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United Nations Office on Drugs and Crime



Combating Transnational Organized Crime Committed at Sea

Issue Paper

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Issue Paper



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Overview of transnational organized crime at sea

Mandate and scope of the *Issue Paper*

The United Nations Office on Drugs and Crime (UNODC) is the guardian of the United Nations Convention against Transnational Organized Crime (UNTOC) and its supplementary Protocols, and of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The United Nations Commission on Crime Prevention and Criminal Justice (CCPCJ), in its twentieth session in 2011 considered the problem of combating transnational organized crime committed at sea. Resolution 20/5 mandates UNODC to convene an expert meeting to “facilitate the investigation and prosecution of such cases by Member States, including by identifying gaps or possible areas for harmonization, and measures to strengthen national capacity, in particular in developing countries, to more effectively combat transnational organized crime”.

This *Issue Paper* is the product of discussions held in Vienna on 12-13 November 2012 at the expert group meeting convened pursuant to resolution 20/5 of the CCPCJ. It is also based on a desk review of research carried out on the issue, with particular emphasis on existing UNODC materials concerning transnational organized crime at sea and the United Nations Convention on the Law of the Sea. Its goal is to serve as a background document to the recommendations of the expert meeting, which will be presented to the CCPCJ at its twenty-second session to be held 22-26 April 2013.

The *Issue Paper* underscores the common and interlinked emerging crimes at sea, including piracy and armed robbery at sea, migrant smuggling and trafficking in persons, drug trafficking, organized crime within the fishing industry and oil bunkering; it identifies the applicable maritime laws and regulations and their potential gaps as well as the relevant good practices and challenges in international cooperation at the legal and operational level with respect to crimes at sea; it discusses the problems concerning the investigation and prosecution of crimes at sea, including questions such as where capacity-building is needed.

The present section presents the basic legal framework of transnational organized crime at sea and identifies the common challenges and responses needed in relation to all facets of maritime criminal activity. The focus then shifts to discussion of each illicit activity separately. In assessing them, first, there appears a short overview of the activity itself and of the relevant international legal framework, followed by the potential shortcomings as well as the challenges concerning international cooperation. Reference is also made to the difficulties encountered in several cases in the investigation and

prosecution of these activities. The conclusion of the *Issue Paper* puts forward some general suggestions for consideration and discussion, drawn from the conclusions and recommendations of the expert group meeting.

Basic legal framework

The legal contours of the research are mainly framed by the United Nations Convention on the Law of the Sea (UNCLOS)¹ and the UNTOC and its two relevant additional Protocols to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking in Persons Protocol), and against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol). The UNTOC does not provide a definition of transnational organized crime. Rather, in Article 2(a) an organized criminal group is defined as follows:

“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”²

In addition to the above, Article 2(b) of the UNTOC states:

“Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”³

Furthermore according to Article 3, an offence is “transnational” in nature if:

- “(a) it is committed in more than one State;
- (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) it is committed in one State but has substantial effects in another State.”⁴

In addition, there are numerous multilateral and bilateral instruments that address directly or indirectly transnational organized crime at sea. As regards illicit trafficking in drugs, of primary significance is the 1988 Drug Convention against Illicit Trafficking

¹ United Nations Convention on the Law of the Sea, 1833 *UNTS* 397; entered into force 16 November 1994 [hereinafter: UNCLOS].

² Article 2(a) of UNTOC.

³ Article 2(b) of UNTOC.

⁴ Article 3 para. 2 of UNTOC.

with almost universal participation,⁵ as well as certain regional conventions, such as the 1995 Council of Europe Agreement⁶ and the 2003 Caribbean Agreement,⁷ which deal with the modalities of suppressing illicit traffic of drugs at sea. With regard to smuggling of migrants, there are also various bilateral instruments providing for interception of vessels carrying illicit migrants, which invite discussion, while the search and rescue of migrants at sea is regulated also by International Maritime Organization (IMO) instruments, such as the 1974 International Convention for the Safety of Life at Sea (SOLAS)⁸ and the 1979 International Convention on Maritime Search and Rescue (SAR).⁹ In the context of piracy and armed robbery, reference could be made to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)¹⁰ and also the various Security Council resolutions concerning piracy off Somalia. Similarly, in respect of fisheries crime, there are numerous universal or regional agreements, such as the 1995 Straddling Stocks Agreement¹¹ or the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean respectively.¹²

In setting out the general legal framework, inevitably reference should be made to human rights law, which applies to all initiatives that States take in regard to transnational organized crime at sea. These include the 1951 Refugee Convention,¹³ the 1966 International Covenant on Civil and Political Rights (ICCPR)¹⁴ and various regional agreements, such as the 1950 European Convention on Human Rights (ECHR).¹⁵ Also, international customary law has its own merit in complementing the treaty law framework of transnational organized crime at sea, especially as far as the assertion of jurisdiction at sea or the principles governing the use of force in maritime interception operations are concerned.

⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988), 21 ILM (1988), 1261. As at 13 December 2012, the Convention had 188 parties; http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en.

⁶ 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; ETS No. 156.

⁷ Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, concluded on 10 April 2003, at San José, Costa Rica and entered into force on 18 September 2008.

⁸ International Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 2.

⁹ International Convention on Maritime Search and Rescue (1979) 1403 UNTS 1.

¹⁰ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. SUA/CONF/15, reprinted in 27 ILM (1988), 672.

¹¹ United Nations Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 88.

¹² Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (2001), 2221 UNTS 189.

¹³ Convention relating to the Status of Refugees (1951), 189 UNTS 150, entered into force 22 April 1954.

¹⁴ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November, 1950, 213 UNTS 221.

Common challenges

It is true that all the aforementioned illicit activities at sea are inextricably intertwined in the sense that not only do they involve activities of “organized criminal groups” within the meaning of the UNTOC, but often the same organized criminal groups are associated with more than one illicit activity. This poses significant hurdles both in respect of the prevention of such crimes and in respect of the applicable legal framework. It is not surprising that a naval asset engaged, for example, in a counter-piracy operation may encounter a fishing trawler that while suspected of being engaged in piracy, is actually engaged in smuggling of migrants or drug trafficking. This may necessitate the application of different Rules of Engagement and may jeopardize the effectiveness of the operation in question. Similarly, the securing of evidence or witnesses could be particularly perplexing as the naval asset would be countering piracy, as opposed to illicit fishing or migrant smuggling. Not surprisingly, the naval asset would be extremely reluctant to take the required action.¹⁶ As highlighted at the Expert Group Meeting, an area with heightened and multifaceted transnational organized criminal activity, including illegal fishing, human trafficking, piracy and oil bunkering, is West Africa.

It is for this reason that an increasing number of multipurpose maritime interdiction operations have been launched with a view to patrolling waters and countering all potential threats to maritime security. Such operations are pursuant either to international agreements, such as the 2008 CARICOM Maritime Security Agreement¹⁷ or to inter-agency cooperation agreements. The United States has been engaged in multipurpose operations in the Caribbean Sea as well as the European borders agency (FRONTEX) lately in the Mediterranean Sea.¹⁸ These joint patrols share common rules of engagement and have identifiable legal bases for the operations. Also, as was underscored at the meeting, instrumental to any successful interdiction operation is prior intelligence concerning illicit activity at sea.

Another common challenge recurring in many interdiction operations at sea is crime scene investigation: questions as to how to secure potential physical evidence for forensic investigation and how to use this for efficient prosecutions are particularly noteworthy. An expert during the meeting advised that a full post-incident forensic investigation team on board a vessel requires a lot of equipment and needs to undertake, inter alia, the following: crime scene walk through to identify physical evidence; securing of outdoor evidence, which may be contaminated by sea water and weather conditions; suspect

¹⁶ In similar vein, it was reported that on 27 March 2011, NATO vessels participating in the Operation Unified Protector ignored a dinghy with 72 migrants coming from Libya resulting in the death of 63 people; see the Council of Europe, Parliamentary Report of 29 March 2012 at http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf.

¹⁷ CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008; available at www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf.

¹⁸ Frontex is reported to have established operational cooperation with the following bodies: EUROPOL: exchange of information on facilitators and intelligence CeCLAD-M: exchange of information regarding vessels of interest (Drug Trafficking), EMSA: exchange of information regarding pollution, EFCA: exchange of information regarding fisheries control, MAOC-N: exchange of information regarding vessels of interest (Drug Trafficking).

identification (pointing out suspects from database); taking statements from victims; taking fingerprints for elimination purposes; evidence removal and transport; collecting blood samples from victims.

In addition, the effective repression of transnational organized crime at sea will never be possible without having adequate and precise legislation in place. It is a common observation that very often States sign and ratify treaties, yet they fail in taking the appropriate legislative measures to give teeth to these international instruments. As a consequence, many incidents involving transnational organized crime at sea never reach a trial phase, while it is observed that often national courts assume a divergent and controversial standing in relation to some issues, e.g. drug trafficking.¹⁹

In any event, it has been observed by many experts that whatever measures the international community adopts at sea in tackling transnational organized crimes, it should be borne in mind that a significant part of the associated criminality (e.g. planning, recruiting, directing) takes place on dry land. This means that measures such as targeting the beneficial owner of the illicit activity or “lifting the corporate veil” as well as entering into extradition or mutual legal assistance treaties become of importance. Needless to say that without international cooperation both at regional and international level, no significant progress can be achieved.

Last but not least, it became readily apparent in the Expert Meeting that a common challenge in combating transnational organized crime at sea is respect of international human rights law. This comes to the fore in many interdiction operations as well as in the subsequent prosecution of the respective crimes. Recent international and national case law attest to the prominence of international human rights law and thus all measures taken to combat transnational organized crimes at sea should be in strict accordance with human rights legislation. The most important rights in need of protection in this context are the prohibition of torture and degrading and inhumane treatment (articles 7 of the International Covenant on Civil and Political Rights (ICCPR) and 3 of the European Convention on Human Rights (ECHR)), as well as the right to liberty and security (articles 9 of ICCPR and 5 of ECHR). Accordingly, no person shall be arbitrarily deprived of his liberty, unless there is a precise and foreseeable law in place; all detained persons enjoy the right to be brought physically before a judge²⁰ (within a few days maximum, but for exceptional circumstances, e.g. *Medvedyev* case)²¹ and suspects have a right to be informed of the reasons for their arrest. There must be an on-board translator, a lawyer (perhaps accessed by video link) and the detention and treatment must conform to international standards. Of primary concern is the principle of *non-refoulement* in cases of extradition, as stressed in the recent *Hirsi* case (2012)²².

¹⁹ *United States v Bellaizac-Hurtado and Others*, Case: 11-14049 (11th Cir, 2012).

²⁰ It was mentioned at the meeting that the practice of video links with Judges is not in keeping with international jurisprudence, since the suspected person has to be brought physically before judge. An interim solution could perhaps be onboard judicial officers.

²¹ ECHR, *Medvedyev et al v France*, Judgment of 29 March 2010 (Grand Chamber, Application No 3394/03).

²² ECHR, *Hirsi Jamaa and Others v. Italy*, (Appl. No. 27765/09), Grand Chamber Judgment of 23 February 2012.

II. Piracy and armed robbery at sea

The contemporary threat of piracy and armed robbery

The crime of piracy remains at the centre of international concern, particularly in view of its surge off the coast of Somalia and more recently in the Gulf of Guinea.²³ The extraordinary increase in piracy in these regions has attracted extensive media coverage, which has subsequently led to a multipronged international response.

According to the latest reports from the International Maritime Organization (IMO):

“In the first eight months of 2012, there were 84 attacks against ships in the waters off the coast of Somalia, resulting in the hijacking of 13 ships. During 2012, the majority of attacks leading to vessels being hijacked took place in the western Indian Ocean. This compares with 234 reported attacks and 29 ships hijacked during the same period in 2011. As of 31 August 2012, 224 people and 17 vessels (including three fishing vessels and eight dhows) were being held hostage. This compares with 378 people and 18 vessels (including 4 fishing vessels, 1 dhow and 1 yacht) held at the end of August 2011.”²⁴

The international community responded with a series of initiatives, such as the deployment of naval operations (European Naval Force (EUNAVFOR) *Operation Atalanta*, NATO *Operation Ocean Shield* and *CTF 151*) and the adoption of Security Council Resolutions such as Security Council Resolution 1851(2008), which authorizes, inter alia, in accordance with Somalia’s consent, the entry into territorial waters and territory to suppress piracy. Additionally in 2008, the Combined Task Force established a maritime security patrol area (MSPA) in international waters off the Somali coast. Also, running through the MSPA is an internationally recognized transit corridor (IRTC). The establishment of the MSPA was followed by a Shared Awareness and De-confliction process (SHADE) among States with naval assets in the Gulf. In essence, SHADE was a process of meetings and information sharing.

Finally, reference should be made to the Contact Group on Piracy off the Coast of Somalia, which was established on 14 January 2009 pursuant to Security Council Resolution 1851 (2008) to facilitate the discussion and coordination of actions among

²³ Report of the International Expert Group on Piracy off the Somali Coast commissioned by the Special Representative of the Secretary-General of the United Nations to Somalia, at 15; available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf.

²⁴ IMO source. For an updated list of cases of piracy and armed robbery, see <http://gisis.imo.org/Public/PAR/Default.aspx>.

