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1

2023

FLAG STATE JURISDICTION AND TRANSNATIONAL ORGANIZED CRIME AT SEA

ISSUE PAPER



From
the People of Japan

GLOBAL MARITIME
CRIME PROGRAMME

UNITED NATIONS OFFICE ON DRUGS AND CRIME
VIENNA



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NOVEMBER 2023

ISSUE PAPER

EFTHYMIOS PAPASTAVRIDIS
AUGUST 2023

THIS PROJECT WAS FUNDED BY THE GOVERNMENT OF JAPAN.

GLOBAL MARITIME CRIME PROGRAMME
UNODC



UNITED NATIONS



**I.
INTRO
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Combating transnational organized crime (TOC) at sea poses numerous challenges, both to States and international organizations. This is because organized crime at sea is a multifaceted problem, involving many criminal activities and many practical difficulties in the domestic setting.¹ Challenges may arise in the context of law enforcement operations at sea, but also when States are called to achieve a 'legal finish' on land,² including, firstly, by establishing jurisdiction over TOC at sea and, secondly, by ensuring efficient cooperation amongst various authorities both intra-State and inter-State.

Evidently, a key factor to address the above challenges and repress TOC at sea is flag State jurisdiction. This is because criminal activities at sea are mainly conducted by vessels having nationality,³ and thus linked to a certain State's jurisdiction. Also, because, as the law of the sea is framed, the flag State enjoys (almost) exclusive jurisdiction over its vessels, and their activities, in most parts of the sea, certainly on the high seas and to a large extent in the Exclusive Economic Zone (EEZ). It is therefore understandable why flag States are called to assume more responsibilities for the suppression of TOC at sea, not only in paper, i.e., by concluding treaties and adopting domestic laws to this effect, but mainly on the implementation level.

The purpose of this Issue Paper is to explore how flag State jurisdiction may effectively contribute to the suppression of TOC at sea. To this end, it will first unpack the principle of flag State jurisdiction under the law of the sea, by discussing its scope *ratione personae*, *ratione loci* and *ratione materiae* (Section II). It will then move to TOC at sea and assess the relevant treaty framework regarding flag State duties in this regard (Section III). Finally, it will conclude by identifying gaps and challenges in, as well as alternatives for, the implementation of flag State jurisdiction over TOC at sea (Section IV).

Apparently, it is beyond of contours of this Issue Paper to exhaustively set out all the applicable treaty bases or the relevant national legislation concerning flag State jurisdiction in this regard. Nor can it take stock of all the criminal activities committed at sea and all the practical problems linked with flag State jurisdiction. The goal is to highlight the pivotal role that flag State may play in the fight against transnational organized crime at sea, which, if combined with relevant initiatives by the port and coastal States, could contribute to its curtailment.

1 See inter alia UNODC, 'Combating Transnational Organized Crime at Sea' Issue Paper (Vienna 2013) and E. Papastavridis, 'Crimes at Sea: A Law of the Sea Perspective', in E. Papastavridis & K. Trapp (eds.), *La Criminalité en Mer/Crimes at Sea* Hague Academy of International Law (Leiden: Martinus Nijhoff Pub. 2014), pp. 3-52.

2 'Legal finish' means that the suspected persons are duly prosecuted and convicted by a court of law, if found guilty. The converse, however, is often the case, i.e., due to, amongst others, the lack of domestic legislation or international cooperation, the suspected persons are left unpunished. For example, on 7 January 2022, a Danish warship let three pirate suspects free who had initially captured after a pirate attack against a container on 24 November 2021 off the Gulf of Guinea; see <<https://www.bbc.com/news/world-africa-59913513>>

3 Vessels without nationality also often engage in criminal activities; see UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (3rd edn, 2020), Chapter 15 (hereinafter: UNODC Manual). See also ee also A. Anderson, 'Jurisdiction over Stateless Vessels on the High Seas' [1982] 13 *Journal of Maritime Law and Commerce* 326



THE PRINCIPLE OF FLAG STATE JURISDICTION UNDER INTERNATIONAL LAW

1. PRELIMINARY REMARKS

Under international law, jurisdiction is the power of a State to enact and enforce laws. It is common to distinguish between legislative or prescriptive jurisdiction (terms to be used interchangeably henceforth), i.e., the power to make laws and regulations, and enforcement jurisdiction, i.e., the power to take executive action in pursuance of or consequent on the making of decisions or rules.⁴ Also, there is jurisdiction to adjudicate—sometimes called ‘judicial’ or ‘curial’ jurisdiction—which ‘refers to a state’s authority under international law to entertain legal proceedings in respect of given persons or property, whether applying its own substantive law or, as is often the case in civil proceedings, the substantive law of another state’.⁵ However, as rightly noted by O’Keefe, separate reference to jurisdiction to adjudicate is unnecessary in the context of criminal law, where the universal practice is that municipal courts will not apply foreign law.⁶ Adjudicative jurisdiction serves as the continuation or extension of both legislative and enforcement jurisdiction, since, on the one hand, the State has already established jurisdiction over a certain criminal activity and has granted the power to its courts to adjudicate such activities (prescriptive jurisdiction) and on the other, by trying the suspected persons in its territory, the State’s courts execute the relevant laws (territorial enforcement jurisdiction).

Flag State jurisdiction is thus the capacity of the State of the nationality of a

vessel to assert prescriptive and enforcement jurisdiction over that vessel under international law. Also, as the International Tribunal for the Law of the Sea (ITLOS) held in the *M/V Norstar case*, ‘under the Convention (UNCLOS), a ship is to be considered a unit “as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States”, that “[t]hus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State”’.⁷

This pronouncement of the Tribunal concerned the claim of the coastal State that the application of the flag State was inadmissible due to the lack of the exhaustion of legal remedies. What is significant for the purposes of the present enquiry is that the Tribunal considered the vessel as a whole, including the persons on board and its activities, as linked with the flag State and its respective obligations. This, by necessary implication, means that in order to discharge its duties the flag State would have, amongst others, to legislate accordingly, and thus, effectively, assert its jurisdiction not only over the vessel itself but also over ‘everything on it, and every person involved or interested in its [the vessel’s] operations’.⁸

In terms of criminal jurisdiction this entails that the flag State may extend its criminal jurisdiction to any person, regardless of its nationality, on board its vessels and any other person being involved in the related criminal offence (e.g. subject to each State’s legislation, to persons having committed inchoate offences, namely, attempt, solicitation or conspiracy, or those being accessories, namely having aided, contributed to, or concealed the crime concerned).

