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The EU and Maritime Security: An Introduction

*Jorrit J. RIJPMA, Melanie FINK, Kristof GOMBEER**

A secure global maritime domain in which freedom of navigation is guaranteed, marine resources and the environment are protected, and the rule of law is upheld is essential for international prosperity and peace. Ensuring maritime security involves combating threats posed by illicit activities, such as piracy against ships, drug trafficking, smuggling and trafficking in human beings, or illegal fishing, as well as by natural disasters, climate change, or conflict in and around coastal regions.

The EU's involvement in the maritime domain goes back to its very foundation, with the establishment of a common fisheries policy, and has expanded with the gradual inclusion of powers in the field of the environment, transport, energy and justice and home affairs (cross border crime and migration control). Since the early 2000s a range of EU bodies has been tasked to support the Commission and the Member States in the implementation of these policies: the EU Fisheries Control Agency (EFCA), the European Maritime Safety Agency (EMSA), and the European Border and Coast Guard Agency (EBGCA or Frontex). In addition, the EU has developed a naval component of its Common Security and Defence Policy (CFSP), cumulating in the launch of its first anti-piracy mission in December 2009. The EU also set up various frameworks for information sharing such as the European Surveillance System (EUROSUR) and the Common Information Sharing Environment for the Maritime Domain ('CISE'), which aims at progressively interlinking existing information systems to facilitate rapid information sharing.

In 2007 the Commission published its Communication on an Integrated Maritime Policy which should help the EU to 'face the challenges of globalisation and competitiveness, climate change, degradation of the marine environment, maritime safety and security, and energy security and sustainability.'[1] This was followed by a Communication on the international dimension of this policy in 2009.[2] In 2016, the European Commission and the EU's High Representative set out a 'Joint agenda for the future of our oceans', including some fifty actions contributing to responsible and sustainable governance of the maritime environment in Europe and globally.[3]

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1 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union' (COM(2007) 575 final, 10 October 2007), 22.

2 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Developing the international dimension of the Integrated Maritime Policy of the European Union' (COM(2009) 536 final, 15 October 2009).

3 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: International ocean governance: an agenda for the future of our oceans' (JOIN(2016) 49 final, 10 November 2016).

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Connected to this, but with a distinct focus on security concerns in a more narrow sense, the Council of the European Union drew up a 'Maritime Security Strategy' (EUMSS) in 2014, accompanied by an action plan that was revised in 2018 to bring together the internal and external dimension of EU maritime security.[4] The EUMSS identified maritime security challenges, such as piracy, trafficking and the smuggling of human beings, arms and narcotics, and stressed the need to facilitate cooperation and information-sharing between civilian and military authorities. It integrated, for the first time, the existing activities of the EU and its Member States into a common framework for the development of a European response to maritime threats and risks, mainstreaming maritime security into EU policies as well as EU external relations.

As a global actor in maritime security, the EU combines unilateral strategies with cooperation with relevant third states. It, for instance, assists states around the Gulf of Guinea to strengthen their maritime capabilities and provides financial assistance and training to the Libyan Coast Guard. In addition, the EU itself conducts maritime enforcement or similar operations. Among these are, in particular, two naval operations in the framework of the European Security and Defence Policy: EU NAVFOR Somalia ('Operation Atalanta') aimed at protecting vessels around the Somalian coast from pirates and the more recent EU NAVFOR MED IRINI, the successor of 'Operation Sophia', aimed at implementing the arms embargo imposed by the UN Security Council regarding Libya, building and training the Libyan Coast Guard, and disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean. In addition, the latest joint border control operations at sea, 'Themis', carried out under the auspices of Frontex, has an explicit mandate to combat cross border crime in the Central Mediterranean.

It is in the nature of the maritime environment that legal regimes of national, European and international law interact, overlap and sometimes contradict. The wide and diverse range of challenges brought under the concept of maritime security contributes to a fragmented picture of the law governing maritime security. This is exacerbated in relation to the European Union, which although a subject of international law, remains bound by the principle of conferral of powers, under which it can only act to the extent its Member States have enabled it to do so. This may lead to practical complications in the cooperation between civil and military actors, as well as protracted discussion on the existence and the nature of competence in the maritime domain.

This Special Issue aims at exploring some of the EU's powers to act 'at sea', the obligations it is bound to when doing so, and how its international responsibility may arise in this regard. The contributions for this Special Issue form a selection of a series of papers that were presented at a Conference that took place at Leiden University from 25 to 26 October 2018.

Thea Coventry (Leiden University) critically analyses the power of states to interdict vessels at sea. She argues that treaty drafters have over time delegated interpretation to state practice in order to fill in the scope of enforcement powers over stateless vessels. Especially Western states have taken an ex-

4 Council of the European Union, 'European Union Maritime Security Strategy' (11205/14, 24 June 2014).

pansive approach to extraterritorial enforcement jurisdiction and expanded their sovereign powers beyond national borders, a practice that was also adopted by the EU in response to Mediterranean migrant crisis. Coventry argues that this practice risks prioritizing the interests of powerful states at the expense of individual human rights and developing states.

The contribution of Richard Kilpatrick (Northeastern Illinois University) stays within the theme of the EU's response to the maritime migration emergency in the Mediterranean. It focusses on a field of actors in practice that is often overlooked: merchant shipping. Kilpatrick shows how evolving SAR policies threaten and undermine compliance with search and rescue obligations at sea. Transpiring form the paper is a plea for a policy of the EU and its Member States which reinvigorates the operational viability of NGO rescuers and which develops a burden-sharing consensus on rescue and disembarkation protocol among EU Member States.

Lorenzo Gasbarri (University College London) dives into the theme of IUU fishing to debate fundamental questions on the nature of due diligence obligations, the attribution of conduct and international responsibility in light of the specific nature of the EU as a global actor having exclusive competence in the field of fisheries. Gasbarri critically addresses these questions by looking at the situation where fishing vessels flying the flag of an EU Member State get involved in IUU fishing in maritime areas covered by agreements between the EU and third states. He proposes to appreciate more properly the specific nature of the EU as an international organisation to construct the scope of its obligations and to allocate responsibilities between the EU and its Member States. Gasbarri moreover argues that EU Member States cannot completely disappear behind the institutional veil of the EU as an international organisation when the latter has exclusive competence over an area of governance. Integrating all arguments, he concludes that in cases of IUU fishing both the EU and its Member States can incur different responsibilities for the violation of different obligations.

Finally, Borja Montes Toscano (University of Seville) discusses climate change as a maritime security issue and the extraterritorial dimensions of the EU's regulatory action in this regard. He looks at unilateral EU policy efforts addressing CO2 emissions in merchant shipping through an analysis of EU Regulation 757/2015 on the monitoring, reporting and verification of dioxide emissions from maritime transport. Reading EU law in light of UNCLOS, Montes Tescano argues that the Regulation's scope of application should be seen as governed by the concept of territorial extension by port states. The Regulation is evaluated as an important mechanism to remedy gaps generated by the inefficiency of flag state jurisdiction and the limits of coastal state jurisdiction. It is a unilateral policy instrument whose scope and functioning the European Commission is nonetheless prepared to adjust in light of potential subsequent international developments regarding emission reduction measures.

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Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels

*Thea COVENTRY**

Abstract

The recent migrant crisis in the Mediterranean Sea has clearly revealed the unclear legal basis for interdicting stateless migrant smuggling vessels in international waters. Despite claims to unilateral enforcement powers by some Western states, the law of the sea does not provide a strong jurisdictional basis for seizing such vessels outside territorial waters. Western destination states, particularly the United States (US), have responded to the legal lacuna surrounding stateless vessels by strategically weaving ambiguity through the transnational crime instruments regulating smuggling of drugs and migrants at sea, and then claiming the ambiguity permits the exercise of coercive measures extraterritorially. The recent European Union naval operations in the Mediterranean have substantially concretized the ambiguity in the Migrant Smuggling Protocol as permitting seizure of stateless vessels. While new maritime threats require flexible interpretation of the law of the sea, any changes to extraterritorial enforcement powers must reflect the common understanding of states. Leaving revision of the law to instrumentally ambiguous treaty drafting and subsequent practice instead risks favouring the interests of powerful states at the expense of individual human rights and developing states.

Keywords: enforcement jurisdiction, extraterritoriality, migrant interdictions, stateless vessels, treaty drafting, Migrant Smuggling Protocol

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1. Introduction

On the evening of 10 September 2013, a Frontex patrol ship sighted a large fishing boat unloading persons onto a small vessel in the international waters of the central Mediterranean Sea. The small vessel sailed off towards the Sicilian port of Syracuse, and the larger fishing vessel in the direction of North Africa. The Frontex patroller trailed the small vessel overnight, monitoring its route. As conditions at sea deteriorated the following evening, the Italian *Guardia di Finanza* intercepted the small boat, rescuing the 199 migrants on board and leaving the vessel adrift. Meanwhile the Frontex patroller continued to track the mothership, establishing that it did not fly a flag and that the ship's name had been erased from the hull. The patroller hailed the mothership and requested identification documents from the crew. Despite receiving 15 documents in Arabic allegedly attesting that the

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crew were fishermen, the *Guardia di Finanza* boarded the mothership, detained the crew and confiscated the vessel. Back at the port of Syracuse, the rescued migrants identified an Egyptian national, Harabi Hani, as being a migrant smuggler. He was arrested and detained before trial for facilitating illegal migration and participating in a criminal organization.

Harabi Hani appealed the preliminary detention order, contending that the coercive measures used against him – detaining him in international waters and forcibly transferring him to Italy – were without basis in international law.[1] The Italian court of appeal rejected Hani's application, holding that the Migrant Smuggling Protocol gives states full enforcement powers to intercept vessels suspected of being stateless and smuggling migrants by sea.[2] The case centred on whether the term 'appropriate measures' in Article 8(7) of the Protocol permits states to exert coercive measures over intercepted vessels beyond the board and search powers contained in the United Nations Convention on the Law of the Sea (UNCLOS).[3] The Court found that the seizure of the vessel and the transfer of its crew to Italy by the *Guardia di Finanza* fell within the scope of the term.

The case illustrates the confusion surrounding whether interdiction of vessels of uncertain nationality engaged in migrant smuggling by sea is actually permitted under international law. Since 2015, nearly 1.5 million undocumented migrants and asylum seekers have reached Europe by sea, mostly with the aid of migrant smugglers.[4] Thousands have been rescued from small, unseaworthy vessels by humanitarian organizations, merchant or naval ships, including Frontex, Mare Nostrum and the European Union-led mission European Union Naval Force Mediterranean (EUNAVFOR MED). Although states may intercept boats in distress in international waters, these powers do not permit general interdiction of smuggling vessels.[5] But the lack of legal enforcement options only became apparent with the increased use of unflagged and unregistered vessels to smuggle drugs and migrants in the 1980s and 1990s. In response, Western destination states have manipulated the developing field of transnational criminal law to expand their sovereign powers beyond national borders.[6]

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1 *In the Matter of Criminal Proceedings against Hani,* final appeal judgment (20 August 2014) No 36052/2015.

2 Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004) 2241 UNTS 507 ('Migrant Smuggling Protocol').