States and organizations to suppress piracy off the coast of Somalia. The membership of the Contact Group has continued to expand and there are now representatives of more than 60 countries and international organizations that participate in the plenary sessions and the various Working Groups.²⁵ Working Group 2 (WG2) is the most pertinent as it addresses the legal issues concerning piracy off Somalia; WG2 has held 11 meetings (the most recent 17–18 September 2012) and one special meeting on Privately Contracted Armed Security Personnel (PCASP), and has developed a “legal tool-box” available to the stakeholders in the region.

The legal framework

Piracy *jure gentium* has traditionally been described as “every unauthorized act of violence by a private vessel on the open sea with the intent to plunder (*animo furandi*)”.²⁶ This broad definition was narrowed by the conventional definitions of the 1958 Geneva Convention on the High Seas and UNCLOS, which should be considered as declaratory on customary international law.²⁷

Article 101 of UNCLOS defines piracy as consisting of any of the following acts:

“[a]ny illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship [...] and directed:

(a) on the high seas, against another ship [...]

(b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State [...]

As far as the suppression of piracy is concerned, it has customarily been recognized and codified that those on board a pirate vessel may be arrested by the seizing vessel. These individuals may be subsequently tried by any State and are subject to penalties imposed by that State’s laws (article 105 LOSC).²⁸ Throughout the past several hundred years, the legitimacy of universal jurisdiction over piracy has been recognized by jurists and scholars of every major maritime nation.²⁹

²⁵ Relevant information at www.thecgpcs.org.

²⁶ L. Oppenheim, “Disputes, War and Neutrality” in H Lauterpacht (ed.), *International Law: A Treatise* (8th edn., 1955), 608. The qualification *jure gentium* serves as the distinguishing trait between piracy under international law and piracy under national law.

²⁷ On the provisions of LOSC concerning piracy see Nordquist, Commentary, 182. On piracy in general, see H. Dubner, *The Law of International Sea Piracy* (2nd edn., The Hague: Martinus Nijhoff, 1988); A. Rubin, *The Law of Piracy* (2nd edn., New York: Transnational, 1998).

²⁸ “The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”, Article 105 LOSC.

²⁹ For example, A. Van Zwanenberg, “Interference with Ships on the High Seas”, 10 *ICLQ* (1961), 785, at 805.

From the definition of piracy as outlined above, it is evident that acts of violence that occur in the territorial or in the internal waters of the coastal State fall beyond the ambit of the international regulation of piracy *jure gentium*. This raises significant problems, since the majority of relevant incidents in the beginning of the twenty-first century occurred in territorial waters or ports of States, while the ships were at anchor or berthed. Therefore acts of piracy committed, for example, in the territorial waters of States littoral to the Malacca Straits,³⁰ as well as in the territorial sea of Somalia, cannot be designated as piracy *jure gentium*. In view of this, the international community, and in particular, the IMO referred to the crime of “armed robbery against ships” as:

“any unlawful act of violence or detention or any act of depredation or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a state’s jurisdiction over such offences”.³¹

This crime reflects what has been acknowledged as piracy in many national jurisdictions (i.e. acts of piracy within territorial waters). Despite this, it is highly unlikely that this expansive notion of piracy within territorial jurisdiction has entered the corpus of international customary law. Moreover, this provision does not fall under the scope of article 105 of UNCLOS (i.e. attracting universal jurisdiction). Hence, each coastal State must enact relevant legislation with regard to armed robbery within its waters. In regard to cases of armed robbery at sea within Somali territorial waters, third States would have prescriptive jurisdiction only if the vessel attacked had their flag (principle of vessel registration) or had its nationals involved in the offence (principle of active or passive personality). Without one of these two characteristics present, *prima facie* there would be no jurisdictional nexus between the forum State and the offence concerned for the assertion of prescriptive jurisdiction.³²

Problems and challenges with regard to the suppression of piracy and armed robbery at sea

It is evident that the most remarkable and controversial issue since the initiation of the counter-piracy campaign off the coast of Somalia in 2008, has been the assertion of jurisdiction over suspected pirates in the region. Notwithstanding the progress that has been made due to the work of UNODC in recent years, the prosecutions of suspected pirates remain low in comparison with the number of attacks. This is so, even though article 105 of UNCLOS clearly permits the assertion of universal jurisdiction.

³⁰ On the attacks in the Malacca Straits, see inter alia J. S. Burnett, *Dangerous Waters: Modern Piracy and Terror on the High Seas* (N.Y.: Plume, 2003), 9.

³¹ IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, adopted 29 November 2001, Res A.922(22), art 2(2), [http://www.pmaesa.org/Maritime/Res%20A.922\(22\).doc](http://www.pmaesa.org/Maritime/Res%20A.922(22).doc). Cf also art 1 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (28 April 2005) ILM (2005), 829.

³² As acknowledged by Lowe and Starker, “the best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating State and the conduct that it seeks to regulate”; V. Lowe & C. Starker, Jurisdiction, in M. Evans (ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010), 313, at 320.

With regard to the assertion of the latter, an empirical study conducted by E. Kontorovich and S. Art stated:

“of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent. This figure includes the unprecedented international response to the Somali piracy surge that began in 2008 and accounts for the majority of prosecutions. Prior to 2008, nations invoked universal jurisdiction, a doctrine that arose precisely to deal with piracy, in a negligible fraction of cases (just 0.53 percent, a total of four cases)”.³³

In respect of the current situation in Somalia, as of 24 September 2012, 1,179 suspected pirates had been prosecuted or were awaiting prosecution in 21 States. Of the 1,179 individuals, 614 have been convicted, 26 have been acquitted and 539 are awaiting trial.³⁴ A table showing a breakdown of global piracy prosecutions from 2006 to the present appears in the annex.

The difficulties in prosecuting suspect pirates in the region have been analysed in a range of publications.³⁵ As mentioned in the 2012 Secretary-General’s Report, there have been many instances where pirates have been apprehended by naval forces which have subsequently had to release them due to lack of sufficient evidence.³⁶ In some cases the release of suspected pirates was due to the non-existence of relevant laws, and in other cases due to the peculiarities of the laws of the capturing State. For example, Denmark and Germany can prosecute pirates only if they have threatened national interests or citizens. Under French law, a captain may apprehend and hold pirates, but only a judicial authority can arrest and detain them.³⁷

In addition, even States that have enacted such laws, often prefer to abstain from trying pirates before their courts. Returning pirates to Somalia for trial has not been considered the most desirable option due to the absence of a stable and functioning government. Therefore, the dominant approach has been to avoid capturing pirates in the first instance, or, alternatively releasing them without charge or transferring them to a third State.

³³ E. Kontorovich & S. Art, “An Empirical Examination of Universal Jurisdiction over Piracy”, 104 *AJIL* (2010), 436, 436. Also Professor Rubin has shown in his authoritative history of piracy law that very few criminal prosecutions for piracy can be found that depended on universal jurisdiction. He enumerates fewer than five cases in the past 300 years; see A Rubin, *The Law of Piracy*, 2nd edn., (N.Y.: Transnational Publishers Inc., 1998), at 302, 348.

³⁴ Source, UNODC, based on reporting by Member States.

³⁵ Inter alia E. Kontorovich, “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists”, 98 *California Law Review* (2010), 243-276; S. Hodgkinson, “International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates” 44 *Case Western Reserve Journal of International Law* (2011), 303-316.

³⁶ United Nations Security Council, Report of Secretary-General on Specialized Anti-Piracy Courts in Somalia and other States in the Region, S/2012/50, 20 January 2012, at para. 7. It also is reported that “over 60% of the pirates apprehended under *Operation Atalanta* are released, which illustrates the impunity of the pirates”; see H. Tuerk, *Reflections on the Contemporary Law of the Sea* (Leiden: Martinus Nijhoff, 2012), at 95.

³⁷ Chatham House, Briefing Note, “Pirates and How to Deal with them”, Africa Programme and International Law Discussion Group, 22 April 2009, at 4; available at

http://www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf.

The latter option has been the most common solution: States such as the United States³⁸ and United Kingdom³⁹ and the European Union,⁴⁰ have opted for entering into Memoranda of Understanding (MOU) with countries in the region (for example Kenya, Mauritius, Seychelles and the United Republic of Tanzania) to transfer the suspects to the latter States. Nonetheless, such agreements have not proved as effective as was initially envisaged, and the transfer of piracy suspects to regional States remains complicated largely due to the lack of requisite capacity in the region.

A lack of capacity is one of the most significant obstacles to a more efficient suppression of the relevant offences in the region. The UNODC counter-piracy programme has made considerable efforts to build judicial capacity in the region and to improve prison conditions. This has included assistance in the establishment of Piracy Prosecution Centres in Kenya, Mauritius and Seychelles, as well as the refurbishment or building of prisons in Mombasa, Kenya and in Somalia (Hargeisa in Somaliland and Bossaso and Garowe in Puntland et al) and the training of personnel.⁴¹ In this effort, the UNODC is assisted by the United Nations Development Programme (UNDP). It has been reported that in Puntland “UNDP is constructing a new police headquarters in Garowe, rehabilitating a police station in Ditto Bossaso and providing additional vehicles. It will also assist with the drafting of a police act, regulations and a code of conduct [...] UNDP is building a new prison in Qardho, with an additional capacity of 266 inmates, which will be completed and handed to the “Puntland” authorities in April 2012 or thereabouts”.⁴²

Despite the various initiatives, both in Somalia and the regional countries, there are significant steps that have to be made to better equip States to prosecute offenders. Emphasis has been placed upon enhancing prosecution by the Regional Piracy Prosecution Centres (Kenya, Mauritius, Seychelles and the United Republic of Tanzania). In any event, all States should amend their domestic law in order to criminalize piracy and facilitate the prosecution of suspected pirates in their national courts, consistent with applicable international law, including human rights law.

³⁸ Memorandum of Understanding between the United States of America and the Republic of the Seychelles concerning the conditions of transfer of suspected pirates and armed robbers and seized property in the western Indian Ocean, the Gulf of Aden, and the Red Sea, signed at Victoria July 14, 2010.

³⁹ Reportedly, the United Kingdom has signed relevant agreements with Kenya, Seychelles, Tanzania and more recently with Mauritius. See e.g. “Republic of Kenya and the United Kingdom Sign A Memorandum Of Understanding On Piracy Along the Coast Of Somalia”, available at http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=305&Itemid=62 and

“Signing of Piracy Agreement with Mauritius” (8 June 2012); available at <http://www.number10.gov.uk/news/piracy-agreement-mauritius/>.

⁴⁰ Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009); Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers (2 December 2009) and Agreement between the European Union and the Republic of Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associate Seized Property from the European-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer (14 July 2011). The text of the agreements and all relevant information are available at <http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eunavfor-somalia/legal-basis.aspx?lang=en>.

⁴¹ For further information, see UNODC Counter-Piracy Programme Brochure, Issue 8 (February 2012); available at http://www.unodc.org/documents/easternafrika/piracy/20120206-UNODC_Brochure_Issue_8.1.pdf.

⁴² United Nations SC Report of the S-G (20 January 2012), paras 17 and 22.

The UNODC Counter Piracy Programme has also been supporting transfer arrangements with third States prosecuting Somali nationals, in order to assist these States to return Somali nationals to Somali's prisons, so as to be closer to their homes and to alleviate the burden on the third States involved. Accordingly, in 2011 Seychelles signed relevant MOUs with the Transitional Federal Government (TFG), with Puntland and with Somaliland. These MOUs enable such transfers to be considered on a case-by-case basis. This means requests are required to be made by Seychelles for each proposed transfer of a convicted person and consent must be obtained from the TFG, Puntland or Somaliland authorities. The consent of the person proposed for transfer is also required. In the event of a transfer, TFG, Puntland or Somaliland is required to enforce the sentence as if it had been imposed in the latter. The transferred person must be treated in accordance with applicable international human rights obligations, and Seychelles has the right to monitor that those obligations are complied with.⁴³

The engagement of Somali authorities in post-trial transfers was highlighted at the meeting as a key issue in the increase of prosecutions by the Regional Piracy Prosecution Centres and in the effective administration of justice in the region. However, problems remain in this regard; the existing lack of capacity, incidences of bribery of prison guards and most significantly, human rights considerations, for example, in regard to the conditions in prisons.

In relation to the issue of human rights, it must be noted that the transfer of suspect pirates to regional States to face prosecution often raises human rights concerns. This has been extensively discussed in the international legal doctrine⁴⁴ and it is particularly relevant to States party to the ECHR in light of the Strasbourg Court decision concerning the extraterritorial application of the Convention.⁴⁵ In other words, it is possible that cases concerning piracy offences off Somalia may eventually come before the Strasbourg Court. This may be facilitated by the accession of the European Union to the ECHR, pursuant to article 59 (2) ECHR (as amended by Protocol No. 14 to the ECHR), since the relevant counter-piracy operations by European States occur under the mandate of the EUNAVFOR *Operation Atalanta*.⁴⁶

Cases concerning the violation of human rights of suspected pirates have already appeared before European Courts. For example, the first interdiction operation on the part of EUNAVFOR *Operation Atalanta* resulted in a ruling of the Kenyan Court, in

⁴³ United Nations SC Report of the Secretary-General (20 January 2012), para 24. See I. Bantekas, *International Criminal Law* (Oxford: Hart, 2010), 363-366 on international prisoner transfer agreements.

⁴⁴ S. Piedimonte Bodini, "Fighting Maritime Piracy under the European Convention on Human Rights", 22 *European Journal of International Law* (2011), 829, D. Guilfoyle, "Counter-piracy Law Enforcement and Human Rights", 59 *International & Comparative Law Quarterly* (2010), 141, C. Laly-Chevalier, "Lutte contre le Piraterie Maritime et Droits de l'Homme", 42 *Revue belge de droit international* (2009), 5, A. Fischer-Lescano, L. Kreck, "Piracy and Human Rights: Legal Issues in the Fight Against Piracy Within the Context of the European *Operation Atalanta*", 52 *German Yearbook of International Law* (2010), 525.

