jurisdiction over nationals regardless of where the conduct occurred.⁵⁴ Similarly, the passive personality principle allows states to assume jurisdiction over offenses committed against victims who are nationals.⁵⁵ This theory of jurisdiction is based on the idea that states have an interest in punishing perpetrators of crimes against their citizens⁵⁶ and protecting their citizens abroad.⁵⁷

47. CARTER & TRIMBLE, *supra* note 1, at 710.

48. *Id.* at 710-11.

49. *Id.* at 712.

50. Laura L. Roos, *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate From International Principles of Jurisdiction*, 9 MAR. LAW. 273, 275 (1984).

51. *Id.* at 276.

52. J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 209 (10th ed. 1989).

53. *Id.* at 210 (noting the exceptions from and restrictions upon territorial jurisdiction, including foreign states and heads of foreign states, diplomatic representatives and consuls, public ships of foreign states, armed forces of foreign states, and international institutions).

54. Roos, *supra* note 50, at 276.

55. *Id.*

56. *Id.* at 276-77.

Therefore, under the passive personality principle a state may apply its laws against a foreign national for acts committed outside the state's territory against its citizens.

The protective principle of jurisdiction focuses on the effect or potential effect of an offense and provides for jurisdiction over harmful conduct which has consequences of the utmost gravity for the state.⁵⁸ Conduct that threatens security, territorial integrity, and political independence of a state justifies asserting this type of jurisdiction.⁵⁹ However, this theory of jurisdiction has been criticized for potentially allowing states to judge subjectively what conduct is particularly harmful, and could, therefore, result in arbitrary decisionmaking.⁶⁰

The universal theory of jurisdiction provides authority for a state to assert extraterritorial jurisdiction over a perpetrator that commits a particularly heinous offense such as piracy, slave trafficking, war crimes, hijacking and sabotage of aircraft, genocide, and terrorism.⁶¹ Trafficking narcotic drugs is currently not recognized as a customary basis for asserting universal jurisdiction, however there are international agreements that provide for such jurisdiction.⁶²

B. CUSTOMARY AND CONVENTIONAL INTERNATIONAL LAW OF THE SEA

The two primary sources of international law of the sea are international customary law and treaties. Rules become customary law when: "(i) a particular usage is habitually observed by the generality of States; and (ii) they observe that usage out of a feeling of legal obligation."⁶³ Treaties create legally binding obligations only for the parties who have ratified the treaty. However, a treaty may provide a model from which international customary law develops.⁶⁴

Prior to the twentieth century, international law of the sea consisted predominantly of customary law, which was largely based on the freedom of the seas, or rather that no single state or group of states could assert sovereignty over the seas.⁶⁵ However, throughout history there has been a tension between preserving the freedom of navigation and recognizing territorial sovereignty.⁶⁶ Specifically, coastal states became concerned with smuggling and armed attacks, and therefore wanted to exert some control

57. STARKE, *supra* note 52, at 233.

58. ROOS, *supra* note 50, at 276.

59. *Id.*

60. STARKE, *supra* note 52, at 233-34.

61. ROOS, *supra* note 50, at 234.

62. *Id.*

63. 1 EDWARD DUNCAN BROWN, *THE INTERNATIONAL LAW OF THE SEA: INTRODUCTORY MANUAL 3* (1994).

64. *Id.*

65. CARTER & TRIMBLE, *supra* note 1, at 928.

66. *Id.* at 928-29.

over conduct in the waters adjacent to the coast.⁶⁷ The conflict between these competing interests has been exemplified in disagreements over the length of the territorial sea, which is the area of the adjacent water over which states can exercise sovereignty.⁶⁸

During the twentieth century, there have been several motivating factors encouraging codification of the law of the sea, including the increasing depletion of fishery stocks and the threat of technological exploitation of the ocean.⁶⁹ Finally, the United Nations Conference on the Law of the Sea in 1958 led to the codification of a majority of the customary rules in four treaties: The Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Living Resources of the High Seas.⁷⁰ These treaties are collectively referred to as the Geneva Conventions on the Law of the Sea.⁷¹ However, at this conference the parties were unable to come to an agreement regarding the breadth of the territorial sea.⁷²

After an unsuccessful second conference, the third United Nations conference led to creation of the 1982 United Nations Convention on the Law of the Sea (LOSC).⁷³ The LOSC largely superseded the Geneva Conventions and came into force in November 1994. Ireland signed the LOSC in 1982 and ratified the treaty on July 21, 1996.⁷⁴ The Netherlands also signed the treaty on December 10, 1982, and ratified the LOSC on June 28, 1996.⁷⁵

One of the major successes of the LOS Convention, including an agreement on the maximum breadth of the territorial sea at twelve miles, is an outline of the zones of the sea and delineation of where coastal states and other states have various rights.⁷⁶ These zones include the internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, and the high seas.⁷⁷

67. *Id.* at 929.