⁴ See J Crawford, *Brownlie’s Principles of Public International Law* (OUP 2012) 486. On jurisdiction in general see FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil des Cours de l’Académie de Droit International* 1; M Akehurst, ‘Jurisdiction in international Law’ (1972-73) 46 *British Yearbook of International Law* 145; and C Ryngaert, *Jurisdiction in International Law* (OUP 2015).

⁵ R. O’Keefe, *International Criminal Law* (Oxford: Oxford University Press 2015), 4.

⁶ *Ibid.*, 5. in the words of Akehurst, ‘in criminal law legislative jurisdiction and judicial jurisdiction are one and the same’, see Akehurst, *ibid.*, 179.

⁷ *M/V “Norstar”* (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44. See also *M/V “SAIGA”* (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 48, para. 106; *M/V “Virginia G” Case* (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4, at p. 48, para. 126.

⁸ *Ibid.*

To comprehend further the scope of the principle of flag State jurisdiction the following questions are in order: first, 'who may assert this jurisdiction?'; or in other words, 'who is the flag State?' (jurisdiction *ratione personae*). Second, 'which type of jurisdiction does this include? Prescriptive and/or enforcement?' (jurisdiction *ratione materiae*); and relatedly, 'where, or in which maritime zone is flag State (prescriptive or enforcement) jurisdiction to be exercised' (jurisdiction *ratione loci*)? These questions will be addressed in turn against the background of the UN Convention on the Law of the Sea (UNCLOS),⁹ which is considered as reflective of customary international law in this respect.¹⁰

Lastly, there is often allusion in international judiciary and scholarly discourse to a different concept of jurisdiction, that of jurisdiction in human rights treaties, which constitutes the threshold requirement for the application of the latter instruments: only if the persons concerned are within the 'jurisdiction' of a State party to such treaties, that State would be under an obligation to secure their rights under the relevant instrument.¹¹ According to the prevailing view, 'jurisdiction' in various human rights treaties 'refers to a power that a state exercises over a territory, and [...] also over individuals [...] This power is a question

of fact, of actual authority and control'.¹² For the purposes of this Issue Paper, 'flag State jurisdiction' concerns only the traditional concept of jurisdiction to prescribe and enforce in a criminal context and not the respective human rights concept.¹³

2. 'FLAG STATE' JURISDICTION *RATIONE PERSONAE*

Flag State jurisdiction is exercised by the State whose flag the vessel in question is entitled to fly, which under the law of the sea, is the State of its nationality. The fact that vessels have nationality of a State (the 'flag State') plays an important role in the law of the sea, especially on the high seas, which no State enjoys sovereignty.¹⁴ The maintenance of order on the high seas requires that some State has authority over vessels (and over the conduct of persons onboard). Under Article 92 (1) UNCLOS, 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.¹⁵ Thus, the jurisdiction of a flag State over its vessels is the principal means to secure the public order of the high seas.

⁹ UN Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 3 (UNCLOS).

¹⁰ The jurisdiction of the flag State beyond the territorial sea, i.e., on the high seas, was already regulated by the 1958 Geneva Convention on the High Seas (450 UNTS 82), which in its preamble recognized that its provisions were adopted 'as generally declaratory of established principles of international law'. See also J. Barrett, *The UN Convention on the Law of the Sea: a "Living" Treaty?* In J. Barrett and R. Barnes (eds), *Law of the Sea: UNCLOS as a living treaty* (BIICL, 2016), 3.

¹¹ See e.g., Article 1 of the European Convention on Human Rights, according to which: '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 UNTS 221 (ECHR). See also Article 2 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171 (ICCPR).

¹² See M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 53. See also R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', (2007) 40 *Israel L Rev* 503, especially at 508, 513–14 and O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', (2006) 6 *Baltic Yearbook of International Law* 183. *Contra* Banković and Others v. Belgium and Others (App. No. 52207/99), Grand Chamber, Judgment of 12 December 2001, para 61.

¹³ For the interaction between these two concepts at sea see E. Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 *German Law Journal*, 417–435.

¹⁴ See Article 89 UNCLOS (n 9).

¹⁵ Article 92 (1) UNCLOS, *ibid*.

All vessels are required to have a nationality in order to sail on the high seas and in other maritime zones under the conditions laid down in UNCLOS and other relevant rules of international law. The right of navigation belongs exclusively to States, whether coastal or landlocked (Article 90 UNCLOS). Notwithstanding the significance of nationality of vessels for the public order of the oceans, international law does not regulate the grant of nationality to vessels and leaves this to the discretion of the flag State concerned. Under Article 91 UNCLOS, 'every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag'.¹⁶ Thus, each State is the sole responsible to set out the conditions for the nationality of its vessels.¹⁷

Nationality is granted to vessels by flag States according to their domestic legislation, either by registration or, in the absence of registration, by a vessel being entitled to fly a State's flag. Indeed, the national legal systems of many States allow smaller vessels owned by nationals to fly their flag, requiring formal registration only for vessels of a certain size.¹⁸

Vessels must sail under one flag only and must not have multiple nationalities. Vessels flying the flags of two or more States are assimilated to a ship without nationality.¹⁹ In addition, a vessel is prohibited from changing its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership

or change of registry.²⁰ As an authoritative commentary notes, 'the provision is broadly aimed at prohibiting a change of flag during a voyage, as this practice is typically associated with a change of registry to a flag of convenience in order to avoid proper legal regulations of the vessel's activities'.²¹ However, 'there is no obvious manner in which such a provision could ever be enforced'.²²

Also, it must be noted that the physical display of the flag is not absolute proof of its nationality, nor an indispensable requirement for a State to enjoy the freedom of navigation. According to a recent case, a flag is to be 'regarded as "visual evidence" or "a symbol" of nationality, but is not determinative for that vessel's nationality',²³ in the sense that a vessel may not fly all times a flag, for practical reasons, without this entailing that it is stateless.²⁴