⁴⁵ Factsheet with the case law on the extra-territorial jurisdiction of ECHR Member States at http://www.echr.coe.int/NR/rdonlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_Extraterritoriale_EN.pdf.

⁴⁶ On *EUNAVFOR Operation Atalanta* see <http://www.eunavfor.eu/> and E. Papastavridis, "Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century", in A. Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010), 122, 127.

the case of *Mohamed Hashi and 8 others*, that “Kenyan Courts are not conferred with or given jurisdiction to deal with any matters arising or which have taken place outside Kenya”.⁴⁷ As the crime concerned was not committed in territorial waters within the jurisdiction of Kenya under Section 5 of Kenyan Penal Code,⁴⁸ the Court ordered the immediate and unconditional release of the applicants from custody.⁴⁹ This decision was appealed by the Prosecutor and on 18 October 2012, the Kenyan Court of Appeal decided to overturn the decision of the Court of First Instance and convict Hashi and the others on the count of piracy.⁵⁰

Simultaneously, the same applicants initiated proceedings in Germany on the basis that their arrest and transfer had been in violation of the German Constitution, the ECHR and the ICCPR. On 11 November 2011, the administrative court of Cologne ruled that Germany had violated the prohibition of torture, inhuman and degrading treatment (Articles 3 ECHR and 7 ICCPR) by transferring them to Kenya.⁵¹ Interestingly, the German Government claimed that the decision for the transfer was made under the authority of the EUNAVFOR Operational Commander and thus Germany was under no responsibility for any potential violation of human rights law. However, the Court held that “the decision to hand over suspected pirates to Kenya had been taken by German authorities, since the latter had the option to transfer the suspected pirates to Kenya or any other third country or to leave prosecution to the public prosecutor in Hamburg”.⁵²

Moreover, there must be progress in the field of investigation; there cannot be so many releases of suspects due to lack of sufficient evidence. There must be stronger international cooperation between the naval forces in the region in seizing the evidence and facilitating the ensuing prosecutions. Such cooperation is facilitated by INTERPOL as well as Europol, which contribute to shore-based criminal intelligence collection and fusion and have supported investigations training in the region. However, United Nations Security Council Resolution 1950 (2010) has resulted in a rather perplexing development on the disposition of evidence, which may hinder the effective prosecution of certain cases.

A welcome initiative is the Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC). During the February 2012 London Conference on Piracy and Somalia, the United Kingdom pledged over US\$1 million to establish RAPPICC, which is located at an old Seychellois coast guard base near Victoria. RAPPICC is an information fusion centre, with a mandate to facilitate the arrest and prosecution of

⁴⁷ *Re Muhamud Hashi and 8 Others v. Republic*, [2009] KLR Miscellaneous Application No 434 of 2009; available also at Lloyd’s List (8 November 2010); p. 17.

⁴⁸ The section provides: [t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters; see http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

⁴⁹ Ademun-Odeke, “Somali Piracy: Jurisdiction over Foreign Pirates in Domestic Courts and Third States under International Law”, 17 *Journal of International Maritime Law* (2011), 121, at 139.

⁵⁰ <http://piracylaw.files.wordpress.com/2012/10/kenya-hashii-appeal-opinion.pdf>.

⁵¹ Summary of the case at: http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html (in German).

⁵² *Ibid* (translation by the author).

the financiers, investors and ringleaders of Somali piracy. “RAPPICC’s philosophy is to separate the ‘financiers, instigators and investors’ of piracy from the ‘foot soldiers’. The goal is to tackle the weaknesses in international and domestic cooperation and to prosecute ‘pirate leaders, financiers and enablers, as well as members of pirate action groups afloat and ashore’.”⁵³ This would clearly help in fighting the sources of the transnational organized crime concerned, which are invariably on land and not at sea.

As regards piracy trials, there is the conspicuous problem of securing the presence of witnesses, who are often either naval officers or seafarers, and frequently in a different part of the world by the time of any trial. Testimonies by video link or other means may be a useful solution to the reticence of witnesses to be physically present for the trial. As was consistently stressed at the meeting, the rights of seafarers should be equally taken into account in the fight against piracy.

Revised guidance on combating piracy and armed robbery against ships was agreed by IMO’s Maritime Safety Committee (MSC) in its 86th session from 27 May to 5 June 2009. The MSC produced updated Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships and guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships. The guidance to shipmasters and crew includes a new annex aimed at seafarers, fishermen, and other mariners who may be kidnapped or held hostage for ransom. An MSC circular on piracy and armed robbery against ships in waters off the coast of Somalia was also adopted, to include best management practices to deter piracy in the Gulf of Aden and off the Coast of Somalia.⁵⁴

The most controversial recent initiative of IMO in this respect, however, was the Interim Recommendations for Flag States Regarding the Use of PCASP on Board Ships in the High Risk Area, which were approved by the Maritime Safety Committee, at its eighty-ninth session (11 to 20 May 2011).⁵⁵ The IMO espoused the calls of ship owners, who, in an increasing number of cases, employ private armed guards to augment onboard security arrangements when transiting the area of the Gulf of Aden and West Indian Ocean. As was noted in the guidance, flag State jurisdiction and thus any laws and regulations imposed by the flag State concerning the use of PMSC and PCASP apply to their ships.⁵⁶

⁵³ Relevant information at <http://oceansbeyondpiracy.org/matrix/activity/regional-anti-piracy-prosecutions-intelligence-co-ordination-centre-rappicc>.

⁵⁴ MSC 1/Circ 1339, Best Management Practices for Protection against Somalia-Based Piracy (BMP 4) (revokes MSC 1/Circ 1337), available at: www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1339.pdf.

⁵⁵ See MSC 1/Circ 1406 (23 May 2011). On the use of private armed guards see C. Spearin, “Private Military and Security Companies v International Naval Endeavours v Somali Pirates” 10 *Journal of International Criminal Justice* (2012) 823–37.

⁵⁶ MSC.1/Circ.1405/Rev.2 (25 May 2012), available at www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1405-Rev2.pdf. See also Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area; MSC.1/Circ.1406/Rev.2 (25 May 2012) and Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area; MSC.1/Circ.1408/Rev.1 (25 May 2012).

It is a matter for the international community to collectively find a stable and sustainable solution for the crimes of piracy and armed robbery off Somalia's shores. Efforts should be also made to counter other illicit activities at sea, which are in close interplay with the problem of piracy in the region. These are activities such as dumping of waste and other noxious substances as well as illegal, unreported and unregulated fishing by other flag States in Somali waters. The Security Council has acknowledged this; for example, resolution 1976 (2011) underscored "the importance of preventing, in accordance with international law, illegal fishing and illegal dumping, including of toxic substances, and *stressing* the need to investigate allegations of such illegal fishing and dumping". Finally, there should be continuous monitoring of the shifting location of piracy in the region. For example, such attacks have been conducted in the West Indian Ocean and, in West Africa, the Gulf of Guinea is the new theatre of pirate operations.

III. Smuggling of migrants and human trafficking at sea

The contemporary threat of smuggling of migrants and human trafficking

For centuries people have often undertaken very perilous journeys, putting their lives into serious danger as a way to safety for persons in fear of their lives, or a gateway for others in search for a better life.⁵⁷ The sea can be the location of exploitation of victims of trafficking in persons or the means by which they are transported from one place to another. Smuggling of migrants by sea is the most dangerous type of smuggling for the migrants concerned.⁵⁸ In addition to the means of transportation, fishing boats, merchant vessels and cargo ships can also be places where the human rights of migrants are violated. The oceans have facilitated the “commerce” of humans being traded like commodities from one jurisdiction to another, adding to the profitability of trafficking in persons and the smuggling of migrants as illegal enterprises.

Given that the prime concern of most migrants is to flee from their country of origin, it is not surprising that they flee by whatever means possible, including overcrowded and unseaworthy vessels.⁵⁹ Such vessels will often be at risk of sinking, and many do not withstand the journey, with the result that thousands of lives are lost every year.⁶⁰ This was particularly noticeable in the period of the Arab Spring (since January 2011), in which there was an increase in departures of migrant boats from North Africa and allegedly, at least 1,500 persons have lost their lives while trying to cross the Mediterranean.⁶¹

⁵⁷ Reports to IMO recount unimaginable means of transportation such as a small inflated raft for children of two metres length, carrying two migrants, a windsurfer with two migrants, an improvised raft (wooden door with plastic bottles tied to it) with two migrants etc.; see Second Biannual Report, IMO doc. MSC.3/Circ.2 (October 31, 2001); available at www.imo.org.

⁵⁸ UNODC *Issue Paper, Smuggling of Migrants by Sea*.

⁵⁹ Reports to IMO recount unimaginable means of transportation such as a small inflated raft for children of two metres length, carrying two migrants, a windsurfer with two migrants, an improvised raft (wooden door with plastic bottles tied to it) with two migrants etc.; see Second Biannual Report, IMO doc. MSC.3/Circ.2 (October 31, 2001); available at www.imo.org.

⁶⁰ See information and reports of dead or missing people up to 2011 in the UNHCR’s website on asylum and migration, entitled “All in the same boat: the challenges of mixed migration”; available at <http://www.unhcr.org/pages/4a1d406060.html>.

⁶¹ Inter alia Report by T. Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg, 7 September 2011)–CommDH(2011)26, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1826921>. See also the allegations with respect to NATO vessels leaving people to die off the coast off Libya at <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants> (8 May 2011).

The migrants traversing the Mediterranean Sea or other seas of the world can be qualified under many legal categories and migrants may be entitled to refugee status under international refugee law. It is often the case that migrants are either the victims of human trafficking or are smuggled by transnational organized crime groups.⁶² There are often strong links with other facets of transnational organized crime at sea, in the sense that vessels engaged in illegal, unreported and unregulated (IUU) fishing may simultaneously be used for the purposes of smuggling migrants or trafficking in persons.⁶³

The legal framework

The smuggling of migrants and human trafficking at sea are subject to different legal frameworks, because such crimes fall under the dimensions of the law of the sea and transnational criminal law.

The majority of the people intercepted on the seas are migrants travelling without documentation, often facilitated by smugglers. Smuggling of migrants is defined by Article 3(a) of the Smuggling of Migrants Protocol as:

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”⁶⁴

Smuggling of migrants must also be differentiated from the concept of trafficking in persons, defined by article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children as:

“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The first category to consider is refugees, the legal definition of which can be found in article 1A (2) of the Refugee Convention which states:

“A refugee is a person, who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group

⁶² An excellent report of the various modalities of smuggling of migrants is found in the UNODC, *Issue Paper, Smuggling of Migrants at Sea* (Vienna, 2011).

⁶³ See UNODC, *Transnational Organized Crime in the Fishing Industry* (Vienna, 2011).

⁶⁴ Article 3 (a) of Smuggling Protocol. In addition, reference should be made to the Convention on the Protection of All Migrant Workers and Members of their Families (1990), in which the term “migrant worker” is defined in article 2 (1) as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”; 30 *ILM* 1521.

or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country' ”.

Pursuant to the work of the United Nations High Commission for Refugees (UNHCR),⁶⁵ the class of individuals concerned has gradually shifted to a more generic class of refugees, including groups of persons who can be determined or presumed to be without the protection of the government of their State of origin. In principle, it is essential that the persons in question should have crossed an international border and that the reasons for flight should be traceable to conflicts, human rights violations, or other serious harm resulting from radical political, social, environmental or economic changes in their own country or natural and environmental calamities.⁶⁶

Within the provisions of the law of the sea, UNCLOS refers to “immigration” only with regard to the competence of the coastal State to prevent or suppress infringements of its “immigration laws” (article 33), with due consideration to the competence of the coastal State to exert jurisdiction with regard to “immigration laws and regulations” (article 60 para. 2 and article 80 para. 2).

Of premier concern is the duty to assist persons in distress at sea. This duty is a long-established rule of customary international law. It extends both to other vessels and coastal States in the vicinity and has been codified in UNCLOS, which prescribes relevant duties for both the flag and the coastal States.

First, with regard to flag States, article 98(1) of UNCLOS provides that:

“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers ... to render assistance to any person found at sea in danger of being lost ... and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him.”

Although the aforesaid provision is located in the part of UNCLOS concerning the high seas, it is submitted that the duty in question applies in all maritime zones. On the face of article 98(1), the responsibility to rescue and provide assistance rests initially with the master of the ship that comes to rescue and entails the duty to deliver the people onboard to a place of safety. Every flag State must require the master of a ship flying its flag, both State and private vessels, to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance.

Secondly, with regard to coastal States, article 98(2) of UNCLOS stipulates:

“Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over

⁶⁵ For an overview of the work of the UNHCR, see B.S. Chimni, (ed.), *International Refugee Law* (2000), 213.

⁶⁶ Goodwin-Gill and Mc Adam; at 32.

the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”

On the face of this provision, it is evident that UNCLOS sets out a general obligation of conduct on the part of coastal States to maintain search and rescue services as well as a general obligation of cooperation with other States to this end.