3 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS') art 110.

4 Jonathan Clayton and Hereward Holland, 'Over one million sea arrivals reach Europe in 2015' (United Nations High Commissioner for Refugees ('UNHCR'), 30 December 2015) <http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> accessed 13 December 2019; International Organization for Migration ('IOM'), 'Mediterranean Migrant Arrivals Top 363,348 in 2016: Deaths at Sea: 5079' (1 June 2017) <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079> accessed 13 December 2019; UNHCR, 'Refugees & Migrants Arrivals to Europe in 2017' (2017) <https://data2.unhcr.org/es/documents/download/62023> accessed 13 December 2019; UNHCR, 'Operations Portal: Refugee Situations' <https://data2.unhcr.org/en/situations/mediterranean> accessed on 13 December 2019.

5 Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a fragmentary reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 174176.

6 Douglas Guilfoyle, 'Transnational Crime and the Rule of Law at Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea* (Brill 2016) 189.

Stateless vessels inhabit a lacuna in international law as neither customary law nor treaty practice makes clear provision for their regulation, legality or jurisdiction.[7] The jurisdictional regime applicable to stateless vessels at sea is complex. In international waters, states may only exercise jurisdiction over such vessels where a jurisdictional nexus connects the intercepting state to the suspect vessel. Beyond universal jurisdiction, the bases for extensions of jurisdiction extraterritorially are limited, requiring evidence that an offence was partially committed in the territory of the state or the offender possesses the nationality or residence of the intercepting state.[8] Further states cannot easily rely on treaty-based extensions of jurisdiction, as such extensions technically rely on jurisdictional 'swaps' between state parties and consequently cannot bind non-party states.[9] In establishing jurisdiction over stateless vessels, states effectively claim that an underlying basis exists in custom.[10] Objection or acquiescence by the third-party state then supports or rebuts the claim. Yet, again, no state exists to object or acquiesce to the practice of interdicting stateless vessels.

Over the last thirty years, however, treaty practice towards stateless vessels has become increasingly ambiguous. When read against the traditional principles of the law of the sea and jurisdiction in international law, the treaty provisions regulating enforcement action against stateless vessels engaged in transnational crime only permit states with a jurisdictional nexus to exercise criminal jurisdiction. But Western states have repeatedly claimed the 2000 Migrant Smuggling Protocol enables any state to seize stateless smuggling vessels and arrest offenders aboard.[11] Tracing the transposition of the interdiction provisions across the relevant instruments reveals that the ambiguity has been strategically woven through recent treaty practice. States have then relied on this ambiguity to claim enforcement action is permitted by the Migrant Smuggling Protocol.

This analysis falls within the growing body of literature emphasizing the shadow of Western hegemony falling across the transnational criminal law project.[12] Western states increasingly rely on prohibition regimes to overcome the traditional confines on their coercive powers abroad.[13] Wealthy developed states utilize international diplomacy, legal expertise in treaty negotiations and subsequent practice to extra-territorialize their domestic laws and criminal justice paradigms globally.[14]

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7 Douglas Guilfoyle, 'The High Seas' in Donald Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 224.

8 Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 7.

9 Vienna Convention on the Law of Treaties (adopted 23 May 1968, entry into force 27 January 1980) 115 UNTS 311 art 34 (VCLT); Neil Boister, *Introduction to Transnational Criminal Law* (OUP 2018) 251.

10 Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 3, 44.

11 USA Navy, *The Commander's Handbook on the Law of Naval Operations* (2007), 3-12; Commission of the European Communities, *Study on the international law instruments in relation to illegal immigration by sea* (SEC(2007) 691 (15 May 2007) at para. 2.2.2; Efthymios Papastavridis, 'Crimes at Sea: A Law of the Sea Perspective' in *The Centre for Studies and Research in International Law and International Relations* (Brill 2016); *Hirsi Jamaa v Italy* App no 27765/09 (ECHR, 23 February 2012).

12 See, for example, Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (OUP 2006); Neil Boister, 'Further reflections on the concept of transnational criminal law' (2015) 6 Transnational Legal Theory 9; Douglas Guilfoyle, (above n 6); Beth Simmons, Paulette Lloyd and Brandon Stewart, 'The Global Diffusion of Law: Transnational Crime and the Case of Human Trafficking' (2018) 72 International Organization 249.

13 Guilfoyle (above n 6) 187-9.

14 Boister (above n 11) 26.

Relying on custom to subsequently clarify ambiguity in the transnational crime instruments favours the sovereign interests of the dominant members of the international community,[15] as only few states have the resources to engage in maritime interdiction outside their territorial seas as a form of subsequent practice interpreting a treaty.

While stateless vessels do not have many champions on the international stage, the risks in covertly shifting the extent of coercive state power reaches beyond their decks. At the micro level, the rights of individuals have frequently been compromised by extensions of enforcement jurisdiction without the corresponding regulation and protection, particularly with the shift towards harsher border controls in the West. And at the macro level, instrumentally co-opting treaty drafting to promote domestic interests can eventually backfire, with initially hoodwinked states refusing to cooperate in the future.[16] Sandwiched between the two is the overburdening and distorting effect of compliance with prohibition regime obligations on the criminal justice systems of developing states.[17] Continually co-opting transnational criminal law to suit purely Western interests risks self-immolating the whole project.

This article argues that while new maritime threats require flexible interpretation of the law of the sea, any changes to extraterritorial enforcement powers must reflect the common understanding of states. Leaving revision of the law to instrumentally ambiguous treaty drafting and subsequent practice instead risks prioritizing the interests of powerful states at the expense of individual human rights and developing states. This article begins by explaining the application of extraterritorial criminal jurisdiction and jurisdiction in the law of the sea to stateless vessels (section 2), before tracking the cross-transposition of ambiguous terms through the relevant transnational crime instruments regulating smuggling by sea (sections 3-4), and examining how recent state practice, particularly on the part of the European Union (EU) in response to Mediterranean migrant crisis, has solidified an expansive approach to extraterritorial enforcement jurisdiction at odds with the law of the sea (section 5). The final section briefly canvasses the risks of developing transnational criminal law incoherently with the general principles underlying extraterritorial jurisdiction in international law.

15 Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia Journal of International Law 449, 519; Martti Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17 Cambridge Review of International Affairs 197, 198.

16 Andreas Kulick, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law' (2016) 59 German Yearbook of International Law 1, 7: Kulick gives the example of the semi-strategic ambiguity incorporated in the UNSC Resolutions on Libya used by France, the UK and the US to conduct airstrikes against Qaddafi's regime, which resulted in Russia vetoing subsequent UNSC resolutions (21-22).

17 Boister (above n 9) 38.

2. Interdiction of Stateless Vessels in International Law

The recent migrant crisis has exposed the unsettled nature of criminal jurisdiction over stateless vessels engaged in crime in international waters. Approximately 1.5 million people escaping conflict or poverty have reached Europe by sea since 2015.[18] Most of these migrants and asylum seekers have been transported across the Mediterranean from Turkey and the Magreb states on inflatable dinghies or wooden fishing boats by migrant smugglers.[19] In June 2015, the EU naval operation, EUNAVFOR MED Operation Sophia, was launched in response to the overwhelming numbers of people fleeing the Syrian conflict.[20] The mission's core mandate was to identify, capture and destroy vessels and weapons used by suspected migrant smugglers to 'disrupt the business model of human smuggling and trafficking networks'.[21] Operation Sophia is the latest of several naval operations commenced by the EU over the last decade to 'save lives' and 'strengthen border control' at sea.[22] In contrast to the often secretive, unilateral interdictions by individual states, their multilateral nature has required greater transparency about the legal bases permitting the operations in international waters. As a consequence, Operation Sophia has been carefully packaged as a legitimate extraterritorial action in accordance with international law.[23]

The legal instruments underpinning EUNAVFOR MED Operation Sofia rely on UNCLOS and the 2000 Migrant Smuggling Protocol for enforcement jurisdiction over stateless vessels suspected of smuggling in international waters. However, neither instrument explicitly provides clear enforcement powers beyond stop and search. Seizure and arrest is not provided for in UNCLOS and remains ambiguous in the protocol. The absence of an explicit jurisdictional basis in treaty law effectively delegates the establishment of jurisdiction to an underlying principle of customary international law.[24] But customary international law is silent on whether states may exert jurisdiction over stateless

18 UNHCR, 'Operations Portal: Refugee Situations' (22 July 2019) <https://data2.unhcr.org/en/situations/mediterranean> accessed 13 December 2019.

19 Operation Commander Enrico Credendino, 'EUNAVFOR MED Op SOPHIA, Six Monthly Report: 22 June to 31 December 2015' (*EUNAVFOR MED*, 29 January 2016) 6.

20 EUNAVFOR Med, 'Mission Factsheet' (13 June 2017) <https://eeas.europa.eu/sites/eeas/files/eunavfor_med_-_mission_13_june_2017_en.pdf> accessed 13 December 2019.

21 ibid; Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean, OJ L122/31 (Council Decision 2015/778) art 2.

22 European Commission, 'EU Operations in the Mediterranean Sea' (, 2016) < https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf> accessed 13 December 2019.

23 Council Decision (CFSP) 2016/118 of 20 January 2016 concerning the implementation by EUNAVFOR MED operation SOPHIA of United Nations Security Council Resolution 2240 (2015), OJ L23/63; European Parliamentary Research Service, 'At a Glance: EU mounts new maritime operation to tackle Mediterranean people traffickers' (*European Parliament,* 5 June 2015) <www.europarl.europa.eu/RegData/etudes/ATAG/2015/559489/EPRS_ATA%282015%29559489_EN.pdf > accessed 13 December 2019.

24 Rosemary Rayfuse, 'Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-flag State Enforcement in the High Seas Fisheries and Disarmament Contexts' (2005) 24 Australian Yearbook of International Law 181, 182.

vessels on the high seas or not.[25] Thus, having failed to find a base in other sources of jurisdiction, interpretations of Article 8(7) permitting coercive action over suspect vessels depend on the conceptual characterization of extraterritorial enforcement jurisdiction. While the requirement for a jurisdictional nexus for enforcement action is more consistent with the allocation of jurisdiction in customary law, recent treaty law and international practice indicates a shift towards a new exception to the express requirement of a jurisdictional nexus connecting the intercepting state to a suspect stateless vessel.[26]

2.1 Extraterritorial Criminal Jurisdiction

For international lawyers, the term jurisdiction functions to allocate competences and rights normally aligned to state sovereignty.[27] But jurisdiction is not a tangible object, but rather a 'omnibus' concept used to make sense of competing rights and responsibilities.[28] As a concept, however, it is confusing as 'jurisdiction' can refer to a territory, a polity, a foreign nation, the legal reach of a court or tribunal, or the relationship between the state and an individual.[29] Moreover the meaning and scope of jurisdiction can change, depending on the location and the field of law. Although appropriate allocations of jurisdiction are essential to prevent interference in the international affairs of other states and protect the equality of states,[30] abstract legal theorizing on jurisdiction as a whole is still surprisingly sparse.[31] Most scholars note simply that *Lotus* is highly confusing and generally disregarded, a permissive rule requires a connecting jurisdictional nexus, state practice has provided five more or less accepted heads of jurisdiction, and enforcement jurisdiction remains territorial.[32]

In international law, criminal jurisdiction is normally characterized as being two-pronged: jurisdiction to legislate and jurisdiction to enforce.[33] Prescriptive jurisdiction refers to the state's authority to

25 JPA François (Special Rapporteur), 'Report on the High Seas' (16 March 1950) UN Doc. A/CN.4/17, 6-7; International Law Commission, 'Yearbook of the International Law Commission 1956', UN Doc. A/3159, 284.