Finally, questions have arisen in relation to the inclusion of a genuine link requirement under Article 91 (1), namely that '[t]here must exist a genuine link between [a] State and the ship' which flies its flag. There is no indication in UNCLOS as to which would be the consequences for a ship not having a genuine link with the flag State, even though according to the relevant case-law, the purpose of the genuine link requirement: '[i]s to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States'.²⁵

¹⁶ Article 91 UNCLOS, *ibid.*

¹⁷ As ITLOS observed, Article 91 "leaves to each State exclusive jurisdiction over the granting of its nationality to ships"; *M/V "SAIGA" (No 2)* (n 7), para. 63. In the *Muscat Dhows* case, the tribunal stated that "generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants"; *PCA Case No. 1904-01: Muscat Dhows Case, France v. Great Britain, Award of 8 August 1905, RIAA Vol. XI RIAA, p. 83 at p. 84.*

¹⁸ See *inter alia* S. 1 (1)(d) Merchant Shipping Act 1995 (UK) exempting from registration vessels under 24 metres in length owned by 'qualified owners', e. g. nationals; 46 USC § 12102(b) and Exemption from Number Requirements, 46 USC § 12303(a) exempting vessels under 5 tons, other exceptions may be made by regulations.

¹⁹ See Article 92 (2) UNCLOS (n 9) and UNODC Manual (n 3), Ch. 15.

²⁰ Article 92 (1) UNCLOS, *ibid.*

²¹ Guilfoyle, 'Article 92' in A. Proelss, *UN Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2016), 704 [13] (hereinafter: *Proelss Commentary*).

²² *Ibid.*

²³ *PCA, The "Enrica Lexie" Incident (Italy v Italy), PCA Case No. 2015-28, Award of 21 May 2020, para 1029.*

²⁴ See also N. Ready, 'Nationality, Registration, and Ownership of Ships' in D. Attard, M. Fitzmaurice, and N. A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea*, (Oxford University Press, 2016), p. 24.

²⁵ *M/V 'Saiga' Case (No. 2)* (note 7), para. 83; reaffirmed in *ITLOS, The M/V 'Virginia G' Case* (n 7), paras. 112–113.



In conclusion, as the Arbitral Tribunal in the *Enrica Lexie* case affirmed, 'the test under the Convention for establishing a jurisdictional link between a vessel and a State is whether a vessel possesses the nationality of that State'.²⁶ And the possession of that nationality is a matter that rests exclusively with the flag State in question.

3. THE *RATIONE MATERIAE ET LOCI* SCOPE OF FLAG STATE JURISDICTION?

The assertion of both prescriptive and enforcement jurisdiction by States, including flag States, requires a legal basis under international law, which in the maritime context is provided by the law of the sea and other relevant rules of international law. Indeed, to a large extent, the scope of the jurisdictional competence of the flag State is contingent upon the maritime zone the vessel is located.

I) PRESCRIPTIVE JURISDICTION

First, *as to the prescriptive leg of flag State jurisdiction*, it is submitted that by dint of the nationality of the vessel, flag State enjoys the full gamut of prescriptive powers related to the vessel, 'everything on it, and every person involved or interested in its operations'.²⁷ Thus, in respect of criminal law, the principle of flag State jurisdiction or nationality of the vessel serves as the requisite nexus for the flag State to extend its criminal legislation to the vessel, or any activity related to it, wherever the vessel is located.

However, the Arbitral Tribunal in the *Enrica Lexie* case opined differently as to the rationale for, or the proper legal basis of, flag State jurisdiction, which according to

the Tribunal is not the 'nationality' principle, but that of 'territoriality'.²⁸ The case involved the killing of two Indian fishers on board an Indian vessel named the "St. Antony" within the Indian EEZ, allegedly by rifle fire from two Marines stationed on MV "Enrica Lexie".²⁹ The main question concerned whether India acted in breach of international law by asserting and exercising jurisdiction over the Italian Marines in connection with the "Enrica Lexie incident". Leaving aside the argument concerning the immunities of the Italian Marines as State officials, which was rightly upheld by the Tribunal,³⁰ it was questioned whether India lawfully asserted prescriptive jurisdiction over the incident in the first place.³¹ In addressing this, the Tribunal did refer to the "objective territoriality" principle, i.e., that the act of shooting and killing of the two Indian fishers, albeit started from a foreign vessel, was completed in the "territory" of India, that is, the

28 For the territoriality principle see inter alia R. O'Keefe (n 5), 9 et seq.

29 See a detailed account of the facts of the *Enrica Lexie* case (n 23), paras 77-216.

30 According to the Tribunal, 'regardless of whether the Marines' acts were ultra vires or unlawful, the evidence demonstrates that during the incident the Marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD' (para 867). Therefore, the Arbitral Tribunal concluded that 'the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012 because (i) immunity of State officials is a well-established rule of customary international law; (ii) the Marines are State officials who were acting in their official capacity during the incident...' (para 873) and thus '...India is precluded from exercising its jurisdiction over the Marines' (874), *ibid*.

31 There was no issue with the enforcement jurisdiction, since the arrest of the Marines took place in the port of Kochi, i.e., in the territory of India, over which it enjoys plenary enforcement jurisdiction, see *ibid*, para 168. However, the question here is prescriptive jurisdiction.

26 *Enrica Lexie* case (n 23), para 1029.

27 See e.g. *M/V "Virginia G" Case* (n 7) para. 126.

Indian flagged vessel, *St Antony*.³²

In the view of this author, the findings of the Tribunal reflect a dated and “far-fetched” extension of the “territoriality principle”, which practically assimilates ‘vessels’ with the territory of the State.³³ It is submitted that the nationality or flag State principle suffices as the legal basis to extend the criminal jurisdiction on its vessels.

Irrespective of which is the appropriate jurisdictional nexus for flag State jurisdiction, it is indisputable that under international law a flag State may extend its criminal legislation to any activity or person onboard its vessel, including those concerning TOC at sea. Moreover, if the suspected person is found in the territory of the flag State, and the latter has thus prescribed, the courts of the State concerned may exercise their adjudicative or curial jurisdiction over the crime in question.³⁴

As per the *ratione loci* scope of this flag State prescriptive jurisdiction, it certainly applies on the high seas (Article 92 (1) UNCLOS), and by

virtue of 58 (2) UNCLOS in the EEZ,³⁵ while it also extends to the sovereign waters of another State (internal waters, territorial sea, and archipelagic waters, where applicable) pursuant to the head of flag State/nationality principle. The question that follows is whether this jurisdiction is exclusive, i.e., is it only the flag State that may enact legislation over activities onboard its vessel or other States may also extend their criminal laws to such activities?