These laws are supplemented by other treaty instruments, for example the 1974 Safety of Life at Sea Convention (SOLAS).⁶⁷ The SOLAS covers a wide range of matters ranging from construction standards to operational rules to security measures. It sets forth specific provisions about the safety of navigation and rescue obligations. Chapter V, Reg. 10(a) of SOLAS echoes article 98(1) of UNCLOS, with the additional requirement that the master record reasons for failing to render assistance (with the view that this may provide a check on decision-making). Moreover, Regulation 15(a) specifically deals with coastal State obligations. The other relevant IMO Convention is the 1979 International Convention on Maritime Search and Rescue (SAR Convention).⁶⁸

In May 2004, in the wake of the *Tampa* incident⁶⁹ and the initiatives that it fuelled,⁷⁰ the SAR and SOLAS Conventions were amended to impose for the first time an obligation on States to “cooperate and coordinate” to ensure that ships’ masters are allowed to disembark rescued persons to a place safely. This obligation applies irrespective of the nationality or status of those upon the ship, and with minimal disruption to the ship’s planned itinerary.⁷¹

Neither the SOLAS nor the SAR Convention presents a definition of what constitutes a “place of safety”. However, by 2004 the IMO *Guidelines on the Treatment of Persons rescued at Sea* specified that a “place of safety” means a “place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met”.⁷² Paragraph 6.13 elaborates further in the provision stating that “[a]n assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship”.⁷³

⁶⁷ International Convention for the Safety of Life at Sea, adopted 1 November 1974, entered into force 25 May 1980 (1184 UNTS No. 278).

⁶⁸ International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985; (1405 UNTS No. 23489).

⁶⁹ Relevant discussion in C. M. Bostock, “The International Legal Obligation Owed to the Asylum-Seekers on the *M. V. Tampa*”, 14 *International Journal of Refugee Law* (2002), 279.

⁷⁰ Inter alia IMO Assembly Resolution on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, 22nd session, Agenda Item No. 8, IMO Assembly Res. A.920(22), November 2001 and UNHCR, “Note on International Protection”, 53rd session, United Nations doc.A/AC.96/965 (11 Sept. 2002).

⁷¹ IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004) with regard to the amendments to SOLAS and IMO, MSC Res. 155 (78) with regard to amendments to SAR Convention. Both amendments entered into force on 1 July 2006; see further information at <http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Pages/Default.aspx>.

⁷² Resolution MSC. 167(78), adopted 20 May 2004; available at <http://docs.imo.org>.

⁷³ *Ibid.*

As far as the interception powers accorded to States under the law of the sea, reference should be made to article 110 of UNCLOS that codifies the customary right of visit on the high seas. It is evident that neither the smuggling of migrants nor human trafficking are contemplated by the Convention as specific grounds for the right to visit a foreign vessel. As a result, the requisite legal basis could be extrapolated from the other grounds for interference stipulated in article 110, or could be sought within another legal framework. With respect to the provisions of article 110, it is very often the case that the transportation of the persons in question is carried out using non-registered small vessels without name or flag (i.e. stateless vessels). Certainly, based on the few related reports and literature, the “absence of nationality” seems to be the most relevant basis for intercepting vessels with forced migrants onboard.⁷⁴ The right of visit could apply to cases of trafficking in persons, because trafficking in persons is often referred to as a modern form of slavery (see: art 110 (b) the ship is engaged in the slave trade). However, this article has never been used to exercise a right of visit for a suspected situation of trafficking in persons.

By virtue of UNCLOS, there are further legal justifications for the interference with smuggling of migrants or human trafficking on the high seas. More specifically, article 110 (1) contains the exception “where acts of interference derive from powers conferred by treaty” This means that powers of interference can be conferred by treaty on a variety of subjects, including the suppression of smuggling of migrants. States have concluded numerous multilateral and bilateral agreements that provide the right of visit in respect of irregular migration on the high seas. Such agreements either grant interference powers to State parties on a reciprocal basis, or provide for joint patrolling. In regard to joint patrolling, the institution of “ship-riders” is employed, which involves the deployment of law enforcement officers from one State (“sending State”) aboard another States’ government vessel (“host State”). These arrangements are usually aimed at broadening the law enforcement powers that may be exercised by a warship or other government vessel within a third State’s territorial waters.⁷⁵

The most important multilateral treaty providing for the right to visit on the high seas for counter-migration purposes is the UNTOC Smuggling of Migrants Protocol (2000).⁷⁶ The right to visit as such of a foreign-flagged vessel is stipulated in article 8 (2) as follows:

“2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate

⁷⁴ Also N. Ronzitti, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in N. Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda*, (2002), 1271, at 1274.

⁷⁵ On “ship-riders” in general see inter alia J. Kramek, “Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?” 31 *University of Miami Inter-American Law Review* (2000), 121.

⁷⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by GA Res. 55/25 of 15 November 2000 and entered into force on 28 January 2004.

measures with regard to that vessel. The flag State may authorize the requesting State, *inter alia*:

- (a) to board the vessel;
- (b) to search the vessel; and
- (c) if evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.”

Problems and challenges in the regulation of smuggling of migrants and human trafficking at sea

There are numerous challenges in the fight against the crimes of human trafficking and smuggling of migrants by sea. First, those encountered may be irregular migrants, refugees in *stricto* or *lato sensu* or victims of human trafficking and, among them may be smugglers and other criminals. Therefore, it is important that first responders are trained to identify victims of trafficking in persons; are able to conduct appropriate debriefing of migrants; and know how to preserve evidence in order to facilitate investigation of these cases. For example, a coastguard vessel that intercepts on the high seas a vessel suspected of engaging in the smuggling of migrants is not expected to proceed itself to a Refugee Status Determination or to interrogate and arrest the smugglers on board the intercepted vessel. These procedures should take place in the port to which the vessel is diverted, which would be consistent with the human rights obligations of the States concerned. In the recent judgment of the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy*, the Grand Chamber held that Italy was in violation of article 3 of the Convention concerning the prohibition of *non-refoulement* and of article 4 of Protocol No. 4 concerning the collective expulsion of aliens.⁷⁷ These complaints were raised by Somalian and Eritrean migrants who had been intercepted on the high seas by the Italian authorities and sent back to Libya.⁷⁸

Secondly, even in the event that migrants have been rescued, yet not intercepted by the relevant authorities, the problem of the locus of disembarkation of the rescued persons becomes relevant. Irregular migrants or asylum-seekers are usually transferred by unseaworthy vessels that have a high likelihood of being in distress. Therefore, the regime of search and rescue at sea comes to the fore. The obligation upon the State parties to SOLAS and SAR Convention is to provide “a place of safety” as soon as reasonably practicable. However, this obligation does not necessarily mean that the State responsible for the SAR region is obliged to disembark the survivors in its own area. In other words, the provisions in question do not oblige a coastal State to allow

⁷⁷ *Hirsi Jamaa and Others v. Italy*, (Appl. No. 27765/09), Grand Chamber Judgment of 23 February 2012 [hereinafter: *Hirsi case*]. On *Hirsi case* see M. Giuffrè, “Waterdown Rights on the High Seas: *Hirsi Jamaa and others v. Italy* (2012)”, 61 *ICLQ* (2012), 728-750.

⁷⁸ According to the Italian authorities, from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya; see further information at <http://migrantsatsea.wordpress.com/2010/03/18/unhcr-files-ecthr-third-party-intervention-in-hirsi-v-italy/>.

disembarkation on its own territory when it has not been possible to do so elsewhere.⁷⁹ This has been criticized as the major shortcoming of the treaty regime, largely because it does not adequately address incidents such as the *Pinar*⁸⁰ or the *Tampa*.⁸¹

In order to address this legislative deficiency, there have recently been initiatives to enhance the obligations of the coastal States. In January 2009, the IMO Facilitation Committee (FAL) adopted the “principles relating to administrative procedures for disembarking persons rescued at sea”, which stipulated: “[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued...”.⁸² This was later rejected in March 2010 at the fourteenth session of the Sub-Committee on Radio Communications and Search and Rescue (COMSAR).⁸³

In a similar vein, the 2010 Council of Europe decision proposed with respect to search and rescue in the context of operations of FRONTEX that priority should be given to disembarkation in the third country from which the interdicted ship departed, or through whose territorial waters or search and rescue region it transited. If this were not possible, it was suggested that priority be given to disembarkation in the Member State hosting the FRONTEX operation, unless a different course of action proves necessary to ensure the safety of the persons involved.⁸⁴ This has stirred criticism by States that usually host FRONTEX operations; on 22 September 2012 the Decision was annulled by the European Court of Justice on the grounds of EU law.⁸⁵

In addition, there is currently an ongoing discussion in the context of IMO, with a view to adopting a regional Memorandum of Understanding (MoU) concerning measures to protect the safety of persons rescued at sea.⁸⁶ The purpose of this draft MoU was, initially, the coordination of the search and rescue services as well as the delineation of the respective responsibilities solely of Spain, Italy and Malta. It was observed during the Expert Meeting, that this MoU could be an initiative worthy of extension to other areas.

⁷⁹ For a contrary opinion see S. Trevisanut, *supra* note 176, at 530.

⁸⁰ In April 2009, the Turkish merchant vessel *Pinar* rescued 153 persons off the coast of the Italian island of Lampedusa in the Maltese Search and Rescue (SAR) zone. The *Pinar* had to take the rescued persons who were irregular migrants on board, and she was then refused permission to enter Italian territorial waters. The Italian authorities justified their refusal by arguing that the responsibility for the reception of the rescued persons fell on Malta. On its side, Malta denied its responsibility and refused to give access to its ports; see “Maroni Claims Malta Sent 40,000 Migrants to Italy,” *Times of Malta*, 21 April 2009.

⁸¹ Relevant discussion in V. Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of E.U. Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* (2011), 174, 195 *et seq.*

⁸² IMO, FAL.3/Circ.194, 22 January 2009, Principle No. 3; available at http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D24818/194.pdf.

⁸³ For a detailed discussion of these proposals see J. Coppens and E. Somers, “Towards New Rules on Disembarkation of Persons Rescued at Sea?” 25 *IJMCL* (2010), 377, at 388 *et seq.*

⁸⁴ Para. 2.1, Part II, Annex.

⁸⁵ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1169432>.

⁸⁶ The discussion at the 15th session of COMSAR (7–11 March 2011) www.imo.org/mediacentre/meetingsummaries/comsar/pages/comsar-15th-session.aspx.

Thirdly, there are questions concerning the legislative and enforcement jurisdiction involved in the fight against the smuggling of migrants at sea. The act of carrying migrants on the high seas is not an international crime per se. The only conduct criminalized is the “smuggling of migrants” and this only extends to the States parties to the UNTOC Smuggling of Migrants Protocol. Therefore, in the absence of a treaty provision or without the explicit assertion of any jurisdictional principle, irregular migrants should not be subjected to detention or arrest, provided that they have not entered the territories of the coastal State and have thus not violated its immigration laws.⁸⁷ Therefore in order to arrest potential migrants or asylum seekers on the high seas (for example the *Pamuk case*)⁸⁸ it must first be ascertained that a crime (as codified in law) has been committed.

It is desirable that States that intercept stateless vessels carrying migrants should abstain from arresting persons due to the problem of the procedure to be followed in respect of these persons. In cases where the vessel is in distress or the persons on board are seeking asylum, States should initiate rescue and refugee status determination processes. In all other cases, however, bringing the vessel to a port of the coastal State and detaining the persons on board until there is a full determination of their identification and circumstances (without however, arresting them and trying them for illicit immigration) may be the most appropriate action. In any event, individuals should be treated in accordance with internationally recognized human rights norms. Furthermore, such individuals may be entitled to the protection of the State of their nationality regardless of the fact that they are travelling on a stateless vessel.

As was stressed at the meeting, due account should be paid to the specific needs and vulnerabilities of the following individuals: “Asylum-Seekers and Refugees, Stateless Persons, Victims of Human Trafficking or Torture, Unaccompanied and Separated Children, Women, Girls and Elderly at risk and Persons with Physical and Mental Disabilities”. To this end, the UNHCR has developed a Ten Point Plan in Action (2011)⁸⁹ which enunciates and analyses:

1. Cooperation among key partners
2. Data collection and analysis
3. Protection-sensitive entry systems
4. Reception arrangements
5. Mechanisms for profiling and referral
6. Differentiated processes and procedures
7. Solutions for refugees

⁸⁷ Cf. article 33 of LOSC.

⁸⁸ Italian custom officers had arrested on the high seas a flagless vessel transporting illegal immigrants who had been transferred, on the high seas, to another vessel directed to the Italian coast and had subsequently entered the Italian territorial waters. See the decision of Tribunale di Crotona, 27 September 2001, *Pamuk et al.* cited in *RDI* (2001), 1155 and for commentary: S. Trevisanut, “Droit de la Mer”, 133 *Journal du droit international* (2006), 1035.

⁸⁹ United Nations High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>.

8. Addressing secondary movements
9. Return arrangements for non-refugees and alternative migration options
10. Information strategy.

In the intercepting or rescuing States, the identification of the persons involved in the actual smuggling of migrants at sea would have to be made. This would be followed by the initiation of criminal proceedings, provided that the States concerned are parties to the UNTOC Smuggling of Migrants Protocol and have established the relevant legislation within their national jurisdiction. Therefore, in order to prosecute smugglers, it is necessary that States first enact the requisite legislation.

Finally, international cooperation between police, prosecutorial and judicial authorities is of premier importance. This is because migration routes cross many jurisdictional boundaries. Moreover, smuggling rings may involve nationals of different States. Issues of cooperation between States may arise, particularly in areas concerning the collection of evidence, prosecution of offenders, mutual legal assistance and extradition.