26 Patricia Mallia, *Migrant Smuggling by Sea* (Martinus Nijhoff 2010) 114.

27 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 106.

28 ibid; *Oppenheim's International Law* (9th edn, Longman 1992) 456.

29 Rain Liivoja, 'The criminal jurisdiction of states: a theoretical primer' (2010) 7 NoFo 25, 26.

30 *SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10; F.A Mann, 'The doctrine of international jurisdiction revisited after twenty years'(1984) 186 Collected Courses of the Hague Academy of International Law 20; *Oppenheim's International Law* (above n 27) 476.

31 For the few generalist studies on jurisdiction, see Mann, (above n 29) and Thomas Mann 'The doctrine of international jurisdiction revisited after twenty years' (1984) 186 Collected Courses of the Hague Academy of International Law; Michael Akehurst, 'Jurisdiction in International Law' (1973) 46 British Yearbook of International Law 145; Ryngaert (above n 8).

32 For example, Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed) *International Law* (4th edn, OUP 2014); Ryngaert (above n 8); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) chapter 4; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3 sep op Guillaume and joint sep op Higgins, Kooijmans and Buergenthal. See also the critique of Alex Mills, highlighting that scholarly work on jurisdiction is fairly limited and focuses on 'a fairly ritualized account of the standard 'heads' of jurisdiction: 'Rethinking Jurisdiction in International Law' (2014) 84 British Yearbook of International Law 187, 188.

33 *SS Lotus* (above n 29) at para. 18-20; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 62.

determine both the substance and scope of norms through the adoption of legislation.[34] Enforcement jurisdiction is the execution of those rules through police or judicial action. In the case of purely territorial offences, prescriptive and enforcement jurisdiction are coextensive,[35] but extraterritorially the ambit of permitted actions does not necessarily overlap. International law may permit a state to enact legislation over conduct or persons outside their territorial borders, but the sovereignty of other states prevents them from directly enforcing those laws.

Ignoring the muddling *Lotus* debate,[36] contemporary international law 'permits states to exercise jurisdiction (whether by way of legislation, judicial activity or enforcement) upon a number of grounds',[37] but as with all customs, their standing between states varies.[38] This means a state cannot safely assert jurisdiction without a sufficient connection to interests, people or activities falling within its sovereign sphere. State practice has confirmed territoriality and active nationality (perpetrator) as undisputable bases for jurisdiction.[39] States also routinely assert subjective and objective territorial jurisdiction for conduct initiated territorially and completed extraterritorially, and the reverse.[40] More recently, the assertion of extraterritorial prescriptive jurisdiction by a state where the victim is a national (passive personality), and if a crime threatens the internal or external security of a state, have crystalized as accepted heads of jurisdiction.[41] But no standard practice has coalesced around entirely objective territorial jurisdiction where only 'effects' are felt by the legislating state, despite promulgation by the United States,[42] and, at times, the EU.[43] Finally, international law recognizes universal jurisdiction only for the most heinous crimes of international concern, being grave war crimes[44] as well as the *sui generis* case of piracy on the high seas.[45]

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34 Council of Europe, European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction (1990) 4-5.

35 Boister (above n 9) 246.

36 Even the judges in the Wood Pulp Cases appear confused in the permissive/prohibitive rule debate in international law: *Ahlström Osakeyhtiö and Ors v Commission of the European Communities (Wood Pulp Case)* [1988] ECR 5193, 5212-3.

37 Malcolm Shaw, *International Law* (7th edn, CUP 2014) 488.

38 Akehurst (above n 30) 44. According to Akehurst, an act (or the exercise of jurisdiction) is contrary to international law if it usurps the sovereign powers of the host state. That is, if the acting state undertakes an activity pertaining to the host state. All criminal enforcement activities clearly fall within the sovereignty of the host state: 26.

39 'Harvard Research Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 American Journal of International Law 439 arts 3, 5; Shaw (above n 36) 488-497.

40 Staker (above n 31) 317.

41 *Arrest Warrants Case*, (above n 31) sep op Guillaume, at para. 4; joint sep op Higgens, Kooijmans and Buergenthal at para. 47.

42 Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 International and Comparative Law Quarterly 378.

43 Higgins, (above n 31), 75; see also *Wood Pulp Case* (above n 35).

44 M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Vanderbilt Journal of International Law, 82, 115-6; Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589, 591.

45 UNCLOS art 104.

2.2 Prescribing and Enforcing

Enforcement jurisdiction is generally characterized as being 'strictly territorial',[46] but this often confuses prerogative with scope. When discussing jurisdiction, courts and scholars predominantly note the requirement of a jurisdictional nexus between state and person or conduct, but do not elucidate whether this requirement applies to only prescriptive jurisdiction or also to enforcement actions. International case-law on enforcement jurisdiction has been sparse, leaving most of the heavy lifting to theorists.[47] As one of the few theorists to explicitly discuss enforcement jurisdiction in detail, F.A Mann sets out three rules governing the relationship between prescription and enforcement in international law.[48] Firstly, coercive action is only lawful when enforcing legislation enacted in accordance with international law. And secondly, even where a law is validly enacted, that does not in itself entitle the exercise of unlimited power to enforce that law.[49] The first rule relates to the prerogative for enforcement action and the second to geographical scope. Mann adds the final proposition that the ability to enforce legislation domestically does not entail possession of necessary legislative jurisdiction, and 'does not render the enforcement jurisdiction valid in public international law'.[50]

But terminological and conceptual misunderstandings have muddied the waters around prescriptive and enforcement jurisdiction. This partly arises from semantics; both the repetition of terms for different things and the use of different terms for the same thing. Thus 'having' jurisdiction can refer to the scope of a rule determined by a domestic legislature, but also to the limits imposed by international law on a state extending the scope of its laws.[51] On the other hand, lawyers often refer to states 'asserting' prescriptive jurisdiction and 'exercising' enforcement jurisdiction, when both enacting laws and applying them are in fact 'exercise' of jurisdiction.[52] Thus, despite Mann presuming otherwise, he is actually in agreement with Ian Brownlie about the parasitic nature of enforcement jurisdiction. For Brownlie there is:

> [N]o essential distinction between the legal bases for and limits of substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other. If the substantive jurisdiction is beyond lawful limits, than any consequent enforcement jurisdiction is unlawful.[53]

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46 See e.g., Mills (above n 31), 195; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735, 740.

47 For the few cases see *Lotus* (above n 29) and *Arrest Warrants* (above n 31).

48 Mann (above n 29) 34-35.

49 Erik Jaap Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 192; Klein (above n 32) 62-63.

50 Mann (above n 29) 34-35. Of course countries can choose to disregard international law. A law can be breach international law and still be valid from a domestic perspective. In 'The doctrine of jurisdiction in international law', Mann also states 'it is hardly possible for [a state] to enjoy enforcement jurisdiction, when it is without legislative jurisdiction' (above n 30) 128.

51 Liivoja (above n 28) 54.

52 cf Council of Europe, European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction (1990) 4-5.

53 Brownlie (above n 26) 311.

Brownlie was not referring to geographical reach (as Mann assumed) but the legal basis; that valid enforcement jurisdiction presupposes valid legislative jurisdiction.[54] By replacing 'enforcement' and 'prescriptive' with less loaded terms, Liivoja helpfully explains that 'a rule of adjudication is possible only where an underlying rule of conduct exists'.[55]

Roger O'Keefe, on the other hand, explicitly rejects the dependence of enforcement authority on prescriptive authority.[56] He contends that 'jurisdiction to enforce is […] strictly territorial' to refer to both prerogative and scope. For O'Keefe, jurisdiction to prescribe and enforce 'are logically independent of each other'.[57] Thus on his account, a state can territorially enforce a law based on an exorbitant exercise of prescriptive jurisdiction without breaching any 'rule of international law governing jurisdiction to enforce'.[58] A state may enact and enforce its laws as it chooses (subject only to its treaty commitments and human rights obligations).[59] As no sovereign toes are stepped on (or foreign sovereign powers usurped),[60] he presumes that no international rules are breached. While he is correct that the legality of enforcement action cannot affect the legality of prescriptive action, it is not because the two competences are autonomous, but because enforcement is parasitic upon prescription.

O'Keefe's interpretation is important, as, if correct, it would justify the use of enforcement powers over stateless vessels on the high seas without prescriptive jurisdiction being explicitly granted. If the high seas are conceptualized as *res communis*, with an underlying concurrent jurisdiction shared by all states,[61] and enforcement jurisdiction is not logically or legally dependent on prescriptive jurisdiction, then theoretically the Migrant Smuggling Protocol could provide for enforcement actions over stateless vessels in international waters, even without prescriptive jurisdiction or customary universal jurisdiction *qua* piracy being explicitly granted.

2.3 Stateless Vessels in the Law of the Sea

Interdiction of foreign vessels at sea requires a valid legal basis. Jurisdiction at sea is divided into zones of competence for coastal states, flag state jurisdiction and limited treaty-based extensions of

54 Liiovja (above n 28) 54.

55 ibid 54. As Liiovja explains one has to first ask 'whether the criminal law of a particular state actually applies to certain behavior. If it does, then the next question is a procedural one: which is the appropriate court? The question of the jurisdiction of a court is thus parasitical upon the question of applicability (or scope, or ambit, or incidence) of the substantive law: (above n 28) 35.

56 O'Keefe contends the judges in Attest Warrant inaccurately elide the concepts of prescriptive and enforcement jurisdiction: (above n 45) 735, 749-50; cf Cassese (above n 43) 593.

57 O'Keefe (above n 45) 741.

58 ibid.

59 Staker (above n 31) 316.

60 Akehurst (above n 30) 147.

61 Daniel Patrick O'Connell, *The International Law of the Sea* (OUP 1982) 792-6; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 342.

authority.[62] Vast amounts of the ocean are international waters, falling outside the jurisdiction of any one state.[63] The rules regulating state jurisdiction are complex because of the differing rights and obligations in each zone, separately overlaid by flag state jurisdiction. States can rely on a variety of legal bases to interdict smuggling vessels at sea, including flag state jurisdiction or authorization, coastal state powers or search and rescue obligations for vessels in distress.[64] Enforcement action at sea takes a different form than on land, with the range of standard actions including 'surveillance, stopping and boarding vessels, search or inspection, reporting arrest or seizure of persons and vessels, detention, and formal application of law by judicial or other process, including imposition of sanctions'.[65]

Stateless smuggling vessels fall into a jurisdictional lacuna in the law of the sea. UNCLOS, which codified the customary law regulating the high seas, contains very few provisions on enforcement within coastal state jurisdiction, and practically nothing on enforcement beyond those zones.[66] UNCLOS grants only very limited general enforcement powers over non-national vessels in international waters. Article 110 permits board and search on the high seas to establish piracy, slave trade, unauthorized broadcasting, concealed nationality and statelessness, but not for further action once established. Further enforcement action on the high seas is only explicitly permitted in the case of piracy via Article 105 and unauthorized broadcasting via Article 109. The former codifies the common jurisdiction over piracy in customary law, and the latter permits arrest and seizure where a jurisdictional nexus is verifiable. But UNCLOS makes no similar explicit provision for seizure or destruction of stateless vessels.