68. *Id.*

69. *Id.*

70. 1 BROWN, *supra* note 63, at 3

71. *Id.*

72. CARTER & TRIMBLE, *supra* note 1, at 929.

73. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261; *see also* 1 BROWN, *supra* note 61, at 3.

74. CLIVE R. SYMMONS, IRELAND AND THE LAW OF THE SEA 7 (2d ed. 2000).

75. Harm M. Dotinga & Alfred H.A. Soons, *The Netherlands and the Law of the Sea, in THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES* 365, 367 (Tullio Treves ed., 1997); Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, Table of Ratifications/Accessions/Successions, at http://www.un.org/Depts/los/reference_files/status2002.pdf (last modified Feb. 27, 2002).

76. CARTER & TRIMBLE, *supra* note 1, at 930.

77. For purposes of this Note, a discussion of the continental shelf, which includes the sea-bed and sub-soil of submarine areas, is not relevant to the question of whether Ireland has jurisdiction over the Dutch abortion ship.

1. Internal Waters

Under an absolutist view of sovereignty, states have authority to exercise jurisdiction over foreign vessels regarding activities that take place while the vessel is in port.⁷⁸ This is because ports are considered part of the internal waters, and internal waters are treated as if they are part of the land of the state. Although the LOSC is silent on the issue of coastal state control over internal waters, such authority can be inferred from Article 2(1) where internal waters are equated with land territory.⁷⁹ Furthermore, the LOSC and the 1958 Territorial Sea Convention do not provide any limitations on the criminal or civil jurisdiction of a local state over foreign vessels in its port.⁸⁰

However, most states rarely exercise jurisdiction over a foreign vessel in port, and instead recognize the French modification rule.⁸¹ Under this rule, coastal states do not exercise jurisdiction over matters that are considered related purely to the “internal economy” of the foreign vessel.⁸² Instead, jurisdiction is only exercised when the activity in question affects the local state and threatens the peace of the port.⁸³

2. Territorial Seas

The sovereignty of a coastal state extends beyond its land territory and internal waters to the territorial sea.⁸⁴ The LOSC provides that states can claim a territorial sea of up to twelve nautical miles from their shores.⁸⁵ However, an exercise of sovereignty is “subject to this Convention and to other rules of international law.”⁸⁶

One major limitation on the exercise of sovereignty over ships in the territorial sea is the right of innocent passage to which ships of all states are entitled to under the LOSC.⁸⁷ Passage includes navigation for the purpose of calling at a port facility.⁸⁸ Although passage must be continuous and expeditious, stopping and anchoring are included within the definition of passage so long as it is incidental to ordinary navigation or necessary due to bad weather or some sort of distress.⁸⁹

Article 19 includes a lengthy definition of the meaning of innocent

78. Ted L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COM. 305, 308 (1997).

79. *Id.*

80. *Id.* at 309.

81. CARTER & TRIMBLE, *supra* note 1, at 950.

82. McDorman, *supra* note 78, at 308.

83. CARTER & TRIMBLE, *supra* note 1, at 950.

84. Convention on the Law of the Sea, *supra* note 73, at art. 2(1).

85. *Id.* at art. 3.

86. *Id.* at art. 2(3)

87. *Id.* at art. 17.

88. *See id.* at art. 18(1)(b).

89. *See id.* at art. 18(2).

passage.⁹⁰ The article states that, “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”⁹¹ The article lists numerous activities that are considered prejudicial.⁹² Although the LOSC allows for an extension of sovereignty up to twelve nautical miles from the baseline of the coast, the right of innocent passage greatly preserves the freedom of navigation by discouraging coastal state regulation over foreign vessels.

The LOSC provides limitations over when a coastal state should assert jurisdiction over a foreign ship in territorial waters. Coastal states are not permitted to exercise *criminal* jurisdiction on board a foreign ship passing through the territorial sea with regard to any crime committed on board during its passage unless one of the exceptions are met, such as if the consequences of the crime extend to the coastal State or if the nature of the crime would disturb the peace of the country or the good order of the territorial sea.⁹³ However, there is no limitation on asserting jurisdiction

90. See Convention on the Law of the Sea, *supra* note 73, at art. 19.

91. *Id.* at art. 19(1).

92. *Id.* at art. 19(2). The article states:

Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defense or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of willful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Id.

93. *Id.* at art. 27(1). The article states:

The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or

over foreign ships navigating through the territorial sea after leaving internal waters.⁹⁴ The article's purpose is to protect the traditional right of innocent passage to the greatest extent possible, and the primacy of the flag-state under which the ship is registered to exercise jurisdiction for crimes committed on board a ship.