First, when a vessel is within the territorial sea -or within the archipelagic waters, where applicable-³⁶ of another State, jurisdiction to prescribe criminal laws is concurrent among the flag State, the coastal State, and any other State with a recognized jurisdictional nexus, such as the State of nationality of the offender.³⁷

Second, similar concurrent prescriptive (criminal) jurisdiction may limitedly exist in respect of certain activities in the EEZ, over which the coastal State enjoys prescriptive (criminal) jurisdiction, including fisheries,³⁸ artificial islands and other installations,³⁹

32 According to the Tribunal, “such an extended territoriality principle is well established, and the domestic criminal legislation of a large number of States confers jurisdiction over offences committed on board national ships or aircraft. In this regard, the Arbitral Tribunal does not consider that this principle amounts to assimilating a vessel with national territory “for all purposes” as if “a ship is a floating part of state territory”, as Italy argues. In the view of the Arbitral Tribunal, it is also well established that, where the commission of an offence involves the territories of more than one State (for example, an offence was commenced in the territory of one State and completed in the territory of another State), both the State in whose territory an offence was commenced (subjective territoriality principle) and the State in whose territory it was completed (objective territoriality principle) may exercise jurisdiction over the offence. Likewise, where an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence”; *M/V Enrica Lexie* case, *ibid*, paras 365-366 (footnotes omitted).

33 In the *SS Lotus* case: the Permanent Court of International Justice held this on the basis that “by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory [...] It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.”; PCIJ, *The Case of the S.S. “Lotus”*, P.C.I.J. (ser. A) No. 10 (1927), p 25.

34 See O’Keefe (n 5), 5.

35 ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part’, Article 58 (2) UNCLOS (n 9).

36 See e.g., Article 52 (1) UNCLOS regarding the right of innocent passage in the archipelagic waters and *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)* [Award] [2014] PCA Case No 2014-07 para 310.

37 See O’Keefe (n 5), 14.

38 See *inter alia* Article 56 (1), 61 (2), and 62 (4) UNCLOS (n 6). On fisheries in the EEZ in general see C. Goodman, *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone* (Oxford University Press, 2021). Coastal States often criminalize fisheries violations in their EEZ; see *inter alia* Togo, Law No 2015-10 establishing the Criminal Code, Articles 813, 818 and 819; China, Fisheries Law of the People’s Republic of China, 2004, Article 46. On criminal jurisdiction in the EEZ see E. Papastavridis, ‘Coastal State’s (Criminal) Jurisdiction in the Exclusive Economic Zone: Recent Case-Law and State Practice’, [2023] *Heidelberg Journal of International Law* (forthcoming).

See Article 58 (2) UNCLOS (n 9).

39 See Article 60 (2) UNCLOS, *ibid*, and commentary by A. Proelss, ‘Article 60’: in Proelss Commentary (n 21), 464 *et seq*. See also Alex G. Oude Elferink, *Artificial Islands, Installations and Structures*, Max Planck Encyclopedia of International Law (online edition), available at <http://www.mpepil.com>.



and pollution.⁴⁰ In the EEZ all States enjoy the freedom of navigation according to Article 58 (1) UNCLOS and customary international law. Article 58 (2) UNCLOS renders applicable the general provisions of the regime of the high seas codified in Articles 88–115, which concern mainly shipping and flag State jurisdiction, but only if and to the extent to which they are not incompatible with Part V of the Convention, that is on the EEZ.⁴¹ It is evident for present purposes that unless the coastal State has jurisdiction over the foreign-flagged vessel pursuant to the relevant provisions of UNCLOS, the default rule is that the flag State enjoys exclusive jurisdiction over any criminal activity on board that vessel in the EEZ. This is without prejudice to the possibility that other -third States- may also have jurisdiction over certain activities, including acts of piracy.⁴²

Third, on the high seas, as Article 92 sets out, “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”. As to the kind of jurisdiction that flag States enjoy exclusively over their vessels on the high seas, Guilfoyle rightly contends that “despite its wording, Article 92 creates no absolute prohibition on States extending their prescriptive or regulatory jurisdiction to events occurring aboard a foreign vessel.

A State can still assert jurisdiction to punish or regulate the conduct of its own nationals for acts committed aboard foreign vessels. The prohibition is upon States exercising enforcement jurisdiction over foreign vessels on the high seas”.⁴³ Indeed, there is no rule in international law that two or more national juridical orders cannot exist in the same space at the same time, including on vessels.⁴⁴

Nevertheless, as ITLOS enunciated in the *MV Norstar* case (2019), reiterated also by the Arbitral Tribunal in the *Enrica Lexie* case (2020),⁴⁵ the principle of exclusive flag State jurisdiction entails not only exclusive ‘enforcement’ but also exclusive ‘prescriptive’ jurisdiction. In its words, “[a]s no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties”.⁴⁶

It is submitted this is not an accurate statement of general international law, since, besides the treaty exceptions alluded to by the Judgement, there are other heads of jurisdiction under customary international law upon which the prescriptive jurisdiction of third States on board of a foreign-flagged vessel on the high seas may be premised, such as the principles of nationality, the protective principle, or the

40 See Article 211 (6) UNCLOS, *ibid.* See in respect of the coastal State’s jurisdiction in the EEZ A. Boyle and C. Redgwell, *International Law and the Environment*, 4th edn (Oxford University Press, 2021), 542-544, and E. Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (The Hague, Kluwer, 1998), Chapter 10.

41 See Article 58 (2) UNCLOS (n 9).

42 See Article 105 UNCLOS, *ibid.*

43 Guilfoyle, ‘Article 92’, in Proelss Commentary (n 21), 702-703. See e.g., Article 117 UNCLOS (duty to cooperate in respect of nationals’ fishing activities on the high seas) and Article 97 (1) UNCLOS (flag State and State of nationality have jurisdiction in penal matters arising from a collision) and FAO, International Plan of Action on Illegal, Unreported and Unregulated Fishing 2001, 23 June 2001, available at: <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.