Neither migrant smuggling nor stateless vessels attract universal jurisdiction, as the former is not a core international crime and the latter is not a crime at all. Confusion surrounding interdiction of stateless vessels stems partly from their unsettled status in the law of the sea, as well as the multiple terms used to designate vessels of uncertain nationality.[67] While customary law obliges states to set conditions for granting nationality to ships, it does not require ships to actually possess nationality.[68] The conditions for granting nationality are left wholly to municipal law, which often does not require registration of small craft.[69] Thus despite frequent conflation of the terms, being 'unflagged' or unregistered is not the same as being stateless,[70] instead true 'statelessness' only arises when a vessel has no

62 Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007).

63 UNCLOS art 89; C. John Colombos, *The International Law of the Sea* (4th edn, Longmans 1959) 54-55.

64 UNCLOS arts 23, 25, 92; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entry into force 25 May 1980) 1184 UNTS 278 ('SOLAS'); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entry into force 22 June 1985) 405 UNTS 97 ('SAR').

65 William Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (OUP 1994) 303.

66 ibid.

67 JPA François (Special Rapporteur), 'Report on the High Seas' (16 March 1950) UN Doc. A/CN.4/17, 6-7.

68 Convention on the High Seas (adopted 29 April 1958, entry into force 30 September 1962) 450 UNTS 11, art 5(1); UNCLOS art 9(1); International Law Commission, Yearbook of the International Law Commission 1955, UN Doc. A/CN.4/SER.A/1955, 13.

69 Herman Meijers, *The Nationality of Ships* (Martinus Nijhoff 1967) 147.

70 UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240, para. 5; Guilfoyle (above n 6) 185.

jurisdictional links to a state or may be 'assimilated' to statelessness because it sails under two flags interchangeably.[71] However labelled, no well-known general principle of customary international law permits seizure of stateless vessels simply by virtue of being stateless, leaving the issue to be resolved at the abstract level.[72]

This legal lacuna has provoked two alternative positions on stateless vessels which result in diametrically opposed interpretations of Article 8(7) of the Migrant Smuggling Protocol.[73] As treaties cannot technically extend jurisdiction beyond the states parties,[74] the protocol relies on an underlying jurisdictional basis in custom or from general principles of international law. The first position, advocated by the US and increasingly by the EU, holds that absent a protective flag state, any state may seize a stateless vessel on the high seas.[75] The alternate position requires a jurisdictional nexus between intercepting state and vessel for the valid exercise of enforcement jurisdiction.[76] This tension feeds into the allocation of extraterritorial jurisdiction in the protocol, with coercive measures permitted depending on the characterization of criminal enforcement jurisdiction in international law. While the requirement for a jurisdictional nexus is more in keeping with the general principles of international law governing jurisdiction and treaty practice, recent state practice indicates a developing exception to the requirement for a jurisdictional connecting point between the intercepting state and suspect stateless vessel.[77]

3. Interdiction of Migrant Smuggling Vessels in Transnational Criminal Law

Western states have relied on ambiguity in the Migrant Smuggling Protocol to interdict vessels engaged in migrant smuggling where nationality is uncertain. Article 8(7) of the protocol permits intercepting states to take 'appropriate measures' over vessels after establishing smuggling and statelessness. But it is unclear whether this refers to the unilateral exercise of criminal jurisdiction or only where alternative jurisdictional bases exist entitling enforcement action, such as coastal state

71 UNCLOS arts 91 and 92.

72 cf Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 International and Comparative Law Quarterly 378, 388.

73 Ann Gallagher and Fiona David, *International Law of Migrant Smuggling* (CUP 2014) 422.

74 Higgins (above n 31) 63-4; Cassese (above n 43) 594; Staker (above n 31) 323.

75 *Naim Molvan v Attorney-General for Palestine* [1048] AC 351; *US v Marino-Garcia* 679 F.2d 1373 (1982); *Shaw* (above n 36) 457; USA Navy, *The Commander's Handbook on the Law of Naval Operations* (2007), 3-12; Commission of the European Communities, *Study on the international law instruments in relation to illegal immigration by sea* (SEC(2007) 691 (15 May 2007) at para. 2.2.2.

76 RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press 1999) 214; Malcolm Evans, 'The Law of the Sea' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2010); Guilfoyle (above n 7) 216-8.

77 Mallia (above n 25) 114.

jurisdiction or the nationality of offenders aboard. Historically, few states have asserted universal jurisdiction over stateless vessels on the high seas, instead recognizing that crime on stateless vessels simply fell into an unfortunate jurisdictional lacuna.[78] The failure to expressly permit seizure and arrest in Article 8(7) indicates that states parties were not prepared to remedy this by extending criminal enforcement jurisdiction to stateless vessels at the time of drafting.[79] The preparatory works to the protocol reveal no common plan to modify the scope of enforcement jurisdiction extraterritorially. Instead, tracing the transposition of the provisions dealing with interdiction at sea indicates the ambiguity was strategically infused by several Western states across the relevant transnational crime instruments to give the impression of expanded enforcement powers.

Constructive ambiguity, a term purportedly coined by Kissinger, refers to the process of papering over disagreement between parties during negotiations by using ambiguous or vague language to accommodate divergent perspectives.[80] In treaty drafting, these different visions for the treaty are 'ultimately codified in terse, often vague or ambiguous treaty provisions that reflect a series of compromises'.[81] While little theorized, relying on vague and ambiguous language is a well-known tactic to prevent negotiations from stalling.[82] Resorting to ambiguity can have both positive and negative consequences. In a culturally pluralistic world, it allows for divergent norms to be ascribed to a particular term, such as 'family' in Article 23 of the International Covenant on Civil and Political Rights.[83] Where treaty provisions are directed towards purely domestic realization, this inclusive function of constructive ambiguity permits ascription by a larger number of states.[84] Flexible language defers confirmation of meaning to subsequent state practice, international agreements or judicial review.[85]

On the other hand, vague and ambiguous drafting can lead to confusion, obscurity and conflict, particularly where the preparatory works to the treaty fail to reveal the intended meaning of the parties, or no obvious review mechanism exists at the international level.[86] Recent empirical research

78 ECOSOC Commission on Narcotic Drugs, 'Report of the meeting of the Working Group on Maritime Cooperation', UN Doc E/CN.7/1995/13 in Barbara Kwiatkowska et al. (eds), *International Organizations and the Law of the Sea: Documentary Yearbook 1999* (Martinus Nijhoff Publishers 1999) 473, 477.

79 Gallagher and David (above n 72) 245.

80 Dan Snodderly (ed), *Peace terms: Glossary of terms for conflict management and peacebuilding* (United States Institute for Peace 2011) 16; Elie Friedman, 'Evasion strategies in international documents: when 'constructive ambiguity' leads to oppositional interpretation' (2017) 14 Critical Discourse Studies 385.

81 Kevin Cope and Mila Versteeg, 'Review Essay: The interpretation of international law by domestic courts' (2017) 111 American Journal of International Law 538, 541.

82 Discussed more often in conflict resolution documents than treaty drafting: see e.g., Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 166; Friedman (above n 79) 385.

83 International Covenant on Civil and Political Rights (adopted 19 December 1966, entry into force 23 March 1976) 999 UNTS 171 ('ICCPR') art 23; Kulick (above n 15) 11.

84 ibid.

85 George Walker, *Definitions for the Law of the Sea: Terms not defined by the 1982 Convention* (Martinus Nijhoff 2012) 48.

86 VCLT art 32. This was particularly at issue in the drafting of UNCLOS. Many of the negotiations were informal and the meeting records were not recorded in writing: Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 218-219.

by Linos and Pegram reveals how indeterminate treaty language can lead to poorer implementation and compliance by states.[87] Opacity in drafting can also be inadvertent, intentional or semi-strategic. While in some situations terms are left intentionally opaque to facilitate consensus in complex multilateral negotiations, ambiguity can also be covertly inserted by only some parties to the treaty. Kulick labels this kind of ambiguity 'semi-strategic',[88] the deliberate covert creation of legal loopholes or platforms for future action not intended or anticipated by all parties. But such covert ambiguity risks undermining the legitimacy of international agreements. Consenting to be bound to treaties is what gives the agreement 'normative force'.[89] And while universal acceptance of subsequent interpretations is not necessary for the stable development of international norms, duplicity in drafting and subsequent practice does expose international law to charges of hegemony and risks undermining constructive future inter-state cooperation.

3.1 Ambiguity in the Migrant Smuggling Protocol

The Migrant Smuggling Protocol establishes a cooperation regime between states to combat migrant smuggling by sea. Premised on facilitating law enforcement cooperation, Article 8 permits states to request flag state authorization to take enforcement measures against foreign vessels suspected of migrant smuggling and for indeterminate measures against stateless vessels. Article 8(7) provides:

> A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

It is not clear from the ordinary meaning of the provision whether it permits states to exercise criminal enforcement jurisdiction over stateless vessels. Reference to states taking 'appropriate measures' after confirming smuggling implies further enforcement powers beyond board and search, but not whether these powers accrue to any intercepting state or only where an independent jurisdictional nexus exists.

Reading the protocol coherently with jurisdiction in law of the sea, supports a restricted allocation of enforcement powers where an independent jurisdictional nexus is established.[90] Firstly, Article 8(7) is not restricted to the high seas, thus appropriate measures taken in accordance with international law can refer to a coastal state's functional jurisdiction to prevent passage which is not innocent into its territorial sea, or to prevent infringements of immigration regulations in the continuous

87 Katerina Linos and Tom Pegram, 'The Language of Compromise in International Agreements' (2016) 70 International Organization 587.

88 Kulick (above n 15) 7.

89 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2013) 63.

90 United Nations Office on Drugs and Crime ('UNODC'), *Model Law against the Smuggling of Migrants* (Vienna 2010) 84: 'Articles 7-9 of the Smuggling of Migrants Protocol should be read in the context of the international law of the sea[…] in drafting national laws[...] states parties will need to ensure consistency with' UNCLOS.

zone.[91] The wording further encompasses situations where the intercepting state suspects both smuggling and statelessness, but following board and search uncovers nationality, in which case 'appropriate measures' refers to a subsequent request for flag state authorization to take further enforcement action.[92] Further, appropriate measures have to be 'in accordance with relevant domestic and international law'.[93] As discussed above, this divorces the legal sources of enforcement and prescriptive jurisdiction in international law. Presuming enforcement jurisdiction is parasitic on prescriptive jurisdiction means 'appropriate measures' can only authorize general coercive powers if the Migrant Smuggling Protocol or its parent convention, the United Nations Convention Against Transnational Organized Crime (UNTOC),[94] clearly provided for prescriptive jurisdiction or an underlying basis for universal jurisdiction over migrant smuggling or stateless vessels existed in customary international law.