There are also limitations on the exercise of *civil* jurisdiction over foreign ships. The coastal state cannot *stop* or *divert* a foreign ship from passing through the territorial sea for purposes of exercising civil jurisdiction.⁹⁵ In addition, the coastal state cannot *arrest* the ship for civil proceedings, unless the ship itself incurs liabilities.⁹⁶ Similar to an exercise of criminal jurisdiction, there are no limitations on the right of a coastal state to arrest a foreign ship in territorial waters after it has left internal waters.⁹⁷

3. Contiguous Zone

The LOSC also recognizes a contiguous zone, which includes the waters contiguous to the territorial sea. States may not extend the contiguous zone beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured.⁹⁸ States can exercise control necessary within the contiguous zone to prevent and punish "the infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea."⁹⁹ In effect, this provision permits states to extend their jurisdiction beyond the territorial sea limit of twelve miles with respect to certain prescribed areas of the law that are breached within their territory or territorial sea. There is also a more expansive view that states have jurisdiction over violations that occur within the contiguous zone if the foreign vessel is about to enter or just left the territorial sea.¹⁰⁰

4. Exclusive Economic Zone

The exclusive economic zone (EEZ) includes the area beyond the territorial sea: States can claim an EEZ of up to 200 nautical miles from

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- the good order of the territorial sea;
 - (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
 - (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Id.

94. Convention on the Law of the Sea, *supra* note 73, at art. 27(2).

95. *Id.* at art. 28(1).

96. *Id.* at art. 28(2).

97. *Id.* at art. 28(3).

98. *Id.* at art. 33(2).

99. *Id.* at art. 33(1).

100. D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 290 (1999).

the baselines from where the length of the territorial sea is measured.¹⁰¹ The LOSC grants rights to exercise jurisdiction with respect to: "(i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research, and (iii) the protection and preservation of the marine environment."¹⁰²

In addition, all states are entitled to the same rights in the EEZ as provided in the high seas relating to the freedom of navigation, overflight, laying of submarine cables and pipelines, and other purposes that are compatible with the EEZ provisions of the Convention.¹⁰³ Limitations on the assertion of jurisdiction on the high seas are also applicable to the EEZ unless they are incompatible with other provisions of the LOSC.¹⁰⁴

5. High Seas

The high seas constitutes "all parts of the seas that are not included in the exclusive economic zone, in the territorial seas or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."¹⁰⁵ The LOSC codifies the customary rule that the high seas are open to all States and lists the various freedoms that are included.¹⁰⁶ Furthermore, the high seas are "reserved for peaceful purposes" and no state may claim any part of the high seas subject to its sovereignty.¹⁰⁷

The LOSC also includes the customary rule that ships on the high seas are subject to the exclusive jurisdiction of the flag state under which the ship is registered.¹⁰⁸ However, there are exceptions expressly provided for in international treaties or under the LOSC, which include ships engaged in slave transportation, piracy, and unauthorized broadcasting.¹⁰⁹

101. Convention on the Law of the Sea, *supra* note 73, at arts. 55, 57.

102. *Id.* at art. 56(1)(b).

103. *Id.* at art. 58(1).

104. *Id.* at art. 58(2).

105. *Id.* at art. 86.

106. *Id.* at art. 87(1). The article states:

The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

Id.

107. Convention on the Law of the Sea, *supra* note 73, at arts. 88, 89.

108. *Id.* at art. 92.

109. *Id.* at arts. 99-100, 109.

C. IRELAND AND THE LAW OF THE SEA

As an island state with a long coastline and an extensive continental shelf, Ireland maintains tremendous interest in the international law of the sea and its development. In fact, Irish dry land only makes up 10% of its offshore zones.¹¹⁰ Although Ireland has a small ocean-going merchant fleet and navy, the country has substantial interest in fishery resources.¹¹¹

Consequently, Ireland has participated in all three of the U.N. Conferences on the Law of the Sea. Although Ireland signed the Geneva Conventions on the Law of the Sea, Ireland never ratified the Conventions.¹¹² It appears that the Convention on Conservation of Living Resources on the High Seas was considered for ratification, however it was determined that it contained provisions which might be interpreted to prevent Ireland from establishing an exclusive fishery zone beyond its territorial seas.¹¹³ Regarding the other three conventions, one commentator has suggested that non-ratification was "due to lethargy rather than objections in principle" since Ireland's maritime legislation, the Maritime Jurisdiction Act of 1959 (MJA), contains provisions that are identical or very similar to the Convention on the Territorial Sea.¹¹⁴