As mentioned at the meeting, it is a priority to establish the link between activities at sea and activities on land. Questions such as “what is the follow up upon arrival?”, “is the network simply providing the journey over sea or does it continue its operations inland?” and “who is controlling the money?” should be addressed in practice. In addition, there is need for cooperation to be established both at operational and strategic levels, while local agreements, either bilateral or regional, may in some instances work better than global approaches and conventions.

However, not all States have enacted relevant legislation, or entered into treaties on mutual legal assistance and extradition.

IV. Drug trafficking

The threat from drug trafficking at sea

Although a wide variety of methods of transit are utilized by drug traffickers, the use of private and commercial vessels is a long standing issue. This is particularly the case with drugs such as cocaine, opium and its derivatives, and cannabis. Each of these substances is regulated by the Single Convention on Narcotics Drugs, as amended,⁹⁰ where transportation involves passage over ocean areas.⁹¹ For example, given its relatively high volume and low cost, the vast majority of marijuana and cocaine entering the United States is transported by private vessels.⁹² UNODC has reported:

“[f]or the North American market, cocaine is typically transported from Colombia to Mexico or Central America by sea and then onwards by land to the United States and Canada. Cocaine is trafficked to Europe mostly by sea, often in container shipments. Colombia remains the main source of the cocaine found in Europe, but direct shipments from Peru and the Plurinational State of Bolivia are far more common than in the United States market”.⁹³

Also, the means employed by the drug-traffickers in Central America have become highly sophisticated: apart from “go-fast” vessels,⁹⁴ they use semi-submersible vessels, which are almost impossible to be properly stopped and visited.⁹⁵

⁹⁰ Single Convention on Narcotic Drugs (1961), 520 UNTS, 151; as amended by the 1972 Protocol, 976 UNTS 3.

⁹¹ P. Van der Kruit, *Maritime Drug Interdiction in International Law* (2007), at 21.

⁹² W. Gilmore, “Narcotics Interdiction at Sea, US-UK Cooperation”, *MP* (1989), 218.

⁹³ <http://www.unodc.org/unodc/en/drug-trafficking/index.html>. The latest World Drugs Report-Executive Summary (2011) issued by the United Nations Office on Drugs and Crime, recorded that “since 2006 seizures have shifted towards the source areas in South America and away from the consumer markets in North America and West and Central Europe. The role of West Africa in cocaine trafficking from South America to Europe might have decreased if judged from seizures only, but there are other indications that traffickers may have changed their tactics, and the area remains vulnerable to a resurgence in trafficking of cocaine”; see at <http://www.unodc.org/documents/data-and-analysis/WDR2011/WDR2011-ExSum.pdf>.

⁹⁴ These are typically 25-50ft open boats, powered by twin outbound engines and capable of sustaining speed of 20-40 knots in 1-3 ft seas. Such boats present significant detection problems and their high speed enables them to escape into foreign territorial waters when confronted by the possibility of interdiction on the high seas; see: W. Gilmore, *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area*, (2005), at 2.

⁹⁵ Drug submarines, which can be made for as little as \$500,000 each and assembled in fewer than three months, are thought to carry almost thirty percent of Colombia’s cocaine exports; see David Kushner, Drug-Sub Culture, *The New York Times*, April 23, 2009, 30, available at <http://www.nytimes.com/2009/04/26/magazine/26drugs-t.html>. It is reported that “One self-propelled semi-submersible vessel intercepted by the Coast Guard, for example, contained seven tons of cocaine, worth \$187 million”; see A Bennett, “The Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel interdiction Act” (2012) 37 *Yale Journal of International Law* 433, 434.

Drug trafficking by sea has led to various initiatives adopted by consumer States (for example the United States of America and European countries). There is a policy of intercepting vessels, not only in the territorial waters of consumer States, but also on the high seas and in the territorial waters of source or transit States. This policy has been effectuated through informal means, for example the receipt of ad hoc consent of the flag State or from the vessel's master (consensual boarding), or through bilateral and multilateral treaties. Such treaties include the Caribbean ship rider agreements⁹⁶ and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁹⁷

Legal framework

Illicit trafficking in narcotic drugs and psychotropic substances has been the subject of various international legislative and enforcement measures. The most relevant United Nations Conventions in force concerning trafficking in drugs are the 1961 Single Convention on Narcotics Drugs, the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Drug Convention). Each of these conventions will be examined in turn. Firstly, the 1961 Single Convention on Narcotics Drugs harmonized all previous conventions in relation to narcotic substances.⁹⁸ This Convention improved the system of international control through the strict limitation of manufacture, exports and imports of a broad list of drugs (including opium, poppy, coca leaf and cannabis).⁹⁹ This convention was amended by the 1972 Protocol.¹⁰⁰ Secondly, the 1971 Convention on Psychotropic Substances was established as a companion instrument of the 1961 Convention because it deals with psychotropic substances in a way that is complementary to the 1961 Convention.¹⁰¹ Lastly, the 1988 Drug Convention was designed to deal specifically with the growing problem of international trafficking, as the earlier

⁹⁶ The problem of maritime illicit traffic of narcotic drugs is particularly acute in the Caribbean region, where there exists a number of contiguous nations separated by relatively narrow bodies of water which serve, for the smugglers, as natural "stepping stones" between source and consumer States. These nations provide the "quintessential drug trafficking havens due to their sparse populations and limited enforcement capability"; see K. Rattray, "Caribbean Drug Challenges", in M. Nordquist and J.N. Moore (eds), *Ocean Policy: New Institutions, Challenges and Opportunities* (1998), 179, at 185.

⁹⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988), 21 *ILM* (1988), 1261 [hereinafter: 1988 Drug Convention]. For commentary see inter alia United Nations Economic and Social Council, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1998) [hereinafter: Vienna Commentary].

⁹⁸ As early as 1912, the problems associated with the use of specified types of drugs were recognized as a matter of international concern, which led to the adoption of the first international instrument in this regard, the 1912 International Opium Convention, 8 *LNTS* 187. This was followed by a plethora of relevant treaties, such as the Second Opium Convention (1925), the Convention for the Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (1931), Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (1936).

⁹⁹ The State parties to the Convention agreed to cooperate closely in a co-coordinated campaign against illicit traffic in narcotic drugs and to assist each other in the campaign.

¹⁰⁰ The 1972 Protocol amending the latter Convention made several improvements in the implementing and monitoring mechanisms, extradition provisions, technical assistance, and treatment and preventative measures; 976 UNTS, 3.

¹⁰¹ Convention on Psychotropic Substances (New York, 21 February 1971), 1019 UNTS, 176.

instruments marginally addressed this issue.¹⁰² This Convention also included provisions allowing ships on the high seas to be intercepted if they are suspected of illicit trafficking by a State party, other than the flag State.

In more detail, article 17 (3) reads as follows:

“A Party which has reasonable grounds to suspect that a vessel exercising the freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.”

This provision should be scrutinized in relation both to article 17 (entitled “illicit traffic by sea”) and with respect to other key provisions of the 1988 Drug Convention. For example, while the focus of article 17 is on the exercise of enforcement jurisdiction in relation to suspect vessels, the overall effectiveness of the scheme is contingent upon the possession of appropriate prescriptive jurisdiction by the intercepting State, which is accorded by article 4.¹⁰³

The most significant remark is that article 17(3) requires the explicit “authorization” of the flag State. The requirement for such authorization was included only after lengthy informal consultations. As it is pointed out in the *travaux préparatoires*, this word was deliberately used in order to:

“stress the positive nature of the decision and of the action which the flag State in the exercise of its sovereignty was to take with regard to the vessel. It is entirely within the discretion of that State to decide whether to allow another party to act against its vessel”.¹⁰⁴

It is pertinent that the drafters highlighted the disjunctive nature of the various processes which the right of visit includes (i.e. the right to board and the right to search¹⁰⁵). Furthermore, it is important to note that they disassociate the right of visit as an exception to the freedom of the high seas, with the enforcement jurisdiction over the illicit cargo and the offenders. This distinction is not self-evident in the context of operations based on bilateral treaties or ad hoc arrangements. If the flag State declines its authorization for boarding, this does not negate the State’s obligation to cooperate in the suppression of illicit drug trafficking (i.e. the obligation to take all necessary measures to suppress drug trafficking.)

¹⁰² As Gilmore, who is a leading commentator on the issue at hand, observes, “while these Conventions focused primarily on controlling the production of licit drugs and the prevention of their diversion into the illicit market place, they were widely seen as making insufficient provision for effective international cooperation in law enforcement”; see: idem, “The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 15 *Marine Policy* (1991), 183.

¹⁰³ Vienna Commentary, at 323.

¹⁰⁴ *Official Records of the 1988 Drug Convention*, Summary Records of Committee II, 29th meeting, para. 7.

¹⁰⁵ As the Commentary stresses, “the drafting of the paragraph was intended to make clear the disjunctive nature of the various processes which might be taken against the vessel concerned: boarding; search and only if evidence is found further appropriate action”; see Vienna Commentary, at 330.

Regarding the *ratione loci* ambit of this provision, specifically the maritime area concerned, the reference to the “exercise of the freedom of navigation in accordance with international law” in conjunction with the statement in paragraph 11 (i.e. that any action must take due account of the need not to interfere with the jurisdiction of coastal States) was the outcome of a difficult compromise. Subsequently, it was decided that “the suspected ship must be located beyond the outer limit of the territorial sea for an authorization to be requested from the flag state to board the vessel.”¹⁰⁶

The 1988 Drug Convention was followed by other similar agreements in a regional context. First, the 1995 Council of Europe (CoE) Agreement on Illicit Traffic by Sea¹⁰⁷ supplements and strengthens the relevant treaty framework in the European context. The final Agreement is intimately connected to the 1988 Convention, since article 17 and other relevant provisions acted as a constant frame of reference for the drafters.¹⁰⁸ Therefore, following article 17, parties to the 1995 CoE Agreement undertake to cooperate to the fullest extent possible in order to suppress the trafficking of narcotics at sea. As with the 1988 Drug Convention, it was agreed from the outset that actions taken towards private and commercial vessels located beyond the territorial sea of any State would be firmly based on the concept of authorization of the flag State,¹⁰⁹ with consideration that there is no obligation for a flag State to respond affirmatively to a request for authorization.¹¹⁰

Another relevant regional arrangement is the Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area. This Agreement entered into force on the 18 September 2008,¹¹¹ and emerged from the practical experiences of the States and territories of the region, including the development of an extensive network of bilateral agreements to counter drug trafficking. In 2008 the Caribbean Community (CARICOM) Member States decided to introduce an all-encompassing maritime security agreement.¹¹² The 2008 CARICOM Agreement differs from the 2003 Caribbean Agreement both in its *ratione materiae* and *ratione personae* scope. This agreement aims at addressing a series

¹⁰⁶ Vienna Commentary, at 326.

¹⁰⁷ Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995) *European Treaty Series* No. 156 [hereinafter: 1995 CoE Agreement].

¹⁰⁸ Because of the fact that this Agreement is implementing article 17 of the 1988 Drug Convention, it was accepted from the outset that, for example, solutions, which were contrary to the letter or spirit of the 1988 Drug Convention, would not be acceptable. In addition, it was decided to limit the possibility of becoming a party to the instrument to those member States of the Council of Europe, which have ratified the 1988 Drug Convention (article 27).

¹⁰⁹ Article 6 reads as follows: “[w]here the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorization of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement”. *No such actions may be taken by virtue of this Agreement, without the authorization of the flag State* (emphasis added).

¹¹⁰ Also article 17 of the 1995 Agreement.

¹¹¹ The text and a short commentary is found in W. Gilmore, *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area*, (2005) [hereinafter: Caribbean Agreement].

¹¹² CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008; available at http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf.

of threats to maritime security, including drug trafficking, and it is not restricted to the latter activity. However, it is only applicable to the Member States of the CARICOM and not to third States (for example, the United States and the United Kingdom).¹¹³

There have been numerous bilateral accords that provide for the interception of suspect vessels on the high seas or in the territorial waters of consumer States. For example, the United States has established a number of bilateral agreements with the neighbouring States in the Caribbean region, as well as generally in Central and South America.¹¹⁴ According to the latest International Narcotics Control Strategy Report (March 2012), “there are 44 maritime counterdrug bilateral agreements or operational procedures in place between the United States and partner nations”.¹¹⁵ The United States has entered into agreements with the following countries in the region: Antigua, Barbuda, the Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Venezuela (Bolivarian Republic of). There is also an agreement with the United Kingdom and eight MoUs and Operational Procedures with other States having overseas territories in the region, such as the Netherlands or Belgium.¹¹⁶ Central to such bilateral agreements especially in the Caribbean milieu, is the use of ship-riders. In addition to this treaty-making policy, the States concerned have resorted to informal measures, such as seeking the ad hoc consent of the flag State or of the master of the suspect vessel, in order to exert the right to board and search the vessel for counter-drug trafficking purposes.

Problems and challenges in the legal framework of drug trafficking at sea

There remain many challenges in the legal framework of drug trafficking at sea. First, there are factual considerations, which have definite legal repercussions. For example, the use of semi-submersible vessels raises problems for the traditional mode of interdiction at sea (in the sense of article 110 of LOSC). In 2008 the United States passed the Drug Trafficking Vessel Interdiction Act. This Act responds to the practical difficulties created by the use of submersible or semi-submersible vessels and criminalizes the operation of such vessels without nationality and with the intent to evade detection.¹¹⁷ Additionally, the geography of the Caribbean area provides drug traffickers with many

¹¹³ None of the States that have signed or ratified the 2008 CARICOM Agreement are signatory States of the 2003 Caribbean Agreement.