44 Guilfoyle, *ibid.*, 703 and also L. Savagado, ‘Les navires battant pavillon d’une organisation internationale’, (2007) 53 AFDI, 640, 661.

45 See *Enrica Lexie* case (n 23), para 473.

46 *M/V Norstar* case (n 7), para 222. See the forceful joint dissenting opinion on this point by Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge Ad Hoc Treves (International Tribunal for the Law of the Sea, Case No 25, 10 April 2019) para 36.

passive personality principle.⁴⁷

A final, yet important, note is in order: flag State's prescriptive criminal jurisdiction, as any case of criminal jurisdiction, is by its nature permissive and not mandatory, that is, an entitlement and not an obligation, unless the flag State is bound otherwise.⁴⁸

II) ENFORCEMENT JURISDICTION

In contrast to prescriptive jurisdiction, the enforcement leg of jurisdiction heavily depends on the location of the crime (*locus delicti (commissi)*) and of the vessel.

First, the general rule of customary international law governing jurisdiction to enforce in the criminal context is that a State shall not exercise its law-enforcement powers in the territory of another state, including in its territorial sea. This was expressly affirmed by the Permanent Court of International Justice (PCIJ) in *Lotus*: [T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial'.⁴⁹ It follows therefrom that the flag State shall not exert any enforcement jurisdiction over the vessel when the latter is in the sovereign waters of another State (internal waters, territorial sea, archipelagic waters, where applicable).

Second, and contrary to the case in foreign sovereign waters, the flag State may lawfully exert enforcement jurisdiction over its national vessels (and the persons onboard)

beyond the outer limits of any State's territorial sea. As recognized by customary international law and codified in Article 92(1) UNCLOS, the flag state's jurisdiction over ships on the high seas includes criminal enforcement jurisdiction, which is also applicable in the EEZ pursuant to Article 58 (2) UNCLOS. This effectively means that when a vessel is beyond the outer limits of any State's territorial sea, its flag state is authorized by international law to stop and board it, to search it, and ultimately to seize it and arrest its crew, including any foreign nationals, with a view to the enforcement of its own or another state's criminal law.⁵⁰

Is such enforcement jurisdiction by the flag State exclusive?

On the high seas, the rationale behind the principle of the freedom of the high seas (*mare liberum*) is the prohibition of interference by the ships of one nation against those of another.⁵¹ This prohibition has given rise to the principle of exclusivity of flag State jurisdiction, namely that ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the State whose flag they lawfully fly.⁵² The flag State has thus *exclusive* enforcement jurisdiction over its national vessels on the high seas.⁵³ However, as Article 92 UNCLOS itself acknowledges, there are exceptions to this exclusive flag State jurisdiction on the high seas, the most notable exceptions being found in the general right of visit under customary and treaty law (Article 110 UNCLOS)⁵⁴ and in the right of hot pursuit

47 See in relation to the principle of nationality (n 43); for the passive personality principle see *Enrica Lexie* case (n 23), para 345, and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Separate Opinion of President Guillaume, I.C.J. Reports 2002, p. 3 at p. 37, para. 4); for the protective principle see O'Keefe (n 5), 12.

48 As is the case with respect to many TOC at sea; see *infra* Section III.

49 *The SS 'Lotus'* (n 33), pp. 18-19.

50 R. O'Keefe (n 5), p. 43.

51 See E. Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum v. Mare Clausum* Revisited', [2011] 24 *Leiden Journal of International Law* 45-69.

52 See generally DP O'Connell, *The International Law of the Sea* Vol II (ed IA Shearer) (Oxford: Clarendon Press, 1984) 796; R Jennings and A Watts, *Oppenheim's International Law*, (9th edn, London: Longman, 1992) 737.

53 See Guilfoyle (n 21), 700, and E. Papastavridis, *Interception of Vessels on the High Seas* (Hart, 2013), 50.

54 See Papastavridis, *ibid*, 60 et seq.



[Article 111 UNCLOS].⁵⁵ Other exceptions are found in various law enforcement treaties which contemplate measures of visit, inspection, and arrest of vessels on the high seas in relation to particular subject matters.⁵⁶ Under international law, the flag State may also consent on an ad hoc basis to the exercise of enforcement jurisdiction by other States.⁵⁷

In contrast to the high seas, in the EEZ, the flag State enforcement jurisdiction is not exclusive, since in light of Article 58 (2) UNCLOS, Article 92 'appl[ies] to the exclusive economic zone in so far as they are not incompatible with this Part'. This means that the coastal States enjoys concurrent enforcement jurisdiction over certain activities, such as fisheries (Article 73),⁵⁸ offshore installations (Article 60 paras 2 and 4),⁵⁹ and pollution (Article 220 paras 5-6).⁶⁰ Also, in the contiguous zone the coastal State enjoys concurrent enforcement jurisdiction over fiscal, immigration, sanitary, and customs laws and regulations according to Article 33 UNCLOS and customary international law.⁶¹

In conclusion, international law of the sea sets out the rules governing flag State jurisdiction, both prescriptive and enforcement. In short, flag State has plenary prescriptive jurisdiction, which might be concurrent with the coastal State in some maritime zones, e.g., in the territorial sea or in the EEZ, while it has exclusive enforcement jurisdiction over its vessels on the high seas (with exceptions), and concurrent with the coastal State in the EEZ and the contiguous zone. On the contrary, it has no enforcement jurisdiction in the sovereign waters of coastal States.

55 See N.M. Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn. 2002) and PCA, *Arctic Sunrise Arbitration* (Netherlands v. Russia), Merits, Award of 14 August 2015, para 242 et seq.

56 See e.g. Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UNTS 1582, 95 (hereinafter: Vienna Drug Trafficking Convention); Article 8bis Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 14 October 2005, IMO Doc. LEG/CONF.15/21 (hereinafter: 2005 SUA Protocol).

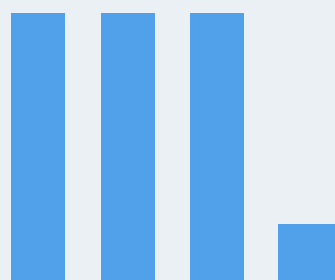
57 See Papastavridis (n 53), 63 et seq.