1. Internal Waters and Territorial Sea

The MJA originally provided for a three-mile territorial sea limit.¹¹⁵ However, the MJA was amended in 1987 to claim the maximum twelve nautical miles under the LOSC.¹¹⁶ This amendment came into force on September 1, 1988.¹¹⁷

The right of innocent passage is only mentioned once in the MJA in relation to internal waters formerly considered part of the territorial seas or high sea areas enclosed by straight baselines, e.g. bays.¹¹⁸ Although the MJA does not interpret the right of innocent passage, official statements at the UNCLOS III demonstrate that Ireland was against a restrictive definition of innocent passage.¹¹⁹

Offenses committed within Irish internal waters or territorial waters by means of or on board a foreign ship are subject to Irish criminal jurisdiction.¹²⁰ However, in order to prosecute an alien for an offense committed in territorial waters on board a foreign ship, a certification from

110. SYMMONS, *supra* note 74, at 1.

111. *Id.* at 2.

112. *Id.* at 3.

113. *Id.*

114. *Id.* at 4.

115. Maritime Jurisdiction Act, § 3 (1959).

116. SYMMONS, *supra* note 74, at 76.

117. *Id.* at 76 n.64.

118. *See* Maritime Jurisdiction Act, § 5 (1959).

119. SYMMONS, *supra* note 74, at 85.

120. Maritime Jurisdiction Act, § 10 (1959).

the Minister of External Affairs is required before proceedings can be instituted.¹²¹ Clearly, this provision provides safeguards for aliens, however only with regard to offenses committed in the territorial seas.¹²² No such certificate is required for offenses committed by aliens in internal waters.¹²³

The interesting question is whether Ireland has adopted the “peace of the port” principle. Major seafaring nations such as the United Kingdom, France, and the United States apply this doctrine.¹²⁴ This author was unable to find any Irish case law that establishes an adherence or rejection of this principle or that addresses the extent to which Ireland asserts port state jurisdiction over foreign vessels. However, it may be inferred that Ireland would follow English case law, which clearly recognizes that host states should not exercise authority over a foreign vessel in port, unless the conduct has sufficiently affected the port state’s interests.¹²⁵

2. Contiguous Zone

Although the LOSC permits states to claim a contiguous zone of up to an additional twelve miles from the edge of the territorial sea, Ireland does not claim a contiguous zone separate from the breadth of the territorial sea, nor is there any mention of such a zone in the MJA.¹²⁶ No coastal state is obligated to claim this zone since the LOSC uses permissive language.¹²⁷ At present, Ireland only exercises jurisdiction over the territorial sea of twelve miles. Therefore, regulation of Ireland’s custom, fiscal, immigration, and sanitary laws does not extend beyond the territorial sea.

3. Exclusive Economic Zone

The MJA recognizes a separate exclusive fishery zone, however there is no mention of an exclusive economic zone.¹²⁸ Although in 1976 Ireland established a 200-mile exclusive fishery zone (EFZ) in a statutory order – the Maritime Jurisdiction (Exclusive Fisher Limits) Order – Ireland has not claimed a 200-mile exclusive economic zone.¹²⁹ Therefore, there seems to be a jurisdictional gap outside the twelve-mile territorial limit over matters

121. *Id.* § 11.

122. *See id.*

123. *See id.*

124. *See* Jason M. Schupp, *The Clay Bill: Testing the Limits of Port State Sovereignty*, 18 MD. J. INT’L L. & TRADE 199, 207-08 (1994) (Describing the “internal economy rule,” which states, “port states will assume jurisdiction when, in their opinion, the peace or tranquility of the port is disturbed.”).

125. *Id.* at 210.

126. SYMMONS, *supra* note 74, at 125.

127. *Id.*

128. Maritime Jurisdiction Act, § 6 (1959).

129. Clive R. Symmons, *Ireland and the Law of the Sea*, in *THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES*, *supra* note 75, at 261, 280.

that do not constitute a breach of fishery laws.¹³⁰ This is exemplified by the jurisdictional problems Irish authorities have had dealing with the intentional ramming of Irish fishing vessels by Spanish trawlers within the 200-mile EFZ.¹³¹

4. High Seas

As an island state, Ireland views freedom on the high seas as a fundamental principle of international law that ensures freedom of navigation between countries. In practice, Ireland has consistently followed the principle that jurisdiction on the high seas belongs to the foreign vessel's flag state.¹³²

III. ANALYSIS

Principles of international jurisdiction, international law of the sea, and Irish law of the sea help clarify the potential arguments for and against Irish jurisdictional authority over either Dutch or Irish nationals during various stages of the abortion ship's travel.