But neither UNTOC nor the Migrant Smuggling Protocol clearly extend jurisdiction to most instances of migrant smuggling at sea. Article 15 UNTOC, which also applies to the protocol,[95] sets out obligatory and optional bases of jurisdiction, validating the assertion of extraterritorial jurisdiction by states parties.[96] But each extraterritorial extension of jurisdiction in Article 15 requires a jurisdictional nexus connecting the state to the offence. UNTOC obliges states parties to establish jurisdiction over offences committed within their state territory, or aboard a flag state vessel, and permits establishment of jurisdiction over offences committed by or against national or by permanent residents.[97] Article 15(2)(c) also tolerates a limited form of expanded territorial jurisdiction for the offences of participating in a criminal group and inchoate money laundering where the offence is committed outside the state party's territory with a view to omission of a serious crime within its territory. Thus states can only criminalize extraterritorial smuggling at sea offences where a national is a victim of smuggling or a national or person with habitual residence engages in smuggling. Unilateral powers over suspect stateless smuggling vessels therefore appear limited to board and search from Article 110 UNCLOS, or dependent on 'appropriate measures' in Article 8(7).

Unfortunately, the preparatory works to the Migrant Smuggling Protocol throw no light on the intended scope of the term 'appropriate measures'.[98] No definition is provided in the protocol or UN-

91 UNCLOS arts 25 and 33. This is the interpretation given to the similar term referring to cooperation to suppress unflagged vessels engaged in narcotics smuggling in United Kingdom legislation implementing the 1988 Narcotics Convention: Criminal Justice (International Co-operation) Act 1990 [United Kingdom] s 20; Explanatory Notes Policing and Crime Act 2017 [United Kingdom] 28.

92 Migrant Smuggling Protocol art 8(2).

93 Migrant Smuggling Protocol art 8(7).

94 United Nations Convention Against Transnational Organized Crime (adopted 12 December 2000, entry into force 29 September 2003) 2225 UNTS 209 ('UNTOC').

95 Migrant Smuggling Protocol art 1(3); although McClean notes the interaction between art 15 UNTOC and the protocol is somewhat confused: David McClean, *Transnational Organized Crime: A Commentary to the UN Convention and its Protocols* (OUP 2007) 394.

96 Boister (above n 9) 250-251.

97 UNTOC art 15(2)(a) and (b).

98 Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations 2006) 495-506 ('*Travaux préparatoires*').

TOC, the non-authoritative interpretative guides provide no guidance and the *travaux préparatoires* reveal nothing of the drafters intentions.[99] The term is also used in Article 8(2) for foreign flagged vessels. But in this context the term is deliberately left open to reflect the full-range of enforcement measures flag states can authorize on a case-by-case basis. The term 'appropriate measures' was first introduced during the drafting of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Narcotics Convention) to facilitate agreement between states on Article 17 on illicit traffic by sea, but also in the context of flag state authorization. The *travaux préparatoires* do not indicate whether states parties simply failed to account for jurisdiction over stateless vessels, or, aware of the jurisdictional lacuna, consensually delegated resolution of the issue to subsequent practice, or whether the ambiguity was covertly introduced by select states. But tracing the evolution of the term across related transnational crime instruments suggests the ambiguous drafting surrounding stateless vessels in recent treaty practice was a deliberate technique by some states parties to expand enforcement powers extraterritorially.

3.2 Ambiguity in Antecedent Treaty Practice

UNCLOS provided a platform for claims of expanded enforcement powers in subsequent treaty practice by firstly expanding the right of visit to stateless vessels, and secondly through the introduction of a novel cooperation obligation for suppression of illicit traffic in narcotic drugs on the high seas. As discussed above, Article 110(1)(d) permits states to stop and search all non-national vessels suspected of being without nationality, but includes no further enforcement powers.[100] Some commentators have argued that this silence reflects a pre-existing universal jurisdiction over stateless vessels in customary international law, effectively claiming the drafters felt its codification to be simply unnecessary.[101] But given that UNCLOS makes explicit provision for criminal enforcement jurisdiction over piracy, despite the undisputed universal jurisdiction in customary law, this interpretation is unlikely.[102]

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99 Neither the Legislative Guide to UNTOC or the UNODC Model Law on migrant smuggling discuss what actions might constitute 'appropriate measures' in the context of stateless vessels: Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto (UNDOC 2004) 386-388; Model Law against the Smuggling of Migrants (UNODC 2010) 83-92; Travaux préparatoires, 495-506.

100 Neither the official travaux préparatoires and unofficial records of the treaty negotiations explain the somewhat incoherent treatment of stateless vessels in UNCLOS. As no detailed formal records were kept of the drafting proceedings, it is not possible to establish whether the lop-sided inclusion of stateless vessels in art 110 was the result of a negotiated compromise or simple oversight. Unofficial records of the drafting sessions reveal stateless vessels first appear in a 'blue paper' from an informal consultative group in Geneva in 1975, and pop in and out of the draft provisions before settling in the final text of art 110. No evidence suggests further enforcement powers were envisaged by the drafters: C.2/Blue Paper No. 5, C.2/Blue Paper No.9 and C.2/Blue Paper No.9.Rev in Renate Platzöder, *The United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (vol IV, Oceana Publications 1982).

101 See Deirdre Warner-Kramer and Krista Canty, 'Stateless Fishing Vessels: The Current International Regime And a New Approach' (2000) 5 Ocean and Coastal Law Journal 227, 231; Andrew Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: an appraisal under Domestic and International Law' (1982) 13 Journal of Maritime Law and Commerce 323, 337. Sometimes stateless vessels are fallaciously analogized to piracy, a second *hostis humani generis,* as a means to extend universal jurisdiction: Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 Harvard International Law Journal 183.

102 UNCLOS art 107.

UNCLOS also introduced a separate novel provision creating an obligation on states to cooperate in the suppression of illicit traffic in narcotic drugs on the high seas, where contrary to international conventions. Article 108(2) provides that states which have reasonable grounds for believing a ship flying its own flag is engaged in drug smuggling may request the cooperation of other states to suppress such traffic on the high seas. This enables states to request assistance, but does not place any obligation on the requested state. Further, it only refers to the requesting states' own vessels, and is thus not applicable to where a state seeks to intercept a vessel flying the flag of another state or stateless vessels.

This cooperation obligation was expanded and modified in the 1988 Narcotics Convention. Article 17 establishes a cooperation regime to facilitate law enforcement action against vessels engaged in drug smuggling. Article 17(2) replicates Article 108 UNCLOS, but shifts the emphasis from suppressing illicit traffic to suppressing the use of vessels in drug smuggling. Article 17, however, goes beyond Article 108 UNCLOS, with no explicit restriction in its geographic scope and applying also to vessels 'not displaying a flag or marks of registry'. Despite no coextensive establishment of prescriptive jurisdiction in Article 4 1988 Narcotics Convention, the reference to 'suppressing' a vessel's use in Article 17 has been interpreted as at least permitting the seizure of stateless vessels engaged in smuggling, if not also prescribing and prosecuting drug offences committed aboard.[103]

The unorthodox language in Article 17(2) is worth noting. The Article does not refer to requests for assistance over 'vessels without nationality', which is the standard term in international law for stateless vessels, but for the overlapping category of unflagged and unmarked vessels.[104] In treaties, domestic legislation and common parlance, 'flagged', registration and documentation are all substituted for nationality. But flying a flag is only an indication of nationality, not determinative.[105] Thus, arguably Article 17(2) is not making reference to interdiction of stateless vessels at all. It merely acknowledges the right of visit contained in Article 110 UNCLOS to ascertain whether a suspect vessel is stateless; if, instead, foreign nationality is discovered, the intercepting state can request that flag state for authorization for enforcement actions as set out in Article 17(3) and (4). By conflating 'unflagged' and 'unregistered' with true statelessness, states are able to extend the reach of Article 110 powers.[106]

But the real contribution of the 1988 Narcotics Convention in infusing ambiguity into assertions of extraterritorial enforcement jurisdiction, is not the purported seizure power in Article 17(2), but the introduction of the open and undefined term 'appropriate measures' in Article 17(3) and (4). Article 17(3) provides that where a party has reasonable grounds to suspect that a foreign flagged vessel 'ex-

103 Guilfoyle (above n 60) 17.

104 Council of Europe, Explanatory Report to the Agreement on Illicit Trafficking by Sea, implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Strasbourg 1995) 10.

105 O'Connell (above n 60) 752.

106 See for example, US Navy, 'Commander's handbook'; European Commission, Staff Working Document, 'Study on the International Law Instruments in Relation to Illegal Immigration by Sea' SEC(2007) 691, 15 May 2007; Maritime Powers Act 2013 (Cth) [Australia] s 21(1).

ercising freedom of navigation' is engaged in illicit traffic, it may notify the flag state and, if receiving confirmation of registry, request subsequent authorization to 'take appropriate measures' over the vessel. The final draft deliberately omitted the word 'seizure' found in earlier versions, following concerns by states about encouraging use of force.[107] Appropriate measures are dependent on flag state authorization, with each measure disjunctively relying on separate authorization.[108] Only the Argentinian delegate to the negotiations observed that with the replacement of seizure, 'it was no longer clear what "appropriate action" mentioned in paragraph 4(c) was'.[109] Article 17 thus introduced a new term into the lexicon of transnational criminal law, with no agreed meaning or contours. Typical of drafting in transnational crime instruments, both the format of Article 17(4) and the term 'appropriate measures' were reused in Article 8(7) of the Migrant Smuggling Protocol, which sets out enforcement measures states may take over stateless vessels suspected of smuggling migrants by sea.

International practice directly subsequent to the 1988 Narcotics Convention shows that states did not recognize Article 17(2) as permitting interdiction of stateless vessels engaged in drug smuggling. However, states were concerned with the jurisdictional gap allowing stateless vessels to operate with impunity.[110] In 1995, the Council of European States attempted to fill the jurisdictional gap through the Agreement on Illicit Traffic by Sea, aimed at maximizing law enforcement efforts against drug smuggling.[111] The agreement requires states parties to establish prescriptive jurisdiction in their domestic legal codes over the 1988 Narcotics Convention offences when committed on board vessels without nationality, but provides no express coextensive enforcement jurisdiction.[112] Given the limited utility of the provision, it seems likely it was included to strategically close the jurisdictional gap. Although not widely ratified, the inclusion of a mandatory provision establishing prescriptive jurisdiction in the 1995 Agreement could be claimed as subsequent practice supporting a more lenient application of the jurisdictional nexus requirement.

4. Cross-Pollination in Transnational Criminal Law

Transnational crime instruments cross-pollinate; drafters have recycled and reused terms, language and norms across all the transnational crime treaties. Diffusion of terms and norms across instru-

107 Official Records: 'United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (vol II, 29th meeting, UN Doc E/CONF.82/16/Add.1) at para. 8. States parties repeatedly expressed strong concerns throughout the negotiation of the 1988 Narcotics Convention not to disturb the jurisdictional balance achieved in UNCLOS.