¹¹⁴ A list of United States Maritime Law Enforcement Agreements is included in A. Roach & R. Smith, *Excessive Maritime Claims* (3rd edn.) (Leiden: Martinus Nijhoff, 2012), Appendix 16.

¹¹⁵ International Narcotics Control Strategy Report Vol. I (2012), at 52; available at <http://www.state.gov/documents/organization/187109.pdf>.

¹¹⁶ For example Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Belgium concerning the deployment of United States Coast Guard Law Enforcement Detachments on Belgian Navy vessels in the waters of the Caribbean Sea, signed at Washington March 1, 2001.

¹¹⁷ 18 U.S.C.A. para 2285; see also A. Bennett, “The Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act”. 37 *Yale Journal of International Law* (2012), 433.

alternative routes of transit through the jurisdictional zones of many different States in the region. This raises issues regarding multilateral cooperation in granting consent for interdiction, as well as the establishment of jurisdiction by both the coastal and interdicting States.

Questions of jurisdiction assume significant prominence. The relevant treaties oversee the issue of the assertion of jurisdiction (for example, interdictions that take place in the coastal waters of a Caribbean State pursuant to a bilateral agreement with the United States). In this example, if the coastal State retains primary jurisdiction, it raises the question whether there is sufficient legal basis for the assertion of jurisdiction by United States domestic courts over an act within a third State's sovereign waters, without any other jurisdictional nexus with the United States. The only way in which the forum State could sentence the alleged offenders would be to invoke the principle of universal jurisdiction, which does not require a nexus between the offence and the forum State.

However, drug trafficking is not included in the list of international crimes for which universal jurisdiction is afforded.¹¹⁸ Nonetheless, there has been a recent case that held that drug trafficking is a universal crime,¹¹⁹ while there is a trend towards this approach, with the possibility that in the near future this would be consistent with international doctrine.¹²⁰ This has also been discussed at the expert meeting and there was considerable support on this by the participants. The ECHR would seem to be in accord: in the *Medvedyev* case, the Grand Chamber opined that "having regard to the gravity and enormity of the problem posed by illegal drug trafficking, developments in public international law which embraced the principle that all States have jurisdiction as an exception to the law of the flag State would be a significant step in the fight against illegal trade in narcotics. This would bring international law on drug trafficking into line with what has now already existed for many years in respect of piracy".¹²¹

However, very recently, on 6 November 2012, the Court of Appeals (Eleventh Circuit) handed down a rather controversial decision in the *United States v Bellaizac-Hurtado* case, which not only rejects any universal jurisdiction claim, but also disputes the prohibition of drug trafficking under customary law.¹²² The case involved a drug smuggling vessel, apparently stateless, which was spotted by a United States Coast Guard vessel patrolling in the Panamanian territorial sea. The crew fled ashore, while 760 kg of cocaine was discovered aboard their vessel. Panama waived jurisdiction to allow the United States to prosecute the case under Article IX(2) of the United States-Panama

¹¹⁸ For example, during the drafting of the ICC Statute, the participants debated but ultimately rejected a proposal to include drug trafficking in the Court's jurisdiction. See relevant analysis in A. Geraghty "Universal Jurisdiction and Drug Trafficking", 16 *Florida Journal of International Law* (2004), 371, at 387.

¹¹⁹ For example, *United States v Salcedo-Ibarra*, 2009 WL 1953399 (M.D. Fla. July 6, 2009).

¹²⁰ Also the Princeton Principles of Universal Jurisdiction (2001), which even though did not include drug trafficking in the list of relevant crimes, they leave the door open for such development (Principle No. 2).

¹²¹ ECHR, *Medvedyev et al v France*, Judgment of 29 March 2010 (Grand Chamber, Application No 3394/03), at para, 101. See also E. Papastavridis, "Case Comment: ECHR, *Medvedyev v France*" 59 *ICLQ* (2010) 867, at 877.

¹²² *United States v Bellaizac-Hurtado and others*, Case: 11-14049 (11th Cir, 2012) and commentary by Guilfoyle at www.ejiltalk.org/drug-trafficking-at-sea-no-longer-a-crime-of-universal-jurisdiction-before-us-courts/#more-7000 (22 November 2012).

Supplementary Agreement.¹²³ The federal grand jury indicted the applicants for conspiracy to possess with intent to distribute cocaine, and for actual possession with intent to distribute cocaine, on board a vessel subject to the jurisdiction of the United States. However, the Court vacated their convictions by concluding that drug trafficking is not an “Offence against the Law of Nations” and that Congress cannot constitutionally proscribe the defendants’ conduct under the Offences Clause. It remains to be seen whether United States courts will adhere to this jurisprudence; it is however, imperative to have clear, precise and foreseeable rules in place, which will be consistently interpreted and applied by national courts.

The need for prior assertion of prescriptive jurisdiction and more specifically, of precise and foreseeable legislation regarding drug trafficking on the high seas was significantly raised in the *Medvedyev v. France* case before the European Court of Human Rights. The Court found a violation of article 5(1) of the ECHR on the part of France, on the basis that the pertinent provisions of international and national law were not adequately “precise” and therefore the detention was not “prescribed by law”, within the meaning of the above article.¹²⁴

Further questions arise in the application of the relevant multilateral conventions. As discussed above, article 17 of the 1988 Drug Convention is primarily concerned with provisions for procedures that enable State parties to exercise enforcement jurisdiction on the basis of the consent of the flag State. Nevertheless, the application and effectiveness of this article hinges its on the existence of the respective prescriptive jurisdiction, which is the function of its article 4. This article (the scope of which is confined to the most serious international drug trafficking offences as specified in article 3), requires State parties to establish jurisdiction over any offences committed in their territory or on board their vessels. However, despite precedent cases,¹²⁵ the 1988 Drug Convention fails to require that States establish jurisdiction over *offences committed by their nationals*,¹²⁶ or over the offences *committed on board a vessel in respect of which the State has been authorized to take appropriate measures* pursuant to article 17 (3). The level of obligation regarding the assertion of legislative jurisdiction is established under article 4(1)(b)(i) and (ii). It is reported that relatively few States have established such jurisdiction.¹²⁷ As a result, there could be a case where a State party will be authorized to seize the suspect vessel on the high seas by the flag State, yet that State will lack the requisite jurisdiction to seize the cargo and try the offenders in its courts. The lack of

¹²³ Supplementary Arrangement between the Government of the United States of America and the Government of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, signed at Panama 5 February, 2002; entered into force 5 February, 2002. TIAS 02-205.1, 2002 U.S.T. LEXIS 51.

¹²⁴ As the ECtHR has consistently upheld, “where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application ... a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness”; see *Medvedyev* case, para 80.

¹²⁵ For example article 6 (1) (c) of 1988 SUA Convention.

¹²⁶ The decision to make this ground optional stemmed from a fundamental difference between common law and civil law states about whether nationality should be a sufficient ground to establish jurisdiction; see United Nations Doc. E/Conf.82/c.1/SR.18, at 7-12.

¹²⁷ Vienna Commentary, at 107.

mandatory establishment of jurisdiction undermines the effective application of article 17. Moreover, neither article 17 nor article 4 addresses the issue of which State's jurisdiction applies in the case of boarding a vessel of another State party. It can be logically inferred from article 17(4) (which requires the explicit authorization of the flag State for all the relevant measures), that the flag State maintains primary jurisdiction. Nevertheless, it may devolve the relevant jurisdictional competence to the intervening State. The intervening State would then assume concurrent jurisdiction over the persons and the cargo onboard. While concurrent claims to jurisdiction will inevitably arise within this context, the 1988 Drug Convention does not address competing assertions to jurisdiction.

Regarding vessels without nationality, it is worth recalling that article 17(2) of the 1988 Drug Convention only makes provision for States to request assistance in suppressing the use of such vessels in illicit traffic. It makes no reference to legislative jurisdiction. Article 110 of UNCLOS permits the boarding of vessels, however it does not make comment regarding prescriptive jurisdiction. Thus, States must have enacted prior legislation that provides for the assertion of jurisdiction over stateless vessels trafficking narcotic drugs on the high seas.

Another anomaly in the drafting of the 1988 Drug Convention, identified at the meeting is the following: article 17(3) requires the State party to "request confirmation of registry and if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel". The wording of the provision seems to equate the State of registry with the State of nationality, which is not accurate. In the light of article 91(1) of UNCLOS, nationality is not contingent on registration and thus there might be cases that small vessels, such as recreational boats, may be unregistered but still enjoy nationality, e.g. derived from the owner. Bearing in mind that narcotic drugs are frequently trafficked by such small unregistered vessels, it may be more appropriate to use "nationality" in place of "registry" in the 1988 Drug Convention.¹²⁸

It is true that both the 1995 CoE Agreement and the 2003 Caribbean Agreement seem to be more streamlined with international practice and avoid the drafting problems of the 1988 Drug Convention. For example, the 1995 Agreement requires (rather than merely permits: cf. the 1988 Drug Convention) the extension of prescriptive criminal jurisdiction to relevant offences taking place on board both the flag vessels of other parties and stateless ships.¹²⁹ Moreover, article 3(3) of the Agreement requires each participating State "to take such measures as may be necessary to establish its jurisdiction over the relevant offences on board a vessel without nationality."¹³⁰ In similar vein, article 23 of the 2003 Caribbean Agreement makes provisions for the compulsory establishment of jurisdiction concerning offences on own flag vessels; on vessels without nationality and; on board the vessels of other Parties when located seaward of the territorial sea of any State.

¹²⁸ Also: *R v Dean and Bolden* [1998] 2 Cr. App. R. 171.

¹²⁹ Article 3 of the 1995 CoE Agreement and the Explanatory Report, *ibid*.

¹³⁰ Pertinent remarks in W. Gilmore, CoE, at 5 and Vienna Commentary, at 110.

Although it is a consequence of the approach adopted in article 3 of the 1995 CoE Agreement that the boarding State and the flag State will possess concurrent jurisdiction over the relevant offences, the drafters of the 1995 Agreement decided that in such circumstances the rights of the Flag State should be accorded priority.¹³¹ Hence, so-called “preferential jurisdiction” was recognized. Article 1(b) states that: “in relation to a flag State ... the right to exercise its jurisdiction on a priority basis, to the exclusion of the exercise of the other State’s jurisdiction over the offence”.¹³² Due to the need for prompt and efficient communication between the competent organs of the State requesting authorization to interdict, and the flag State, operational difficulties may arise. For example, in paragraph 7 of article 17 of the 1988 Drug Convention, there is the requirement for each Party to designate an authority to receive and respond to requests.¹³³ Although it is for each State party to determine the appropriate mechanisms of the designated national authority, there is a need for effective and expeditious responses to incoming requests. This is important because of the operational environment presented by open ocean areas. The pragmatic need for flexibility and efficiency should be balanced with guarantees that competent State agents will give the requisite authorization. Such guarantees for timely communication might be provided by an independent single contact point.

An example of abuse or misuse of such channels of communication is demonstrated within the United Kingdom case of *Regina v. Charrington and others* (1999).¹³⁴ It relates to the manner in which the consent of Malta, the flag State of *Simon de Danser*, was obtained by the United Kingdom, and the circumstances in which the boarding of the vessel was undertaken.¹³⁵ In short, the British Crown Court granted a stay because the boarding, search and seizure and confiscation of the vessel were *mala fides* and thus unlawful. It was decided that the boarding was not authorized by an appropriate authority, since the British official, who claimed to have telephoned the office of the Attorney-General of Malta, (i.e. the designated authority under the laws of Malta for the purposes of article 17(7) of the 1988 Drug Convention), was unable to produce evidence that such contact had been made. In the context of the 1995 CoE Agreement there is a specific requirement for requests to be made in writing, however this is not the case for the 1988 Drug Convention.

¹³¹ For example the terms of the 1990 Agreement between Italy and Spain (art. 4 para. 2).

¹³² Article 14 and Commentary in Explanatory Report, at 34.

¹³³ As has been pointed out, “this designation must be transmitted to the Secretary-General, who will notify all the participating States. This essential contact information, including addresses, telephone and facsimile numbers, and hours of operation, is published by the United Nations and updated on a periodic basis”; see Vienna Commentary, at 335. See in this respect United Nations, *Competent National Authorities under the International Drug Control Treaties* (1995), at 89. It is also worth noting that a Practical Guide on this matter was published by the United Nations Office on Drugs and Crime in 2003 [hereinafter: Practical Guide].

¹³⁴ Report of the case and extensive commentary in W. Gilmore, “Drug Trafficking at Sea: The Case of *R. v. Charrington and Others*”, 49 *ICLQ* (2000), 477. The failure of the prosecution in this case prompted the Commissioners of Customs and Excise to commission an independent inquiry into this operation and its aftermath; see Inquiry into HM Customs and Excise Aspects of the *Simon de Danser* case: Report by Sir Gerald Hosker KCB QC (1999).

¹³⁵ The *Simon de Danser* was on the high seas, some 100 miles off the coast of Portugal, when it was approached in darkness by members of the Royal Marines Special Boat Squadron, accompanied by officers of HM Customs and Excise. The boarding party used rigid inflatable boats and was dispatched from a British warship, *HMS York*. Four tons of cannabis were found on board. A number of individuals were arrested and brought to the United Kingdom and charged with offences relating to conspiracy to evade the prohibition on the importation of drugs.