A. JURISDICTION PRIOR TO ARRIVAL OF THE ABORTION SHIP

Before the arrival of the abortion ship, Ireland clearly has no jurisdictional authority over the Dutch ship while it is on the high seas. The LOSC and Irish practice have shown the utmost respect for the freedom of navigation on the high seas. At this point, since Dutch nationals aboard the ship have not engaged in any activity that might put them within the jurisdiction of Ireland, the Netherlands retains exclusive jurisdiction. This holds true when the ship enters within the 200-mile zone, since Ireland only claims an exclusive fishery zone, which is unrelated to the activities aboard an abortion ship. Even if Ireland claimed an EEZ, the abortion ship's activity does not fall within the jurisdictional provisions of the LOSC. Furthermore, since Ireland does not claim a contiguous zone, the abortion ship is still effectively outside the jurisdictional purview of Ireland beyond the twelve-mile territorial sea.

However, when the boat enters the twelve-mile territorial limit, it has essentially entered the sovereign territory of Ireland, as recognized under the LOSC and Irish law. Yet, the LOSC explicitly provides for the right of innocent passage, thus limiting a state's ability to exclude foreign vessels from territorial waters. Therefore, the relevant issue is whether the ship's passage qualifies as innocent.

Under the LOSC, "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."¹³³ The enumeration

130. *Id.* at 282.

131. *Id.*

132. *Id.* at 294.

133. Convention on the Law of the Sea, *supra* note 73, at art. 19(1).

of prejudicial activities seems to make "innocence" dependent on the conduct that occurs during passage.¹³⁴ In effect, this prevents Ireland from determining the non-innocence of passage by the character of the ship. Ireland may argue that although the conduct of the Dutch abortion ship is lawful, the purpose of the passage to perform abortions on Irish nationals makes the transit non-innocent. Although Ireland views the passage of the Dutch ship as morally corrupt, and therefore non-innocent, Article 19(2) has been interpreted as an exhaustive list of activities that are non-innocent.¹³⁵ Since the Dutch nationals have not conducted any activities that are listed, they are effectively passing through territorial waters in accordance with the LOSC.

Essentially Ireland has no means to prevent the passage of the abortion ship because it has not engaged in any of the proscribed non-innocent activities. Hence, Ireland may not impede the ship's transit through territorial waters. Furthermore, since no illegal activity has occurred during the ship's passage, Ireland cannot assert jurisdiction over the Dutch nationals.

B. JURISDICTION OVER THE ABORTION SHIP IN PORT

Once the abortion ship arrives in port, Irish jurisdictional authority is at its greatest since Ireland has both prescriptive and enforcement jurisdiction. Women on Waves listed counseling, pregnancy testing, and workshops on reproductive health as activities to be conducted while in port.¹³⁶ The Fourteenth Amendment of the Irish Constitution provides that the Eighth Amendment, protecting the life of the unborn, "shall not limit the freedom to obtain or make available, in the State, subject to such conditions as may be established by law, information relating to services lawfully available in another state."¹³⁷ In March 1995, the Abortion Information Act was passed which limits the right to receive such information. The Act addresses how and under what circumstances publishers of abortion material and organizations rendering pregnancy counseling can provide information regarding abortion.¹³⁸ The Act specifically prohibits counselors from advocating or promoting abortions.¹³⁹ In addition, counselors are not permitted to make an appointment or any other arrangements for an

134. *See id.* at art. 19(2).

135. Although the interpretation of Article 19(2) as an exhaustive list was included in only a bilateral agreement between the United States and Soviet Union, it clarifies the concept of innocent passage for the rest of the international community. Lieutenant Commander John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137, 163 (1992).

136. Women on Waves, *Activities*, at http://www.womeonwaves.org/e/e_activities.html (last visited May 1, 2003).

137. Art. 40.3.3, Constitution of Ireland, 1983.

138. Keith S. Kogler, *Ireland's Abortion Information Act of 1995*, 29 VAND. J. TRANSNAT'L L. 1117, 1137 (1996).

139. *Id.* at 1137-38.

abortion on behalf of a woman.¹⁴⁰ A violation of the Information Act creates civil liability of up to £1,500.¹⁴¹

The Dutch pro-choice activists could be acting in violation of the Abortion Information Act if counselors advocate the termination of a pregnancy. Ireland can argue that the mere context of the counseling – on board a ship outfitted to perform abortions on the high seas – constitutes a promotion of pregnancy termination. In addition, the Dutch nationals would also be in violation of the provision prohibiting counselors from arranging abortions since they are acting within dual roles as both counselors and abortion doctors. Thus, the Dutch nationals may be liable for violations of the Abortion Information Act.