108 UN, 'Commentary on the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (Vienna 1998) UN Doc E/CN.7/590, 330.

109 Official Records II (above n X) at para. 18.

110 United Nations Economic and Social Council (ECOSOC) Commission on Narcotic Drugs (above n 77) 473, 477; UNODC, 'Practical Guide for competent national authorities under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988' (New York 2004) 27.

111 William Gilmore, 'Narcotics interdiction at sea' (1996) 20 Marine Policy 3, 5.

112 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Council of Europe, ETS No. 156, (Strasbourg, 31 January 1995) art 3(3).

ments reflects the synergic, dialectical nature of treaty drafting with states parties being more willing to accept familiar terminology from existing treaties than novel provisions.[113] Repeating already existing language saves times and effort for drafters and ensures continuity of obligations and coherent development within the field of transnational criminal law. But focusing only on chronological shifts in language risks overlooking the hegemonic nature of norm transfer, particularly the migration and modification of extraterritorial powers, across the transnational crime instruments.[114]

Looking back over the wider drafting history of the Migrant Smuggling Protocol reveals that ambiguity around legitimate interdiction powers was strategically introduced into Article 8(7) by the US, coherent with Andreas and Nadelmann's critique of the 'Americanization' of global law enforcement practices.[115] Since the 1970s, the US has relied on bilateral treaties and dubious extraterritorial legislation to extend the reach of its criminal justice system,[116] and further resorting to strategic treaty practice and international diplomacy at the multilateral level to project its interpretation of extraterritorial enforcement jurisdiction globally.[117] Recent treaty practice towards stateless vessels reflects this general policy, with interdiction provisions increasingly mirroring American claims to universal jurisdiction over stateless and unflagged vessels. This unidirectional process of norm transfer fits within broader critiques about the 'democratic deficit in the development of transnational criminal law'.[118]

4.1 Drafting History of the Migrant Smuggling Protocol

The appearance of expanded interdiction powers over stateless smuggling vessels in the Migrant Smuggling Protocol resulted from strategic transpositions, reinterpretations and adjustments of provisions across UNCLOS, the 1988 Narcotics Convention and the International Maritime Organisation (IMO) Interim Measures Circular. While the preparatory works to the three instruments disclose very little about the origins of the ambiguity, looking slightly further afield reveals the pivotal role of the US in promoting the final text of Article 8(7). In response to domestic concerns about irregular Chinese migration in the early 1990s, the US sponsored two resolutions at the IMO and the

113 Cecily Rose, *International Anti-Corruption Norms* (OUP 2015) ch 3.

114 This builds on the work of Paulette Lloyd, Beth Simmons and Brandon Stewart, examining norm diffusion in transnational criminal law: 'Combatting Transnational Crime: The Role of Learning and Norm Diffusion in the Current Rule of Law Wave' in Michael Zurn et al. (eds), *Rule of Law Dynamics* (CUP 2012) 154.

115 Andreas and Nadelmann (above n 11) 17, 105; Ethan Nadelmann, *Cops Across Borders* (Pennsylvania University Press 1993) 470.

116 William Gilmore, 'Narcotics interdiction at sea: UK-US cooperation' (1989) 13 Marine Policy 219; see for example the 2008 Drug Trafficking Vessel Interdiction Act, which claims extraterritorial jurisdiction over any stateless semisubmersible and submersible vessels attempting to evade detection on the high seas, arguably exceeding congressional power and inconsistent with international law: Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction overs Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act' (2012) 67 University of Miami Law Review 255.

117 Andreas and Nadelmann (above n 11) 17, 105.

118 Boister (above n 11) 27.

United Nations General Assembly (UNGA) in quick succession, promoting extended interdiction powers over stateless vessels engaged in migrant smuggling.[119] Through strategic diplomatic advocacy, the US was able to capture the drafting discourse to promulgate its international law enforcement agenda abroad.

In June 1993, a Chinese smuggling vessel, the *Golden Venture*, was deliberately stranded on a New York beach endangering the 286 would-be migrants crowded aboard.[120] The shipwreck heightened domestic American fears of uncontrolled Chinese migration, provoking the release two weeks later of a presidential action plan to combat Asian alien smuggling.[121] Focusing on the role of organized criminal groups and the need to enhance criminal justice responses, the action plan sets out Washington's approach to 'preempt, interdict and deter alien smuggling into the U.S.'. Emphasized in the plan is the need for international advocacy with 'foreign governments and international organizations' to promote flag state cooperation in criminalizing alien smuggling and interdicting 'smuggled aliens as far as possible from the US border'.[122] Several months later, the US submitted a draft resolution on 'prevention of alien smuggling' to the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), which was quickly elevated to the UNGA.[123] As Gallagher and David observe, many of the UNGA measures resurfaced in the Migrant Smuggling Protocol, including the need for measures to prevent and respond to smuggling by sea.[124]

Immediately parallel to the diplomatic advocacy at the United Nations (UN), the US submitted a further resolution to the IMO Assembly on 'Enhancement of Safety of Life at Sea by the Prevention and Suppression of Alien Smuggling by Ship'.[125] Almost identical to the American draft, the Assembly adopted Resolution A.773(18) two months later.[126] Resolution A.773(1) formed the basis for the 1998 Circular 896 on Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea.[127] Paragraph 16 of the Interim Measures requires states to take 'appropriate action' over stateless vessels found to be engaged in unsafe practices. Many of the Interim Measures' operative provisions are patterned on Article 17, with paragraph 16 replicating Article 17(3). Three consecutive working groups were responsible for drafting the resolutions and circulars on the trafficking and transport of illegal migrants by sea, each of which was chaired by the US Navy Commander Raul Pedrozo.[128] Some working group delegates were concerned the proposed measures

119 Gallagher and David (above n 72) 29.

120 Patrick Keefe, 'The Snakehead' (*The New Yorker,* 24 April 2006).

121 Presidential Decision Directive/NSC-9 on Alien Smuggling (The White House, Washington 18 June 1992) available at <https://fas.org/irp/offdocs/pdd/pdd-9.pdf> accessed 13 December 2019.

122 ibid 2.

123 United States of America, Draft Resolution, Prevention of Alien Smuggling (29 October 1993) UN Doc. A/C.3/48/L.9.

124 UNGA,' Prevention of the smuggling of aliens' GA Res 48/102 (8 March 1994) UN Doc. A/RES/48/102; Gallagher and David (above n 72) 31.

125 Gallagher and David (above n 72) 29. The draft assembly resolution is not publically available.

126 IMO (Assembly), 'Enhancement of Safety of Life at Sea by the Prevention and Suppression of Unsafe Practices Associated with Alien Smuggling by Ships' (4 November 1993) IMO Resolution A.773(18).

127 IMO (Maritime Safety Committee), 'Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea' (16 December 1998) IMO Doc. MSC/Circ.896.

128 Raul Pedrozo, 'International Initiatives to Combat Trafficking of Migrants by Sea' in Myron Nordquist and John Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Brill 1999) 57-59.

were inconsistent with UNCLOS, and the IMO should not be pre-empting the UN Commission's work on the transnational organized crime convention. Despite this, it was decided to promote the circular to the CCPCJ at the first negotiating session in Vienna in January 1999 as a potential model for the protocol.[129]

The original draft protocol articles for combatting smuggling by sea were based on a proposal submitted by Italy and Austria to the first negotiating session.[130] Different from the final text, the draft articles were directed towards preventing the irregular entry of migrants into territorial waters, with enforcement actions requiring a clear jurisdictional link between the suspect vessel and intercepting state.[131] Intercepting states needed to substantiate that either the vessel was 'undoubtedly bound for its coasts' or was 'armed or governed or manned by nationals' before taking action in international waters. Permitted enforcement actions were also concretely specified, with states limited to stopping, boarding and diverting vessels. Vessels that refused inspection, or where inspection revealed irregularities, could be ordered back to their port of departure, to the nearest port of a contracting party or to a prescribed destination.[132] The proposed measures both reflected existing powers in UNCLOS to prevent infringements of immigration laws and were coherent with the general international laws regulating extraterritorial prescriptive jurisdiction.[133]

But the draft provisions underwent radical surgery at the fourth negotiating session, shifting from determinate to ambiguous language. The *travaux préparatoires* reveal the new draft provisions on migrant smuggling by sea were drawn from Article 17 of the 1988 Narcotics Convention, with language of Article 8(7) being derived from paragraph 16 of the interim measures.[134] Comparing the three provisions shows how the language journeyed from Article 17 of the 1988 Narcotics Convention, via paragraph 16 of the IMO Circular to Article 8(7) of the Migrant Smuggling Protocol. With each shift the language incrementally shifted its scope and application, providing stronger footholds for expansive reinterpretation. Paragraph 16 of the interim measures replicates five elements of Article 17(3) and (4) of the 1988 Narcotics Convention: reasonable grounds for suspicion, vessel type, offence or activity, investigation, and enforcement action. Article 8(7) of the Migrant Smuggling Protocol then replicates paragraph 16 of the IMO Circular, but replaces the activity of 'engaged in unsafe practices associated with trafficking and transport of migrants by sea' with 'engaged in smuggling of migrants'. The only differences between Article 17 of the 1988 Narcotics Convention on the one hand, and paragraph 16 of the IMO Circular and Article 8(7) of the Migrant Smuggling Protocol on the other, is the requirement for flag state authorization in the former and the stipulation that appropriate measures shall be in accordance with domestic and international law in the latter two.

129 ibid 59, 81.

130 Draft elements for an international legal instrument against illegal trafficking and transport of migrants (proposal submitted by Austria and Italy 15 December 1998) UN Doc. A/AC.254/4/Add.1 ('*Draft Elements*').

131 Draft Elements art M.

132 Draft Elements arts G and I.

133 UNCLOS art 33.

134 Travaux préparatoires 496.

	UNCLOS	1988 Narcotics Convention	IMO 1998 Circular 896 Interim Measures	Migrant Smuggling Protocol
Suppression obligation	Art 108(1)+(2): cooperate to suppress illicit traffic in illegal drugs on high seas	Art 17(2): cooperate to suppress use of national or unflagged vessels engaged in illicit traffic		Art 7: cooperate to prevent and suppress smuggling of migrants by sea
Appropriate measures		Art 17(3)+(4): 'appropriate action' over foreign flagged vessels after discovery of illicit traffic with flag State authorization	para 16: 'appropriate measures' over ships without nationality confirmed to be engaged in unsafe practices associated with trafficking or transport of migrants by sea measures	Art 8(7): 'appropriate measures' over vessels without nationality confirmed to be stateless and engaged in smuggling migrants

The *travaux préparatoires* do not indicate the motivation for the radical change, but the influence of the US in capturing the process of norm transfer is palpable. The *travaux préparatoires* only note an unidentified delegate suggested the interim measures would be a 'useful source of inspiration'.[135] But US Navy Commander Pedrozo, who chaired all three IMO drafting committees on the interim measures, recorded in a 1999 publication on the international initiatives to combat trafficking of migrants by sea that the Ad Hoc Committee agreed to 'take the work of the IMO into consideration in developing a new international instrument and agreed to cooperate closely with the IMO on this matter'.[136]

Despite reservations from some states in the IMO drafting groups that the Interim Measures Circular was potentially inconsistent with UNCLOS, Pedrozo claims that 'paragraph 16 makes clear that all States have jurisdiction over a ship without nationality', entitling states to take enforcement action if unsafe practices associated with the trafficking or transport of migrants is found.[137] Attached to the chapter are 'proposed provisions to combat the smuggling of migrants', providing draft provisions to insert in the preamble and definitions, and also 'article xx: smuggling of migrants by sea'.[138] These provisions are almost identical to the rolling text at the fourth session of the negotiations from 28 June to 9 July 1999.[139] The minor differences in wording and formatting reflect they were not extracted from the draft protocol, but likely produced beforehand.