58 See J. Harrison, 'Article 73', in Proelss Commentary (n 21), 556 and id, *Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice*, in H. Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Springer, 2015), 217-248.

59 See inter alia E. Papastavridis, 'Protecting Offshore Energy Installations under International Law of the Sea' in L. Martin et al (eds.), *Natural Resources and the Law of the Sea: Exploration, Allocation, and Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (NY: Juris Pub. 2017), 197-214

60 See Boyle and Redgwell (n 40), 545-546.

61 See Article 33 UNCLOS (n 9) and ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v Colombia), Judgment of 21 April 2022, paras 145-155.



FLAG STATE JURISDICTION OVER TOC AT SEA

1. TREATY-BASED ASSERTION OF JURISDICTION

The assertion of prescriptive (but also of enforcement) criminal jurisdiction by the flag State under international law of the sea is permissive and not mandatory, i.e., there is no legal obligation incumbent upon States to criminalize certain conduct related to its vessels, let alone, to send their warships or other law enforcement vessels to arrest suspected persons onboard vessels flying their flag on the high seas or in a foreign EEZ. The assertion of jurisdiction is rendered compulsory only when the flag States concerned have agreed so, as often occurs with respect to TOC at sea, or rarely, when this is mandated by a UN Security Council Resolution under Chapter VII of the UN Charter.

The UN Convention on Transnational Organized Crime (UNTOC) remains the key international agreement in the suppression of TOC.⁶² It applies to a very wide range of offences: participation in an organised criminal group, money laundering, corruption, obstruction of justice, and the residual category of “serious crime”,⁶³ provided that this “serious crime” is transnational and involves an organized criminal group.⁶⁴ UNTOC is supplemented by three Protocols targeting specific types of organized crime, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol); the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol); and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and

Ammunition (Firearms Protocol).⁶⁵

Another international agreement relevant to the fight against transnational organized crime, since maritime crimes could be facilitated through corruption, is the 2003 UN Convention against Corruption (Corruption Convention).⁶⁶ Also, reference should be made to the Vienna Drug Trafficking Convention⁶⁷ as well as the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its protocols,⁶⁸ which are of primary importance for the suppression of crimes at sea.

All these multilateral and widely ratified instruments have in common that they provide for the mandatory establishment of flag State prescriptive jurisdiction over the criminal activities concerned.

For example, Article 15 UNTOC stipulates that ‘[e]ach State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:... (b) *The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed*’.⁶⁹

Similarly, the Vienna Drug Trafficking Convention sets out that ‘[e]ach Party: (a) [s]hall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when: ... (ii) *The offence is*

62 See United Nations Convention against Transnational Organized Crime, adopted by GA Res 55/25 of 15 November 2000 (hereinafter: UNTOC)

63 “Serious crime” is defined as referring to offences punishable by a maximum sentence of at least four years by a State party; Article 2(b), *ibid*.

64 See Article 3(1)(b), *ibid*.

65 See for the text of these protocols to UNTOC and the status of ratification see at <<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>>

66 See United Nations Convention against Corruption, adopted by General Assembly resolution 58/4 of 31 October 2003 (hereinafter: UN Corruption Convention).

67 See Vienna Drug Trafficking Convention (n 56).

68 See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc SUA/CONF/15, reprinted in 27 ILM (1988), 672 (hereinafter: SUA Convention) and 2005 SUA Protocol (n 56).

69 Article 15 1(b) UNTOC (n 56) (emphasis added).

committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed.⁷⁰

All these instruments require for 'jurisdiction to be established' in relation to the respective crimes, but this does not mean that it will always be exercised, in the sense that there might be cases where it is more appropriate for the alleged offender, the major parts of whose criminal activities have been committed in another State, to be extradited to face trial in that State.⁷¹ Instrumental to this is the fact that all these conventions ensure that the offences established by them are recognized as extraditable offences under other relevant treaties separately concluded by the States Parties.

For example, as provided for in Article 6 (2) of the Vienna Drug Trafficking Convention, '[e]ach of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them'.⁷² Hence, the flag State may extradite the suspected offenders to another State party, which has established its jurisdiction over the offence concerned, or it may be the receiving State (of the suspects) pursuant to the relevant extradition treaty and the applicable process.

The fact however remains that State parties to these instruments are under an obligation to criminalise the activities proscribed in the latter instruments when they are committed on board their vessels. Hence, flag State prescriptive jurisdiction is rendered obligatory for these crimes, which as such is a very welcome development in the fight against TOC at sea. Further, it goes without saying that the flag State enjoys also enforcement jurisdiction over these crimes on the high seas and in the EEZ of any State -effectively, beyond the territorial sea of any State- ('flag State principle'), or when the alleged offender(s) is found in its territory ('territoriality principle').

In addition, the flag State may consent to another State party's assertion of enforcement jurisdiction over the crime concerned. For example, according to Article 17 (4) of the Vienna Drug Trafficking Convention, 'the flag State may authorize the requesting State to, inter alia: (a) Board the vessel; (b) Search the vessel; (c) If evidence of involvement in illicit traffic is found, *take appropriate action with respect to the vessel, persons and cargo on board*'.⁷³ The latter provision readily includes the assertion of further enforcement measures, such as the seizure of the vessel and the illicit cargo and the arrest of the suspected persons, by the boarding State party. Evidently, such enforcement measures require the prior enactment of adequate implementing legislation by the State party concerned. Indeed, implementing legislation is essential to the proper functioning of the regime of cooperation provided for by article 17, including for the comprehensive enforcement powers in respect of foreign-flagged vessels.⁷⁴

70 Article 4 (1)(a) Vienna Drug Trafficking Convention (n 56) [emphasis added]. See also inter alia Article 42 (1)(b) Corruption Convention (n 66), or Article 6 (1) SUA Convention (n 68).

71 See Commentary to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, p. 102, available at < <https://digitallibrary.un.org/record/266894>> [hereinafter: Vienna Convention Commentary].