However, it is customary under international law to refrain from asserting jurisdiction over foreign vessels unless the activity disturbs the peace of the port.¹⁴² Historically port states have refrained from exercising jurisdiction in situations involving wages, collective bargaining, necessary discipline, and crimes committed on board.¹⁴³ Two cases that established this customary rule involved assaults committed by American seamen on American flag vessels, *Newton* and *Sally*, located in French ports.¹⁴⁴ France declined to assert jurisdiction because the conduct was deemed insufficient to disturb the peace of the port.¹⁴⁵ Yet, in the *Wildenhus* case, the United States Supreme Court held that the murder of a Belgian crewman by another Belgian crewmember on board a Belgian flag vessel while in a U.S. port constituted activity that disturbs the peace.¹⁴⁶ The Court stated that: “If the thing done . . . is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment.”¹⁴⁷ The Court also referred to the universal condemnation of murder as another justification for asserting jurisdiction.¹⁴⁸

In the case of the abortion ship, providing information advocating abortion does not rise to the same level as murder, although Irish pro-life forces would certainly argue to the contrary. Although such conduct may be morally condemned by Ireland, the activity in question is a violation only of civil law, not criminal law. Furthermore, advocating abortion is not conduct that is universally condemned.

On the other hand, if the Dutch pro-choice activists’ conduct incites sufficient public response, a strong argument could be made that Ireland

140. *Id.* at 1138.

141. *Id.*

142. See discussion at *supra* notes 81-83 and accompanying text.

143. Schupp, *supra* note 124, at 208.

144. *Id.*

145. *Id.* at 208-09.

146. *Id.* at 212-13.

147. *Wildenhus's Case*, 120 U.S. 1, 17 (1887).

148. *Id.* at 17-18.

may assert jurisdiction. Surprisingly, when the *Aurora* arrived in the Dublin port there was no sign of protest.¹⁴⁹ When one journalist questioned a member of Youth Defense, one of Ireland's most militant anti-abortion organizations, he responded that Dr. Gomperts was "just pulling a publicity stunt."¹⁵⁰ Therefore, the ability of Ireland to assert jurisdiction over the foreign vessel rests to a considerable degree on the intensity of the public response. However, Ireland may argue that a *potential* disturbance of the peace is sufficient to justify asserting jurisdiction. Such an argument would be similar to the reasoning adopted in *Wildenhus* when the Court stated:

It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done.¹⁵¹

Another question raised is whether Ireland may enjoin its citizens from boarding the abortion ship. Clearly, Ireland has jurisdictional authority over its own citizens under both the territorial and nationality principles. However, *Attorney General v. X* established that there is a fundamental right to travel.¹⁵² In addition, the Thirteenth Amendment of the Irish Constitution recognizes the right of a woman to travel abroad to terminate her pregnancy.¹⁵³ Therefore, it is doubtful that Ireland would be successful in preventing Irish nationals from boarding the *Aurora*.

C. JURISDICTION OVER THE ABORTION SHIP UPON LEAVING PORT

After the abortion ship leaves port, the vessel remains under Irish jurisdiction twelve miles from the baseline. Normally under the LOSC a state should not assert civil jurisdiction over a vessel passing through the territorial waters unless there are liabilities incurred by the ship itself. However, there are no limitations on civil jurisdiction to levy execution or arrest of a foreign ship in the territorial seas after leaving internal waters.¹⁵⁴ Therefore, if Ireland finds a violation of the Abortion Information Act, and the ship has already left internal waters, Ireland may still assert jurisdiction within its territorial waters under international law.

If the Dutch nationals attempted to or performed abortions within the

149. Corbett, *supra* note 39, at 26.

150. *Id.*

151. *Wildenhus's Case*, 120 U.S. at 18.

152. See discussion at *supra* note 23 and accompanying text.

153. See discussion at *supra* notes 25-32 and accompanying text.

154. Convention on the Law of the Sea, *supra* note 73, at art. 28.

territorial waters, Ireland could certainly assert criminal jurisdiction under Irish and international law. Irish law permits criminal jurisdiction within its territorial waters,¹⁵⁵ and international law permits jurisdiction if the nature of the consequences of the crime extend to the coastal State or if the nature of the crime would disturb the peace of the country or good order of the territorial sea.¹⁵⁶ Ireland would have a strong argument for asserting jurisdiction under either exception. First, Ireland may argue that abortion within the territorial seas has profound consequences for the Irish nation by diluting the authority of the government to legislate on social issues, depriving would-be fathers of children, and depriving the Irish unborn of the right to life under the Irish Constitution. These are just some of the arguments Ireland may advance.