The drafting history of the Migrant Smuggling Protocol shows how states can instrumentalize international diplomacy to capture the treaty drafting process.[140] The repetition of terms across the

135 Travaux préparatoires 496. The interim measures were presented to the Ad Hoc Committee drafting the protocol as background paper in document A/AC.254/CRP.3.

136 Pedrozo (above n 128) 64-5.

137 ibid 61.

138 ibid 66-72.

139 Travaux préparatoires, 496-8.

140 This is reminiscent of Koskenniemi's 'hegemonic contestation', the 'process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents': (above n 14) 199.

instruments is not reflective of passive cross-pollination of norms, but the strategic promulgation of ambiguity in treaty drafting to shape the development of transnational criminal law to suit the domestic interests of dominant states in international society.[141] Western states have repeatedly structured transnational crime conventions to overcome the territorial limits on criminal jurisdiction and coercive power.[142] The development of interdiction powers over migrant smuggling vessels falls within this general pattern in transnational criminal law, with the 1993 Presidential Action Plan making clear that the US approach to solving the domestic problems of irregular migration would be through encouraging law reform and criminal justice cooperation with other states.[143] While the initial ambiguity was arguably promoted strategically by the US, it is reliance on the Migrant Smuggling Protocol by the EU for interdiction of smuggling vessels in the recent Mediterranean migrant crisis that has helped concretize Article 8(7) as permitting extraterritorial enforcement action.

5. Recent Practice Subsequent to the Migrant Smuggling Protocol

The ambiguity in the Migrant Smuggling Protocol means that the meaning of 'appropriate measures' can be adjusted by subsequent state practice.[144] Subsequent practice is a standard rule of treaty interpretation.[145] Besides clarifying the original intention of the drafters, it can also evidence the evolving intentions of the states parties.[146] Over the last twenty years, Western states have increasingly claimed extraterritorial enforcement powers over stateless or unflagged vessels engaged in migrant smuggling, and substantiated such claims through enforcement action, law reform and inter-state agreements pursuant to the protocol.[147] In particular, the recent EU naval operation, EUNAVFOR MED Operation Sophia, has substantially concretized the term 'appropriate measures' as permitting the interdiction of stateless vessels engaged in migrant smuggling without a connecting head of jurisdiction. As most extraterritorial interdictions are covert, or at least unpublicized,[148] the multilateral and public nature of the recent EU operations has magnified their interpretative weight. But this state practice reinterprets not only Article 8(7), but also the fundamental principles of customary international law regulating extraterritorial criminal jurisdiction.

In June 2015, the EU naval operation, EUNAVFOR MED Operation Sophia was launched with the core mandate of identifying, capturing and destroying vessels and weapons of migrant smugglers to

141 See Andreas and Nadelmann (above n 11) 10-11.

142 Boister (above n 11) 26.

143 Presidential Decision Directive/NSC-9 (above n 121) 3.

144 Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Agreement' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 106.

145 VCLT art 31(3)(b); Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 4.

146 Campbell McLachlan, 'The Evolution of Treaty Obligations in International Law' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 69.

147 See, for example, Maritime Powers Act 2013 (Cth) [Australia] ss 17, 21(1); Policing and Crime Act 2017 [United Kingdom] ss 84, 96; Council Decision 2015/778; Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders [2014] OJ L189/93.

148 The Australian Government, for example, refuses point-blank to discuss 'on-water matters': Australian Parliament House, 'Operation Sovereign Borders update' (Press Conference, Sydney 8 November 2013).

'disrupt the business model of human smuggling and trafficking networks', legally underpinned by Council Decision (Common Foreign Security Policy, CFSP) 2015/778 and United Nations Security Council (UNSC) Resolution 2240(2015).[149] The preamble to Council Decision 2015/778 claims that 'on the high seas […] states may interdict vessels suspected of smuggling migrants […] where the vessel is without nationality, and may take appropriate measures against the vessel, persons and cargo'.[150] But it is unclear on the exact legal authority permitting interdiction of stateless vessels on the high seas, noting only that 'boarding, search, seizure and diversion on the high seas of vessels suspected of human smuggling or trafficking' would be conducted under the conditions provided for by applicable international law' including UNCLOS and the Migrant Smuggling Protocol or in accordance with the applicable UNSC Resolution.[151]

This skims over the uncertainty surrounding enforcement powers over stateless vessels, as 'in accordance with' could imply either interdictions of any stateless vessel or only where a jurisdictional nexus exists. UNSC Resolution 2240, which legally reinforces EUNAVFOR MED operations on the high seas, is similarly vague about the precise legal basis for interdicting stateless vessels. It is not clear whether the resolution authorizes the inspection, seizure and disposal of 'unflagged' vessels or only affirms the right of visit powers from Article 110 UNCLOS.[152] Paragraphs 7 and 8 grant temporary permission for the inspection of vessels suspected of migrant smuggling on the high seas off the coast of Libya, provided that Member States have first made 'good faith efforts' to obtain flag state consent, and seizure of such vessels if smuggling is confirmed. As the resolution pertains not to affect the 'rights and obligations under UNCLOS', it cannot unequivocally permit general interdiction of stateless vessels when read consistently with the law of the sea. But in practice, the operation commanders have interpreted Council Decision 2015/778 and UNSC Resolution 2240 as granting full powers to EUNAVFOR MED warships to stop, seize and destroy stateless vessels and detain suspects aboard.[153]

Recent Italian case law has lent further support to claims that the Migrant Smuggling Protocol permits the interdiction of stateless vessels engaged in smuggling. In *Harabi Hani*, the Italian Supreme Court of Cassation confirmed 'appropriate measures' as permitting coercive action against both the suspect vessels and suspects aboard. Hani was arrested by the Italian *Guardia di Finanza* following detection by a Frontex patroller during a EU naval operation. Marta Bo reports that the court rejected Article 110(1)(d) UNCLOS as providing a sufficient basis for asserting criminal jurisdiction over Hani, instead relying on him being aboard a vessel engaged in the smuggling of migrants.[154] The court appears to accept migrant smuggling as an exception to the general rule requiring a recognized jurisdictional basis connecting the interdicting state with the suspect vessel. However, the court did not clarify its reasoning for this position, whether because it considered migrant smuggling to be suf-

149 EUNAVFOR MED, 'Mission Factsheet' (13 June 2017); Council Decision 2015/778 art 2.

150 Council Decision 2015/778 para. 7.

151 Council Decision 2015/778 art 2.

152 UNSC Res 2240(2015) para. 5.

153 EEAF (Credendino) (above n 18) 7, 10-11.

154 Marta Bo, 'In the matter of criminal proceedings against Hani' (2014) ILDC 2412, Oxford Reports on International Law 5.

ficiently grave as to attract universal jurisdiction,[155] or because it constituted a threat to the security of the Italian state thus activating the protective principle.

Unless states actively protest against this interpretation, it could be alleged to be acquiescence to expanded extraterritorial enforcement powers.[156] While the EU has been relatively transparent about the legal basis underpinning Operation Sophia, the methods used to claim enforcement powers still smack of subterfuge. Neither the Council Decision nor the UNSC Resolution clearly state that the legal authority for interdicting stateless vessels flows from Article 8(7) of the Migrant Smuggling Protocol.[157] Instead, they replicate the ambiguity inherent in the protocol, leaving EUNAVFOR MED to substantiate the claim with on-water interdictions. Before objecting, states would need to first be aware of the complex and unsettled jurisdictional basis for interdicting stateless vessels on the high seas, and then realize that by interdicting stateless vessels, Operation Sophia is creating an exception to the customary law regulating the extraterritorial assertion of criminal jurisdiction.

State practice forming custom should be widespread and consistent, not a limited number of unilateral acts by several powerful, like-minded states accompanied by acquiescing silence from the global community.[158] Customary law is more than just state practice, however, but the 'community-wide belief that a norm is legally required', or in this case, permitted.[159] Presuming unilateral extraterritorial interdictions, if not actively objected to, can modify the jurisdictional principles regulating the law of the sea is based on the fallacy that 'all states have a perfect knowledge of state practice, unlimited resources, and be aware that the failure to respond would have legal consequences', as well as exactly when practice as formation shifts to crystallization.[160] Most states have not the resources to monitor or protest against modifications of every possible customary rule,[161] let alone engage in resource-intensive maritime interdictions creating alternative or confirmatory practice.[162] Accepting such hegemonic modification of custom risks undermining both the authority and legitimacy of these international norms.

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155 To overcome restrictions on prosecuting apprehended smugglers the EUNAVFOR MED Operation Sophia command has advocated characterizing migrant smuggling and human trafficking as crimes against humanity: EUNAVFOR MED, 'Non-Paper about Migrant Smuggling/Human Trafficking as a Crime against humanity' (on file with author, 8 June 2017); EEAF (Credendino) (above n 18) 19.

156 Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale Journal of International Law 289, 307-8.

157 The EU regulation establishing rules for the surveillance of the EU's external borders is similarly vague providing only that participating unit's may board and search vessels suspected of statelessness and smuggling, and if confirmed take further appropriate measures 'in accordance with the Protocol against the Smuggling of Migrants, and where relevant, national and international law': Regulation (EU) 656/2014 art 7(2) and (11).

158 ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) 2 Yearbook of the International Law Commission, UN Doc. A/73/10, 126.

159 Kelly (above n 14) 453.

160 ibid 522.

161 Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 99-100.

162 Guilfoyle (above n 60) 95.

6. Conclusion

In the case of *Harabi Hani*, the Italian Appeal Court held that the Italian *Guardia di Finanza* could take coercive measures against suspected smugglers on board vessels suspected of statelessness and smuggling of migrants on the high seas.[163] Combined with the recent EU naval operations in the Mediterranean sea, this case could be characterized as subsequent practice interpreting the term 'appropriate measures' as authorizing the universal exercise of enforcement jurisdiction over stateless smuggling vessels in international waters. This interpretation remedies the jurisdictional lacuna surrounding stateless vessels on the high seas, at least when engaged in certain forms of maritime crime. It is not clear, however, on what basis the court dismissed the need for a jurisdictional nexus between the intercepting state and stateless vessel. Did the court imagine migrant smuggling to be a new international crime attracting universal jurisdiction, or that migrant smuggling anywhere affects the security interests of all states thus invoking the still-contentious protective principle? Or did it view prescriptive and enforcement jurisdiction as logically distinct, permitting any state to exercise enforcement powers on the high seas? Or do normal jurisdictional principles not apply to extraterritorial crimes at sea?