72 Article 6 (2) of the Vienna Drug Trafficking Convention (n 56). See also Article 16 (3) UNTOC (n 62).

73 Article 17 (4), *ibid* [emphasis added]. See also Vienna Convention Commentary (n 71), 330.

74 See also E. Papastavridis (n 53), 245 et seq.

2. UN SECURITY COUNCIL-BASED ASSERTION OF JURISDICTION

Also, it is likely that legal obligations concerning the fight against TOC at sea may arise in the context of the Security Council (SC) Resolutions under Chapter VII of the UN Charter.⁷⁵ It is true that there have been numerous SC Resolutions having a maritime dimension, i.e., authorizing the interdiction of vessels suspected of being engaged in a criminal activity at sea,⁷⁶ or in violating a previously-established embargo against a State.⁷⁷ None, however, had specifically obligated State to establish jurisdiction over the related criminal activity.

For example, SC Resolution 2242/2015 concerning the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya,⁷⁸ while it authorized the interdiction on the high seas of vessels suspected of being used in such activities,⁷⁹ it fell short of obligating UN Member States to assert their jurisdictional powers to punish the alleged offenders. The Resolution just 'call[ed] upon all States, with relevant jurisdiction under international law and national legislation, to investigate and prosecute persons responsible

for acts of migrant smuggling and human trafficking at sea, consistent with States' obligations under international law, including international human rights law and international refugee law, as applicable'.⁸⁰

An exception to this, arguably, is the seminal SC Resolution 1540/2004 on proliferation of weapons of mass destruction (WMD),⁸¹ which 'decided also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery...'.⁸² By logical inference, these laws should extend to the vessels flying the flag of the UN Member States and thus the said SC Resolution served as the legal basis for mandatory flag State prescriptive and enforcement jurisdiction over vessels flying their flag and engaged in transfer of WMD.

⁷⁵ On Chapter VII in general, its historical origin and the evolution of the Council's practice see: N. Krisch, 'Introduction to Chapter VII' in Simma et al (ed), *The Charter of the United Nations. A Commentary*, (3rd edn., Oxford: Oxford University Press, 2012) 1238, as well as the bibliography contained therein.

⁷⁶ See e.g., SC Res 2240/2015 on smuggling of migrants from Libya. See also E. Papastavridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea', (2016) 2 *MarSafeLaw Journal* 57-72

⁷⁷ See e.g. Sec Res 665 (1990) on Iraq, SC Res 820 (1993) on former Yugoslavia, SC Res 875 (1993) on Haiti, and SC Res 2292 (2016) -renewed every year to date (latest at the time of writing SC Res 2684 (2023)- on Libya. See also analysis in R McLaughlin, 'UN Mandated Naval Interdiction Operations in the Territorial Sea?' (2002) 51 *International and Comparative Law Quarterly* 249; A Soons, 'A New Exception to the Freedom of the High Seas' in T Gill, W Heere (eds), *Reflections on Principles and Practices of International Law: Essays in Honour of Leo J Bouchez* (The Hague: Martinus Nijhoff, 2000) 205; K Zou, 'Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures' (2011) 26 *International Journal of Marine and Coastal Law* 235.

⁷⁸ See SC Res 2240/2015 (n. 76).

⁷⁹ See *ibid*, paras 7, 8, 10.

⁸⁰ *Ibid*, para 15.

⁸¹ See in this regard S. Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, 190; and G Abi-Saab, 'The Security Council as Legislator and as Executive in its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: the Question of Legitimacy' in R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Berlin: Springer, 2008), 109.

⁸² See SC Res 1540/2004, para 2 (emphasis added). See also E. Papastavridis (n 53), 121 et seq.



IV.

CONCLUDING REMARKS: GAPS, CHALLENGES, AND ALTERNATIVES



Flag State jurisdiction over TOC at sea finds its legal basis in the law of the sea, as reflected in UNCLOS, and other relevant rules of international law, primarily, multilateral treaties addressing transnational criminal activities. Notably, under the latter instruments the prescriptive jurisdiction of the flag State over the activities concerned is rendered obligatory. Also, these instruments facilitate the enforcement of the relevant laws and regulations and the suppression of the activities concerned by enhancing international cooperation to this end.

In view of the very wide participation of States in the above instruments, one would expect that flag State jurisdiction would be a very powerful tool in the fight against TOC at sea. Regrettably, this is not the case, and the reason is simply that the flag States, even if they do assert their legislative jurisdiction over crimes at sea, are not very keen on enforcing such jurisdiction, in the sense of arresting the alleged offenders and bringing them before their domestic courts. This is mainly due to the reality of 'flags of convenience' or 'open registries',⁸³ which entails that the most powerful flag States in the world, in terms of largest ship registries, are not even remotely associated with the vessels flying their flag, let alone, their owners, the master, or the crewmembers. Also, it is commonplace that they may lack the capacity to ensure any enforcement action with respect to a criminal activity committed by or onboard their vessel. Suffice it to note that Liberia is one of the world's largest ship registries,⁸⁴ and at the same time one of the poorest countries of the world.⁸⁵ Thus, even if, hypothetically, Liberia, or any other 'flag of convenience' to this effect, has legislated in respect of a crime committed

onboard of its vessel, it is highly unlikely that it will send its law enforcement vessels, if any, to arrest the alleged offender or initiate any criminal proceedings in its domestic setting. Needless to underline how many criminal activities occurring onboard of these vessels may thus be left unpunished.

To illustrate the problem, an example from national case-law is apt: On 25 November 2014, 3 foreign nationals were arrested by the Greek authorities for smuggling 584 migrants to Greece onboard a Kiribati-flagged vessel, which had sent a distress signal on the high seas, 30 n.m. off Crete. Both the Court of First Instance and the Appeals Court convicted the suspected persons for this act pursuant, amongst others, to the UNTOC Smuggling Protocol. Yet, the Greek Supreme Court annulled the previous judgments, since the offenders committed the said crime onboard a foreign-flagged vessel on the high seas, and thus beyond the territorial jurisdiction of Greece.⁸⁶ The 3 persons were subsequently acquitted. Under the law of the sea and the UNTOC Smuggling Protocol, to which Kiribati, the flag State, is party, the latter State readily enjoys prescriptive and enforcement jurisdiction over such activities on board its flagged vessel. Unsurprisingly, it was never interested in taking up the case of the smugglers in question.

⁸³ For a list of flags of convenience drawn up by the International Transport Workers' Federation see <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience>.