In addition, the performance of abortions off the coast of Ireland would most certainly disturb the peace of the country. Although Dr. Gomperts was met with few signs of protest, if she had actually performed abortions within Ireland's territorial waters, the proximity and the reality of the situation would most likely create significant public outcry. There was little protest upon Dr. Gomperts' arrival because many thought she was bluffing or just trying to stir up media attention. However, if her mission had done more than raise awareness, it is likely that pro-choice groups and religious organizations would have created a greater uproar.

Furthermore, performance of abortions within territorial waters could arguably be considered non-innocent passage under subsection (l), which makes non-innocent "any other activity not having a direct bearing on passage."¹⁵⁷ Although this provision is excessively vague, Ireland may assert that abortion operations do not have any direct relationship to navigation, and therefore passage is non-innocent. Therefore, Ireland could seize the vessel, thus preventing it from passing through territorial waters.

D. JURISDICTION OVER THE ABORTION SHIP ON THE HIGH SEAS

Beyond the twelve-mile territorial waters zone, the ship is not technically in the high seas according to the definition under the LOSC. The provisions regarding the high seas "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."¹⁵⁸ Instead, the boat is located in the EFZ. Although technically performing abortions outside the twelve-mile zone is within the exclusive economic fishery zone, all of the freedoms afforded to the high seas are also granted to the EEZ. Since the *Aurora* would be outside the territorial jurisdiction of Ireland, the issue is whether Ireland may assert extra-

155. Maritime Jurisdiction Act, § 10 (1959).

156. Convention on the Law of the Sea, *supra* note 73, at art. 27(1).

157. *Id.* at art. 19(2)(l).

158. *Id.* at art. 86.

territorial jurisdiction over a foreign vessel performing abortions in international waters.

The LOSC only grants jurisdiction over a foreign vessel in the high seas in cases of slave trafficking, piracy, and unauthorized broadcasting. The only category under which the performance of abortions could possibly fall under is piracy. Article 101 of the LOSC states:

[Piracy includes] (a) any illegal acts of violence or detention, or act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft¹⁵⁹

There are several problems with Ireland asserting universal jurisdiction over the abortion ship. First, the definition of piracy only includes illegal acts of violence *against another ship*, and such persons or property on board such ship. However, it has been suggested that since facts supporting charges of aircraft piracy have occurred on a single plane, in the interest of consistency, high seas piracy can also occur on one ship.¹⁶⁰

Even so, it is questionable whether the performance of abortions on high seas may be considered an illegal act of violence under international law. Although Ireland perceives the act as the unlawful killing of the unborn, there is no widespread agreement that abortion is a sufficiently heinous offense that justifies subjecting foreign vessels to jurisdiction by any state.

In addition, the definition of piracy requires that the acts be committed for private ends. Here, Dr. Gomperts' mission is more an act of political resistance rather than private gain. She intends to perform abortions for free or for a nominal fee, therefore it is difficult to argue that there is an economic incentive at work. Instead, Dr. Gomperts has approached abortion as an international human rights issue and intends to highlight the restrictive abortion laws in Ireland and provide women with a choice.¹⁶¹

Although the abortion ship does not fall within universal jurisdiction under the LOSC, customary principles of international law may provide a basis for extra-territorial jurisdiction. Ireland could certainly assert jurisdiction over Irish passengers on board the abortion ship under the nationality principle and over the Dutch nationals under the passive personality principle since they would be considered perpetrators of a crime against the Irish unborn.

However, although extra-territorial jurisdiction is theoretically

159. *Id.* at art. 101.

160. Elissa Steglich, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 TEX. L. REV. 1323, 1340-41 (2000).

161. Corbett, *supra* note 39, at 24.

plausible, it is questionable whether Ireland would assert jurisdiction because of the right to travel to member states of the European Union for an abortion. The Netherlands is a member of the European Union, and therefore an Irish woman may travel to the Netherlands to procure an abortion without fear of prosecution. In this case, since Dr. Gomperts is using a Dutch-registered ship that is subject to Dutch sovereignty on the high seas, the Irish women have theoretically traveled to another European Union state. Ireland may argue that the Thirteenth Amendment only contemplated travel to the territorial land of another state. Yet, considering Ireland's traditional respect for the freedom of navigation on the high seas and recognition of flag state jurisdiction on the high seas, it would be very difficult for Ireland to make a convincing argument that the women have not effectively traveled outside the jurisdiction of Ireland. Therefore, although jurisdiction is relatively easy to obtain on nationality grounds, the women most likely would evade prosecution on substantive grounds.

In addition, Ireland may argue that the Dutch nationals are within extra-territorial jurisdiction under the passive personality principle, which justifies jurisdiction over perpetrators of crimes against Irish nationals. Since the Irish Constitution recognizes the right to life of the unborn and abortion is a criminal offense, Ireland could argue that the State has an interest in protecting the life of its nationals and bringing those who jeopardize that life to justice. Yet Ireland will have difficulty asserting this argument because abortion is not a crime within the Netherlands and the law of the flag state normally applies on foreign vessels on the high seas.