Considerable attention was devoted in the Court proceedings to the content of the British request. The Court concluded the request contained “blatantly misleading information”.¹³⁶ While the British request indicated that “the vessel *Simon de Danser* is currently exercising freedom of navigation in accordance with international law off the coast of the United Kingdom”, it was later found that the vessel was in Funchal harbour in Madeira. British authorities did not inform the Maltese authorities of the true location of the vessel when this became known. Hence “the boarding and subsequent acts of British authorities were unlawful because the consent of Malta was obtained through the provision of materially inaccurate information, which was, thereafter, deliberately left uncorrected”.¹³⁷

In addition to issues surrounding the establishment of jurisdiction and prompt communication between the States’ competent authorities, there may be further hurdles in the fight against drug trafficking at sea. There is the need for international cooperation in relation to the collection of evidence, extradition of offenders, and the transfer of witnesses. Such issues are usually addressed by treaties of mutual legal assistance and extradition. The majority of the relevant agreements fall short of including detailed mutual legal assistance provisions and therefore there is need for the adoption of additional legislative measures, or the amendment of current legislative provisions, in order to fill this gap.

The need for smooth international cooperation was also raised in the meeting. Emphasis was particularly placed on the success of regional networks of cooperation, e.g. the Maritime Analysis and Operation Centre—Narcotics (MAOC-N) and of the partnerships agreements that the United States has entered into with countries in the Caribbean basin and in other parts of the world. Such models of cooperation may prove very efficient. For example, the United States Government has promoted interagency cooperation to counter trafficking in drugs and other illicit activities and has established an extensive network of international partnerships through formal (e.g. treaties) and other means. It has launched joint, combined and cooperative operations and is in close coordination with UNODC, the Organization of American States (OAS), INTERPOL, IMO, the Caribbean Community (CARICOM), the Association of Southeast Asian Nations (ASEAN), the Maritime Organization of West and Central Africa (MOWCA), MAOC-N, leading to several successes in the counter-trafficking campaign. As regards MAOC-N,¹³⁸ the importance of finding common parts of laws and procedures of countries to respond to drug trafficking and having liaison officers in participating States was stressed at the Expert Group Meeting. Reference was also made to criminal intelligence, and technological advances used in its collection; it would be useful in this regard to have coordination centres, which makes the exchange of information much easier, ensuring that the centres are relevant to matters of the sea (as opposed to

¹³⁶ Transcript, Day 18, p. 1027, cited in Gilmore, Regina, at 484.

¹³⁷ Ibid.

¹³⁸ The mission of MAOC-N is to enhance intelligence and coordinate police action on the high seas, with a view to intercepting vessels carrying cocaine and cannabis. Naval and law-enforcement bodies (police, customs) participate in MAOC-N, although the latter leads the operations. See further information at <http://www.emcdda.europa.eu/about/partners/maoc>.

dividing according to crime type). Securing the vessel and collecting evidence are issues of training and coordination between law-enforcement and military and should draw on best practices, adapted to a given country-specific situation. Finally, the experts raised the issues of damage caused during searches and also the cost of delays (especially for merchant vessels) as matters for further exploration.

Lastly, corruption poses another challenge. A 2009 United Nations International Drug Control Programme (UNIDCP) report states, “It is difficult to have a functioning democratic system when drug cartels have the means to buy protection, political support, or votes at every level of government and society ... where a member of the legislature or judiciary, earning only a modest income, can easily gain the equivalent of some 20 months’ salary from a trafficker by making one favourable decision. A growing culture of corruption ensuing from a lack of transparency in Caribbean society will undermine the credibility of any of its governments as well as frustrate economic growth in the region.”¹³⁹

¹³⁹ United Nations International Drug Control Programme, “Technical Series Report No. 6: Economic and Social Consequences of Drug Abuse and Illicit Trafficking”, New York, 1998, p. 39.

V. Fisheries crime

The current problem of fisheries crime

One of the most long-standing and recurring grounds for interference with foreign vessels on the high seas is fisheries crime. Illegal fishing is very often associated with Illegal, Unreported, Unregulated Fishing (IUU fishing).¹⁴⁰ Collectively, IUU fishing encompasses a wide range of fishing activities which can be considered in violation of or without regard to applicable international, regional or national fisheries regulations and standards.¹⁴¹ For the purpose of this *Paper* only illegal fishing (in the wider context of fisheries crime) and not unregulated or unreported fishing is considered.

Combating IUU fishing has been one of the main issues on the international fisheries agenda for the past decade. This is because IUU fishing has been recognized as a major threat to fisheries conservation and marine biodiversity.¹⁴² It is reported that: “in case of fisheries, more than 75 per cent of the world’s fish stocks are reported as already fully exploited or overexploited and increasing numbers of marine species are considered threatened or endangered”.¹⁴³ Numbers regarding IUU fishing are telling: “the 2008 estimates for the total value of IUU losses worldwide are between US\$ 10 and 23 billion annually”.¹⁴⁴ Collectively, IUU fishing encompasses a wide range of fishing activities which can be considered in violation of or without regard to applicable international, regional or national fisheries regulations and standards.¹⁴⁵

“Illegal fishing” encompasses all fishing activities conducted in contravention of national and international laws, as well as agreed regional fisheries management and conservation measures.¹⁴⁶ Such fishing may include fishing beyond allowable catch limits, the

¹⁴⁰ 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005, available at <ftp://ftp.fao.org/fi/document/ministerial/2005/iuu/declaration.pdf>. See also Closing the Net: Stopping Illegal Fishing on the High Seas, Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas, 2006, available at www.high-seas.org and M. Palma *et al*, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Martinus Nijhoff Pub. 2010), 245.

¹⁴¹ Palma, *ibid*, at 37.

¹⁴² T. Lobach, “Combating IUU Fishing: Interaction of Global and Regional Initiatives”, in Vidas D. (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Leiden: Martinus Nijhoff Pub. 2010), 109, at 109.

¹⁴³ R. Rayfuse, “Moving Beyond the Tragedy of Global Commons: The Grotian Legacy and the Future of Sustainable Management of the Biodiversity of the High Seas”, in Leary D. & Pisupati B. (eds.), *The Future of International Environmental Law* (Tokyo: United Nations University Press, 2010), 201, at 204.

¹⁴⁴ K. Gjerde, “High Seas Fisheries Governance: Prospects and Challenges in the 21st Century”, in Vidas D. & Schei J. (eds.), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden: Martinus Nijhoff Pub. 2011), 221, at 224.

¹⁴⁵ Palma, *Fisheries*, at 37.

¹⁴⁶ See para. 3.1. of the IPOA-IUU.

taking of juvenile fish and prohibited fish species, and fishing during closed seasons or in closed areas.¹⁴⁷ On the high seas, the illegal nature of fishing pertains to the non-compliance with the agreed standards of Regional Fisheries Management Organizations (RFMOs). For example, under the Food and Agriculture Organization (FAO) Compliance Agreement, vessels fishing on the high seas are required to refrain from engaging in any activity that undermines the effectiveness of international conservation measures.¹⁴⁸

The connections between transnational organized crime and illegal fishing in certain regions of the world were explicitly recognized very recently by the United Nations General Assembly.¹⁴⁹ Also, it is considered that illegal fishing represents an environmental threat. This was one of the findings of the UNODC's Report on the Transnational Organized Crime in the Fishing Industry (2011). In this report, many instances and examples of the close association between the fishing industry and other transnational criminal activities were presented.

For example, the report found that instances of human trafficking within the fishing industry take place in most major regions of the world. The few reports that compare findings among trafficking victims in a number of industries conclude that trafficking in persons into the fishing industry—particularly that which takes place on board fishing vessels at sea—is a severe problem. The available material suggests that particularly trafficking for the purpose of forced labour on board fishing vessels involves cruel and inhumane treatment in the extreme.¹⁵⁰

Furthermore, fishing vessels are part of the modus operandi of cocaine trafficking to North America and Europe. According to MAOC-N data, fishing vessels are not the vessels most frequently interdicted transporting cocaine, however the proportionately few fishing vessels that are interdicted or disrupted are often carrying cocaine in large quantities. Concerns have been raised internationally about the use of fishing vessels by drug trafficking organizations. The concerns are evidenced by a number of recently dismantled syndicates suggesting that fishing vessels are used as part of the modus operandi of illicit traffic in cocaine. Anecdotal reports of illicit trafficking in drugs using fishing vessels were also found in the context of amphetamine type stimulants (ATS), cannabis and heroin.¹⁵¹

The legal framework

The contemporary international legal framework regulating fisheries can be divided into two categories:

- Legally binding multilateral agreements and;
- Non-binding instruments.

¹⁴⁷ Cf. article 62 of *LOSC and FAO Code of Conduct for Responsible Fisheries*, adopted at the 28th session of the FAO Conference, Rome, Italy, 31 October 1995, para. 8.2.2.

¹⁴⁸ *Ibid.*, articles III (1), V (1) and V (2).

¹⁴⁹ Resolution A/RES/66/68, United Nations General Assembly, 28 March 2012.

¹⁵⁰ UNODC, *Transnational Organized Crime in the Fishing Industry* (Vienna, 2011), at 54.

¹⁵¹ *Ibid.*, at 93.

There are four major global legally binding multilateral agreements directly related to fisheries:

- The UNCLOS;
- The Straddling Stocks Agreement (SSA);¹⁵²
- The FAO Compliance Agreement¹⁵³ and;
- The Port State Measures Agreement (PSMA).¹⁵⁴

The PSMA includes the FAO Code of Conduct, as well as many other international instruments adopted after International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) (for example: various United Nations Resolutions on sustainable fisheries, the Rome Declaration on IUU Fishing¹⁵⁵ and the FAO Model Scheme on Port State Measures).¹⁵⁶

A central role in the fight against fisheries crime has been ascribed to the Regional Fisheries Management Organizations (RFMOs), which have taken numerous measures against delinquent vessels, such as those that are flying the flag of a third State. For example, the Inter-American Tropical Tuna Commission (IATTC) has procedures to identify vessels flying the flag of non-members that diminish the effectiveness of their conservation measures.¹⁵⁷ Other RFMOs have a number of catch reporting requirements for fishing vessels, such as the maintenance of fishing logbooks containing detailed record of catches.¹⁵⁸ Additionally, joint enforcement operations and inspection schemes have been extensively employed in areas under national jurisdiction and on the high seas.¹⁵⁹

Problems and challenges posed by fisheries crime

There are many challenges concerning fisheries crime that the international community should address. These challenges have been identified by the 2011 UNODC report as follows:

¹⁵² United Nations Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 *UNTS* 88. The Agreement was opened for signature on 4 December 1995 and entered into force on 11 December 2001 [hereinafter: Straddling Stocks Agreement].

¹⁵³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1994), 2221 *UNTS* 91. The FAO Compliance Agreement was approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the FAO Conference and entered in force on 24 April 2003 [hereinafter: FAO Compliance Agreement].

¹⁵⁴ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted in November 2009, Appendix V of the FAO Council 137th session, Rome, 28 September-2 October 2009.

¹⁵⁵ 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005.

¹⁵⁶ FAO, Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Rome: FAO, 2007).

¹⁵⁷ IATTC, Resolution C-04-03, Resolution on a System of Notification of Sightings and Identification of Vessels Operating in the Convention Area.

¹⁵⁸ See more information Palma, Fisheries, at 46.

¹⁵⁹ See inter alia R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden: Brill Academic Publishers, 2004).

1. The global reach of fishing vessels; easy access to surplus fishing vessels due to fishing quota restrictions, the legitimate presence of fishing vessels at sea and the distribution network for fish and fish products create opportunity and legitimate cover for criminal activities.
2. There is a general lack of governance and rule of law in the fishing industry. In particular there is:
 - (a) A lack of at-sea surveillance of vessel movements and transshipments. Compared to merchant vessels, there is no comprehensive and transparent system of fishing vessel tracking or monitoring. This is exacerbated by the fact fishing vessels are not subject to requirements to have Automatic Identification Systems (AIS) or Long Range Identification and Trafficking (LRIT) systems on board the vessels.
 - (b) A lack of transparency of the identity of the beneficial ownership of fishing vessels and a lack of international records of fishing vessels' identity and history.
 - (c) A lack of ability or willingness of some flag States to enforce their criminal law jurisdiction.
 - (d) A lack of international endorsement of existing international regulation of the safety of fishing vessels and the working conditions of fishers at sea to bring these instruments into force in order to ensure compliance in port in the same manner as Port State Control (PSC) of merchant vessels.
3. Quota restrictions and declining fish stocks in many regions of the world have led to destitute fishers and fishing communities deprived of their livelihoods and an important food source. The socio-economic conditions brought about by over-fishing may make fishers and fishing communities vulnerable to recruitment into criminal activities.
4. Social acceptance may facilitate some forms of criminal activities in the fishing industry, such as trafficking of children or marine living resource crimes¹⁶⁰

From the perspective of international law the main issue is the enforcement of the multiple binding or non-binding measures adopted by States or by the RFMOs. Such measures should be adopted and enforced by the respective Flag States. With consideration to the ongoing problem of flags of convenience or open registries, there are clearly additional enforcement issues. Moreover, in relation to port-State control, there are various "ports of convenience" that evade their obligations or commitments under the various multilateral or regional instruments. At the meeting, particular emphasis was placed on illegal fishing off West Africa, which is considered a "hotspot", especially when linked to environmental crime. Also, the challenges posed by transshipment activities, (e.g. different legal regimes apply to different types of vessels) and by the need

for coordination between different types of law-enforcement agencies and for cooperation between States concerned (e.g. cases involving numerous jurisdictions) were discussed.