⁸⁴ See at < <https://liberiancorporations.com/liberian-ship-registry/>>

⁸⁵ See e.g., at <<https://georank.org/economy/liberia>>

⁸⁶ See Supreme Court of Greece ('Areios Pagos'), Judgment No 2070/2017 (in Greek).

How can we address this challenge? Apart from the enhancement of other types of jurisdictions, primarily the port State jurisdiction,⁸⁷ a twofold suggestion is as follows:

First, on a more abstract or theoretical level, it would be very welcome should flag States take their international responsibilities more seriously, and discharge them diligently, in the sense that they monitor that the vessels flying their flag do adhere to the international obligations that they have taken up, including to suppress TOC at sea.

A signal of hope to this end was given by ITLOS in its *Fisheries Advisory Opinion*.⁸⁸ The Tribunal reasoned, on the basis of Article 94 UNCLOS, that a flag State must effectively exercise its jurisdiction and control over ships flying its flag including, as far as fisheries are concerned, by adopting the necessary administrative measures 'to ensure' that such vessels are not involved in activities which will undermine the flag state's responsibilities in respect of the conservation and management of marine living resources.⁸⁹ Having concluded that the UNCLOS imposes on flag States the responsibility 'to ensure' that no Illegal, Unreported, and Unregulated fishing (IUU fishing) occurs, the Tribunal interpreted this as being an obligation of 'conduct' which, referring to the Seabed Disputes Chamber Advisory Opinion,⁹⁰ is an obligation of 'due diligence'. This means that a particular standard of care is expected of a flag State, as opposed to an obligation to achieve a certain result (e.g.

'no IUU fishing'). This is consistent with the International Court of Justice's decision in the *Pulp Mills case*,⁹¹ to the effect that the obligation of a source state *not* to cause transboundary harm is one of 'due diligence'. The Tribunal further set out the measures a flag State should take in order to comply with its 'due diligence' obligations to prevent IUU fishing, particularly, in the EEZ of a third State.⁹²

Of course, the above ITLOS' pronouncement concerned only IUU fishing and not, broadly speaking, all transnational criminal activities at sea. However, it is a welcome development that flag States were called upon by ITLOS to assume more responsibilities in suppressing illegal activities, such as IUU fishing. The rationale of ITLOS in the Fisheries Advisory Opinion may, arguably, find application to other illicit activities proscribed by international instruments and committed on board vessels. It is contended that the legal basis for such obligations of the flag State is not only the instrument concerned but also Article 94 UNCLOS regarding the general duties of the flag State, including to exercise effective jurisdiction over the vessel.⁹³

Secondly, and on a more practical level, it is suggested that, as alternative, States could use more often and more efficiently the *aut dedere aut iudicare* clauses that all instruments concerning transnational organized crime

87 On port State jurisdiction, e.g. in respect of fisheries see C. Musto & E. Papastavridis, 'Tackling Illegal, Unreported, and Unregulated Fishing through Port State Measures' (2021) 22 *Melbourne Journal of International Law* 259.

88 See Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) ITLOS Case No. 21, Advisory Opinion of 2 April 2015 (hereinafter: Fisheries Advisory Opinion).

89 Fisheries Advisory Opinion, *ibid.*, para. 124.

90 *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 40-41, para. 108. See comments by I. Plakokefalos, 'Seabed Disputes Chamber of the International Tribunal for the Law of the Sea', [2011] 24 *Journal of Environmental Law* 133-143.

91 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 79, para. 197.

92 Fisheries Advisory Opinion (n 80), paras 134-140. See also commentary of the case in V. Schatz, Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ', (2016) 47 *Ocean Development & International Law*, 327.

93 See Article 94 UNCLOS and commentary by D. Guilfoyle, 'Article 94', in Proelss Commentary (n 21), 707 et seq. See also the link made by the ITLOS between on the one hand the 'genuine link requirement' under Article 91 UNCLOS and flag State duties under Article 94 UNCLOS on the other: '[genuine link] is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States' (n 25).

contain.⁹⁴ In essence, this concept requires that when an alleged offender is present in the territory of the party and that State does not extradite the individual concerned, it should itself initiate prosecution. For example, Article 16 (10) UNTOC enunciates that '[a] State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this Article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution'.⁹⁵ To that end, Article 15(3) sets out that '[f]or the purposes of Article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite solely on the ground that he or she is one of its national', while the next provision sets out that '[e]ach State Party *may also adopt* such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her'.⁹⁶

It readily appears that the said provisions make some forms of inter-state cooperation and action mandatory rather than discretionary for States Parties to the instruments concerned. However, in implementing these treaty obligations at the domestic level, States Parties would need to ensure that they have appropriate domestic legislation in place that would enable them to undertake such prosecutions, if they choose not to extradite the individual concerned. And while for some situations, mainly when the custodial State refuses to extradite the alleged offender on the ground that he or she is a national of that State, the adoption of such legislation is mandatory under the instrument in question, in all other cases the default rule is that the establishment of such jurisdiction and *ergo* the prosecution of the alleged offender is optional. For example, in the above-mentioned case concerning smuggling of migrants, Greece, as the custodial State, would indubitably have had jurisdiction over the incident and the smugglers, if it had adopted the necessary legislation as it is suggested by Article 15 (4) UNTOC, since both Greece and Kiribati are parties to UNTOC and the Migrants Smuggling Protocol.⁹⁷

In conclusion, it is obvious that solely the ratification of multilateral treaties concerning transnational organized crime does not suffice; rather the full implementation of all the options provided for in those treaties, including the *aut dedere aut judicare* principle, extradition, and mutual legal assistance mechanisms, is the key to a successful legal finish in this regard.

⁹⁴ See for the customary nature of this principle M Plachta, 'The Lockerbie case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' (2001) 12 *European Journal of International Law* 125.

⁹⁵ Article 16 (10) UNTOC (n 62). See also similarly or Article 44 (11) UN Corruption Convention (n 66).

⁹⁶ See Article 15 (3)-(4) UNTOC, *ibid* (emphasis added). Under Article 4 (2) Vienna Drug Trafficking Convention: 'Each Party: (a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground: (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or (ii) That the offence has been committed by one of its nationals; (b) *May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party*' (n 56)(emphasis added).

⁹⁷ See at <<https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>>

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JURISDICTION AND
TRANSNATIONAL
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