Another potential theory that would justify extra-territorial jurisdiction is the protective principle. In order for jurisdiction to be justified under the protective principle, the offense must have harmful or possibly harmful effects to the national interests of the state claiming jurisdiction.¹⁶² The protective theory was designed so that states may protect themselves from offenses that damage or threaten state security, sovereignty, treasury, or governmental functions.¹⁶³

Ireland could argue that the performance of abortions in international seas threatens its moral sovereignty to determine what conduct is deemed offensive. Although Ireland is the only member of the European Union that has remained resistant to the legalization of abortion, European Union law typically defers to members states on issues of morality under the margin of appreciation doctrine of the European Convention of Human Rights.¹⁶⁴ Ireland may argue that although the abortions are performed

162. Christopher L. Blakesley, *Criminal Law: United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1134-35 (1982).

163. *Id.* at 1137-38.

164. Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 396-97 (1994).

outside Irish territory, the potential effects of an abortion ship in the aggregate would make Irish law meaningless if virtually any pregnant woman could terminate her pregnancy outside the twelve-mile territorial limit.

Although abortions performed on the high seas do not pose a security risk to Ireland, the acts do threaten to impose on Ireland's capability to regulate the conduct and morality of its own citizens. However, this argument interferes with the primary goal of international law of the sea, which is to maintain freedom of navigation and prevent ambiguity and subjective decision-making regarding jurisdictional authority. If states were allowed to assert extra-territorial jurisdiction based on morality arguments, the floodgates would open to all sorts of jurisdictional claims.

Ireland may also refer to Article 300 of the LOSC which provides that, "State Parties *shall* fulfil in good faith the obligations assumed under this Convention and *shall* exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."¹⁶⁵ The language of this provision indicates that the LOSC mandates that states exercise their rights without abusing the freedoms guaranteed. Arguably, Ireland and other states would view this activity as an abuse of high seas freedoms to undermine Irish sovereignty. Since performing abortions is not within the contemplated purposes for ensuring freedom of the high seas, such as ease of navigation and sharing of fishing resources, the Dutch nationals' conduct may be perceived as a manipulation of international law and an improper attempt to politicize on an international level a traditionally domestic issue.

On the other hand, pro-choice advocates would argue that such conduct vindicates women's right to reproductive choice and fights against what many activists perceive to be a violation of international human rights by denying access to abortion services to those women who cannot afford to travel abroad. Perhaps an abuse of the law of the sea is a lesser evil than turning a blind eye to the needs of thousands of Irish women.

Most likely, the parties to the LOSC did not consider how to resolve situations where the nature of the conduct implicates morality rather than security, environmental, or resource interests. Since the parties to the Convention are unlikely to reconvene in the near future to consider whether such uses of the high seas should be permissible, the question remains unanswered until Dr. Gomperts or another human rights activist successfully tests the limits of international law. In that event, Ireland may invoke a dispute resolution mechanism under the LOSC.

IV. CONCLUSION

Since Dr. Gomperts was unable to fulfill all of the goals of her mission

165. Convention on the Law of the Sea, *supra* note 73, at art. 300 (emphasis added).

and perform abortions on the high seas, it remains to be seen to what extent a state may protect itself from challenges to its moral independence and how the international community would respond to such use of the high seas. As the trend toward the liberalization of abortion law continues and the world becomes increasingly inter-dependent, Ireland is under increasing pressure to harmonize its laws with the rest of Europe. Although there are potential arguments that Ireland may raise in asserting jurisdiction under the LOSC and customary law, the Irish government may be placed in a difficult position of choosing between maintaining freedom of navigation or protecting its own societal interest in preserving the protection of the Irish unborn.

The abortion ship provides a powerful example of how activists can successfully circumvent domestic law by crossing international boundaries. Interestingly, the high seas may provide a new battleground for debate in the twenty-first century as Dr. Gomperts' idea has attracted the attention of Australian doctor Philip Nitschke, who plans to buy a Dutch-registered ship in order to set up a euthanasia clinic that would travel to countries where the practice is illegal.¹⁶⁶

Although the abortion ship may not be a definitive solution to the restriction on women's right to choose in Ireland, it may be a temporary answer for the potentially large number of women who cannot afford to travel to states where abortion is legal. Perhaps even more significantly, such action raises awareness and forces the abortion issue to the forefront of the international community.

166. David Betty, *Doctor Plans Euthanasia Boat in U.K. Waters*, THE GUARDIAN, June 19, 2001, at 9.