Reference was made to the work of the INTERPOL Fisheries Crime Working Group. The mandate of the Working Group is to assist the General Secretariat in policy formulation and project implementation as subject-matter experts regarding the prevention, deterrence and suppression of fisheries and related crime. The main focus is fisheries crime including crimes against living marine resources. In addition the Fisheries Crime Working Group may explore links to related crimes such as crossover crimes (e.g. human trafficking, tax and customs fraud, traffic in illegal drugs and psychotropic substances, corruption and money-laundering).

Particular reference was made to the importance for intelligence gathering on movements at sea, an advantage for intelligence at sea in comparison to intelligence gathering on land, for which there is very strong legal regime. Indeed, tracking technology is very advanced, but unfortunately, no similar developments have been observed within the fisheries context.

In addition, it has been generally acknowledged that the investigation of ownership/control of property is of primary concern and is much more difficult when applied to fishing vessels. There is a need to look for patterns and gather information, similar to corporate crime cases, involving tax havens and bank secrecy. There has been an OECD initiative on tax crimes and fisheries. In particular, fisheries crime is often clandestine; there is an absence of witnesses in many cases. In both natural resource and environmental crimes, it is difficult to identify offenders, especially the real beneficiaries and instigators. The persons detained on a vessel may be the only identifiable offenders and it therefore becomes very difficult to apply regular methods of investigation to these crimes.

Finally, the importance of tackling fisheries crime off the coasts of Africa and the need for a comprehensive strategy to reform the sector and mobilize a partnership for African fisheries were highlighted at the experts meeting. Fisheries crime in Africa has both ecological impact (e.g., it threatens food security) and economic impact (e.g., it distorts the market, undermines sources of livelihood, disadvantages legal fishers, undermines source of employment/profit/incomes for Africans).

VII. Illegal pollution of the marine environment

“Each year, up to 810,000 tons of oily waste is intentionally and illegally dumped into the world’s oceans by commercial vessels. As a consequence, seabird populations are reduced, the habitats for slow-moving shellfish such as clams, oysters, and mussels are poisoned, and fish, if not killed by the harmful toxins of the oil, lose the ability to reproduce, reproduce deformed offspring, or upon ingestion of the oil, create even more toxic substances. Separately, mammals, reptiles, and amphibians whose natural habitats are either in or close to coastal waters either suffocate to death from oil ingestion or die from eating wildlife previously poisoned by oily waste.”¹⁶¹

This short paragraph aptly describes the threat to the marine environment and to the biodiversity of the global ecosystem posed by the illegal dumping of oil. Vessel-source pollution is responsible for some twelve per cent of marine pollution, and is subject to strict international regulation. A significant amount of this pollution is due to oil bunkering. In order to reduce the chances of getting caught, vessels most often illegally discharge their oily waste outside of any port, flag, or coastal State’s territorial seas, along regular shipping routes or in an area of recent oil accidents at night time. The polluters’ reasons for choosing these locations and times are straightforward. First, polluters believe they will avoid detection and punishment by polluting outside a specific jurisdiction. Second, polluters can avoid detection by mixing their oily waste with accident residues already on the ocean’s surface along regular shipping routes. Finally, the discharge of oily waste at night reduces the ability of many States to positively identify either the oil sheens on the ocean’s surface or the offending vessel.¹⁶²

The legal regime for preventing vessel-source pollution is aptly described in Part XII on the “Protection and Preservation of the Marine Environment” of UNCLOS. Besides the UNCLOS, vessel-source pollution is mainly governed by conventions concluded under the auspices of the International Maritime Organization (IMO). The first and most relevant is the International Convention for the Prevention of Pollution from Ships (MARPOL 1973/78), which mainly addresses the prevention of pollution.¹⁶³ Another relevant IMO Convention is the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), which covers the response in

¹⁶¹ B. S. Gullo, “The Illegal Discharge of Oil on the High Seas: The United States Coast Guard’s Ongoing Battle against Vessel Polluters and a New Approach Toward Establishing Environmental Compliance”, 209 *Military Review* (2011), 122.

¹⁶² OECD report, cost savings stemming from non-compliance with international environmental regulations in the maritime sector 4 (2003), at 47.

¹⁶³ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1983 UNTS 184 (entered into force Oct. 2, 1983) and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1983 UNTS 62 (entered into force Oct. 2, 1983).

case of pollution from ships.¹⁶⁴ As regards bunker oil and issues of liability, reference should be made to the International Convention on Civil Liability for Bunker Oil Pollution Damage. This Convention focuses on liability and was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. The Convention applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States Parties.

The Convention on Civil Liability from Bunker Oil Damage (Bunkers Convention) represents a free-standing instrument covering pollution damage only. It is modelled on the International Convention on Civil Liability for Oil Pollution Damage (1969), which requires that the registered owner of a vessel maintain compulsory insurance cover.¹⁶⁵

Aside from the aforementioned Convention, there is no agreement that addresses the discharge of oil as a transnational crime. There are only national laws that may provide for criminal jurisdiction of the State concerned. An example is the United States Act to Prevent Pollution from Ships (APPS). This provides United States authorities with the discretion to bring criminal charges against vessel owners, operators, and crew members. These individuals can be convicted of a Class D federal felony, punishable by up to six years imprisonment and a fine of up to US\$ 250,000 for an individual or US\$ 500,000 for a corporation. Moreover, upon conviction of the guilty parties, the Act gives courts the authority to award up to half of any fine to persons giving information leading to the conviction.¹⁶⁶

Issues of bunkering of fishing vessels were raised in the *MV Saiga* case before ITLOS. The case had arisen from the arrest and detention of an oil tanker, which had been engaged in providing fishing vessels with gasoil (bunkering) off the coast of Guinea. The latter prosecuted the Master of the tanker, the *M/V Saiga*, for carrying out these activities, alleging that these were offences under its custom laws. Saint Vincent and the Grenadines, however, claimed that the bunkering of the vessels was within the exercise of the freedom of navigation in the exclusive economic zone. The Tribunal, while it acknowledged that arguments can be advanced both ways, it held that "it is not necessary for the Tribunal to come to a conclusion as to which of these two approaches is better founded in law. For the purpose of the admissibility of the application for prompt release of the *M/V Saiga* it is sufficient to note that non-compliance with article 73, paragraph 2 of UNCLOS has been "alleged" and to conclude that the allegation is arguable or sufficiently plausible".¹⁶⁷

¹⁶⁴ International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), Adoption: 30 November 1990; Entry into force: 13 May 1995.

¹⁶⁵ Relevant information at [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-\(BUNKER\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-(BUNKER).aspx).

¹⁶⁶ B. Gullo, *supra* note 39 at 144.

¹⁶⁷ ITLOS, *The M/V "Saiga" case* (St Vincent & the Grenadines v. Guinea), Judgment of 4 December 1997, para. 59. See also comments in M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Leiden: Martinus Nijhoff, 2007), 71.

While it could be proposed that an international agreement be adopted dealing specifically with the issue of oil bunkering as a form of transnational organized crime, the experts meeting reported that the three pillar IMO conventions on environment (Prevention: MARPOL; response: OPRC; and compensation: bunkers convention) cover all the aspects on pollution damage from ships. MARPOL has the maximum rate of oil discharge, and any infraction of annex 1 of MARPOL is prosecuted by the coastal States or port States. National legislation addresses the prosecution of pollution of oil, and there is a very good international coordination to investigate allegedly contraventions (satellite, airplanes, etc.). Therefore, the experts concluded that there is no need for an international agreement to address the issue of oil bunkering as a form of transnational organized crime.

VIII. Conclusions and recommendations

Combating transnational organized crime at sea poses numerous challenges, both to States and international organizations. This is because organized crime at sea is a multi-faceted problem, involving many criminal activities and many practical difficulties in the domestic setting. Challenges may arise when conducting enforcement operations at sea. Such operations may involve multinational forces with no specific mandate or knowledge of how to tackle sensitive issues relevant to evidence collection, witnesses' testimonies or human rights. It is often the case that naval forces have different Rules of Engagement prohibiting the acts necessary to combat transnational organized crime at sea. For example, a naval asset taking part in EUNAVFOR *Operation Atalanta* off the coast of Somalia would not be mandated to engage in an operation concerning smuggling of migrants.

The majority of the challenges are observed firstly in relation to the establishment of jurisdiction over transnational organized crimes at sea and secondly in ensuring efficient cooperation amongst various State authorities. This may be addressed by coordination between competent international organizations and by the development of more Mutual Legal Assistance (MLA) and extradition agreements. The ratification of existing multi-lateral treaties concerning transnational organized crime and the harmonization of domestic legislation is imperative in the fight against transnational organized crime at sea.

Recommendations from Expert Group Meeting: Combating Transnational Organized Crime Committed at Sea

I. Legal/conceptual concerns

With regard to legal and conceptual concerns, the expert group recommends that:

- (a) Transnational organized fisheries crime which is conducted by an organized crime group,¹⁶⁸ is clearly demarcated from illegal, unreported and unregulated fishing for the purposes of UNODC mandates;
- (b) State Parties are called upon to fully assume the responsibilities and obligations incumbent upon Flag States under international law;
- (c) The existing rules of engagement for maritime interdictions are collated and analysed with a view to their harmonization;

¹⁶⁸ As defined by Art. 2(a) of UNTOC.

(d) State Parties to the United Nations Convention on the Law of the Sea (UNCLOS) that have not yet done so be encouraged:

(i) to harmonize their national legislation concerning maritime zones with the provisions of UNCLOS; and

(ii) to deposit with the Secretary-General charts or lists of geographical coordinates, as provided for in UNCLOS, preferably using the most recent geodetic datums, such as WGS84.

2. *Implementation, enforcement, prosecution*

With regard to implementation, enforcement and prosecution, the expert group recommends that:

(a) Gaps in the implementation of UNCLOS and UNTOC into domestic legislation be addressed;

(b) Capacity-building be directed at enforcement and prosecution, with due regard to international human rights and refugee law, particularly in relation to activities such as boarding vessels; securing evidence (including the use of specialized units and developing industry partnerships for best management practices in securing crime scenes); arresting and detaining suspected offenders and protecting victims.

(c) Domestic interagency, regional and international cooperation be enhanced, including intelligence and information sharing, with an increased focus on intelligence led patrolling and enforcement;

(d) The central authorities of State Parties be given unrestricted access to their national shipping registers;

3. *UNODC resources and tools*

With regard to UNODC resources and tools, the expert group recommends that UNODC (in cooperation, as appropriate, with other relevant entities, such as IMO and OLA/DOALOS), be tasked with the production of resources, encompassing, integrating and updating the numerous instruments and resources already available:

(a) A handbook setting out guidelines relevant to law-enforcement operations against transnational organized crime committed at sea for the purposes of practical reference and training. The document should make appropriate consideration of the need to identify specific vulnerabilities and ensure the protection of such individuals and groups.

(b) A manual on intelligence collection relevant to transnational organized crime committed at sea. The manual should include threat assessments of maritime crimes, and should encompass on-land intelligence collection, specifically with regard to the identification and tracing of the beneficial owners of vessels. It should incorporate advice on the appropriate sharing of information between law-enforcement and other stakeholder agencies.

(c) Practical guidelines incorporating Standard Operating Procedures, based on best practices and applicable international standards for the investigation of transnational organized crimes at sea, particularly in relation to evidence collection, preservation and management, the use of forensic evidence, witness testimony (particularly civilian witnesses and use of video-conferencing) and arrest of suspects as well as financial investigation and other special investigation techniques.

In developing the above documents, consideration should be given to regional variances, and the wide range of capabilities, resources and knowledge of enforcement entities. These documents must strike a delicate balance between reaching the lowest common denominator, and being appropriately sophisticated and detailed in suggested procedures and processes.

4. Supporting the African Union policy agenda

With regard to support for the African Union policy agenda, the expert group recommends that:

UNODC inform and support the African Union policy agenda, including working with the African Union Commission, the United Nations Economic Commission for Africa, the Regional Economic Communities, enhancing UNODC mentorship in Western Africa, and establishing and facilitating regional and international partnerships and cooperation.

Annex

Piracy suspects/convicted pirates (as of 24 September 2012)

<i>Country</i>	<i>Number currently held</i>	<i>Number released</i>	<i>Total</i>
Belgium	2 (1 convicted)		2
Comoros	6		6
France	15 (4 convicted)	3 acquitted	18
Germany	10		10
India	119		119
Italy	20		20
Japan	4		4
Kenya	137 (74 convicted)	17 acquitted, 10 completed sentence	164
Madagascar	12		12
Malaysia	7		7
Maldives	41 (awaiting deportation in absence of law)		41
Netherlands	29 (10 convicted)		29
Oman	32 (25 convicted)		32
Seychelles	105 (83 convicted)	2 repatriated to Puntland	107
Somalia	Puntland	290 (approximately 240 convicted)	290
	Somaliland	35 (all convicted) (including 17 transferred from Seychelles)	76 released 111
	South Central	18 (status of trial unclear)	18
Republic of Korea	5 (all convicted)		5
Spain	8 (2 convicted)		8
United Arab Emirates	10		10
United Republic of Tanzania	12		12
United States	28 (17 convicted)		28
Yemen	123 (all convicted)	6 acquitted	129
TOTAL STATES: 21	1 068	114	1 182



UNODC

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