Tracing the transposition of terms and provisions across the transnational crime instruments dealing with interdiction at sea, reveals that this ambiguity surrounding the scope of 'appropriate measures' was deliberately woven through instruments to give the impression of expanded enforcement powers. Ambiguity could then be strategically resolved by state practice. But relying on 'constructed' or strategic ambiguity to covertly expand extraterritorial enforcement powers undermines the legitimacy of transnational criminal law. The hegemonic tendencies of suppression regimes are already well-known. Western states have pushed dubious *malum prohibitum* norms upon developing states, overburdened their criminal justice systems, distorted their legal systems and even exacerbated domestic crime.[164] Dubious extraterritorial interdiction adds another straw to the camel's back. Additionally shifting interdictions to an 'extraterritorial legal space' enables the avoidance of human rights protection and interferes with the rights of refugees and migrants to leave one's country.[165] As a CFSP operation, actions taken during Operation Sophia's deployment are excluded from the jurisdiction of the European Court of Justice.[166] Exercise of jurisdiction over apprehended smugglers or migrants is left to Member States, leaving potentially affected individuals without remedies under EU law.[167]

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163 Bo (above n 154) 1.

164 Yvon Dandurand and Vivienne Chin, 'Implementation of transnational criminal law' in Neil Boister and Robert Currie (eds), *Handbook of Transnational Criminal Law* (Routledge 2015) 445.

165 Boister (above n 11) 30; Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574; ICCPR 12(2); Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 European Journal of International Law 591, 594-99.

166 Treaty on European Union [2010] OJ C 83/13 art 23(1).

167 Matilde Ventrella, 'The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers' (2016) 30 Questions in International Law 3, 10.

When instead located within the legal frames provided by both the law of the sea and customary legal rules and principles governing jurisdiction, only a more limited reading of 'appropriate measures' is defensible. Arguably it simply means that should migrant smuggling be confirmed, states may look to other heads of jurisdiction, whether customary or treaty-based, permitting the exertion of jurisdiction. Sometimes a jurisdictional basis will be found, in other instances no action can be taken. Developed ad hoc by custom and treaty law, states must simply accept that jurisdictional coverage is not always complete or the conceptual bases coherent. In combatting extraterritorial migrant smuggling, states could do well to return to the original Italian and Austrian proposal. In relying on nationality and the protective principle, the proposal limited coercive measures to states with a clear interest in the smuggling vessel, rather than universal interdiction. This presented a subtle and transparent progression in extraterritorial jurisdiction over transnational crime and, consequently, a more inclusive democratic manner to solve regulatory gaps at sea.

Maritime Safety and Security Law Journal

Why Evolving European SAR Policies Threaten Merchant Shipping

*Richard L. Kilpatrick, Jr.**

Abstract

Operators of commercial vessels have rescued tens of thousands of migrant seafarers in the Mediterranean Sea since 2014. For commercial actors, swift disembarkation of survivors is critical to ensure safety and prevent further disruption to the rescuing vessel's primary voyage. From 2014 through 2017, European coastal states such as Italy, Malta, and Greece permitted rescued migrants to disembark into their territory. But recent policy changes reflect evolving attitudes about search and rescue (SAR) responsibility. Beginning in 2018, commercial vessels and humanitarian non-governmental organisations (NGOs) have performed large-scale rescues only to be denied immediate access to Mediterranean ports. This has created alarming scenarios in which rescued migrants and ship operators have remained at sea for days and weeks as solutions were negotiated by politicians on an ad hoc basis. Addressing the consequences of this policy transformation, this paper examines its impact on commercial vessel contributions to migrant rescues. Highlighting the intertwined legal responsibilities of private vessels and public authorities, it discusses the international SAR framework and its contemporary implementation. It then surveys reactions within the shipping industry reflecting concerns that evolving regional perspectives may drive up the risks, costs, and frequency of private participation in SAR operations.

Keywords: International Law; Maritime Law; Search and Rescue; Shipping; Political Risk; Migration

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1. Introduction

Since 2014 more than 18,000 migrant seafarers have died attempting to cross the Mediterranean Sea to reach Europe.[1] During this period, many tens of thousands of people have also been rescued by state coast guards, naval patrols, humanitarian NGOs, and commercial vessels.[2] These rescuers have coordinated attempts to ensure that migrant vessels in distress situations are engaged as quickly as possible and that survivors are delivered to a place of safety in accordance with international legal obligations. During the initial months of this crisis, the rescue infrastructure was under immense strain to respond to the scale and regularity of distress situations. At that time, operators of commercial

1 International Organization for Migration (IOM), 'Missing Migrants Project: Latest Global Figures' <https://missingmigrants.iom.int> accessed 6 December 2019.

2 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf > accessed 6 December 2019.

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vessels often served as first responders, performing over 40,000 rescues in 2014, approximately 25% of the total rescues during that period.[3] These private actors provided heroic contributions despite the enhanced risks and costs of using commercial equipment and personnel to effectuate large-scale rescues.[4] In the years that followed, other rescuing actors assumed primary SAR responsibility, which relieved commercial actors of some of the rescue burden suffered in the initial months of the crisis. But even with the emergence of alternative rescue contributions, commercial vessels have remained an essential part of the Mediterranean SAR apparatus.[5]

For these commercial actors, swift disembarkation is critical to ensure the safety of those on board and to prevent extensive disruption to the rescuing vessel's primary voyage. The infamous *M/V Tampa* incident of 2001 serves as an alarming flashpoint illustrating the potentially dangerous humanitarian consequences of delayed disembarkation, as hundreds of rescued migrants were held on the deck of a container vessel for nearly two weeks after it was denied access to the nearby Australian port.[6] In response to the *Tampa* incident, the international maritime community revisited the legal framework governing rescues at sea and amended international legal instruments articulating SAR obligations to ensure a safe place of disembarkation is quickly determined.[7] Under this updated framework, disembarkation of rescued persons in the Mediterranean has been performed primarily in Italy, Greece, and Malta since 2014. But recent policy changes in Europe have reflected new attitudes about SAR obligations and disembarkation responsibility. Beginning in 2018, NGO and commercial vessels have performed rescues in the Mediterranean Sea only to be denied access to nearby ports. This has created perilous situations in which rescued migrants and rescuing vessel operators have remained at sea for days and weeks while ad hoc political solutions for disembarkation were negotiated on shore.

Addressing this policy transformation regarding survivor disembarkation, this paper examines its impact on commercial vessel contributions to large-scale migrant rescues. Highlighting the intertwined responsibilities of private vessels and public authorities, it discusses the legal framework codifying the obligation to render assistance and disembark rescued persons to a place of safety. It then surveys reactions within the shipping industry reflecting concerns that evolving perspectives in Europe may drive up the risks, costs, and frequency of private participation in SAR operations.[8]

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3 ibid.

4 Richard L. Kilpatrick Jr and Adam Smith, 'The International Legal Obligation to Rescue During Periods of Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis' (2016) 28 (2) University of San Francisco Maritime Law Journal 142.

5 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.

6 Jessica E. Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 Pacific Rim Law & Policy Journal 461.

7 The substance of these amendments are discussed in Section II.

8 For a more practice-oriented commentary on the commercial risks and costs relating to merchant vessel participation in large-scale migrant rescues, see: Richard L. Kilpatrick Jr., 'The "Refugee Clause" for Commercial Shipping Contracts: Why Allocation of Rescue Costs is Critical During Periods of Mass Migration at Sea' (2018) 46 (2) Georgia Journal of International and Comparative Law 403; Kathleen S. Goddard, 'Rescuing Refugees and Migrants at Sea: Some Commercial Shipping Implications' (2015) 21 International Journal of Maritime Law 352.

2. Public and Private SAR Obligations Under International Law

Several international legal instruments codify SAR obligations attached to public and private maritime actors. These agreements reflect a centuries-old customary duty to assist vessels in distress.[9] The United Nations Convention on the Law of the Sea (UNCLOS), the Safety of Life at Sea Convention (SOLAS Convention), the International Convention on Salvage (Salvage Convention), and the International Convention on Maritime Search and Rescue (SAR Convention) each contribute to the modern framework allocating responsibility and compelling coordination in maritime distress situations. These instruments place distinct obligations on coastal states and private shipmasters in attempts to ensure that persons in distress at sea will receive assistance and be delivered to a place of safety.

Contracting States to UNCLOS are required to '[…] promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea […]' in coordination with neighbouring coastal states.[10] The SAR Convention goes further by obliging states to apportion their collective search and rescue responsibilities.[11] Operationalizing these obligations, states have divided the oceans into designated SAR regions and have established Rescue Coordination Centres (RCCs) at strategic locations around the world. These RCCs monitor distress signals, coordinate communication between distressed vessels and rescuing actors, and organize the provision of emergency medical services.[12] RCCs train and deploy state search and rescue units, but they also regularly call on ships already operating at sea (including private commercial vessels) to contribute whenever necessary.

Both the SOLAS Convention and the Salvage Convention explicitly require private shipmasters to assist persons in distress at sea. The SOLAS Convention reads at the relevant part, '[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance'.[13] The Salvage Convention contains a similar provision which reads, '[e]very master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.'[14]

While neither the SAR Convention nor UNCLOS directly address the obligations of private shipmasters, UNCLOS nonetheless obliges Contracting States to 'require' shipmasters flying their flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible

9 For a discussion on the development of this codification, see: Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) Benedict's Maritime Bulletin 83.

10 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 (*'UNCLOS'*) art. 98(2).

11 International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1403 UNTS 97 ('*SAR Convention*') as amended, Annex 2.1.3.

12 ibid.

13 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) ('*SOLAS Convention*') 164 UNTS 113, chapter V, regulation 33.1.

14 International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (Salvage Convention), *supra* note 3, art. 10.

speed to the rescue of person in distress'.[15] This enforcement obligation is also reflected in the Salvage Convention, which mandates Contracting States to 'adopt the measures necessary to enforce' the private shipmaster's duty to render assistance to persons in danger of being lost at sea.[16] States have implemented this obligation by adopting criminal statutes that require shipmasters to render assistance at sea. These statutes, which often provide for fines and even imprisonment as a sanction, have been adopted by various jurisdictions within the Mediterranean region, including Italy, Malta, and Greece, as well as other major flag states, such as Panama, Hong Kong, and Singapore.[17]

These private obligations attach indiscriminately regarding the physical characteristics of the vessel. In practice, this means that even operators of large, cumbersome, and inhospitable container ships, tankers, bulk carriers, platform supply vessels, and others are required to respond to requests for assistance. As of this writing, however, there is no widely reported example from any jurisdiction in the modern era suggesting that states are willing to prosecute private shipmasters for violating such statutes.

Enforcement aside, under the applicable treaties the duty to rescue does not end with the embarkation of the rescued persons onto the rescuing vessel. The modern iteration of the SAR Convention defines 'rescue' to include delivery of rescued persons to a 'place of safety'.[18] The SAR Convention does not define place of safety and does not provide express guidance regarding when a state must accept rescued persons into its territory. Instead it grants the applicable RCC the liberty to 'coordinate' in landing the rescued persons. In practice, the place of safety determination has been administered on an ad hoc basis, which has led to considerable problems.

The disembarkation question was placed under intense scrutiny in the wake of the *Tampa* incident in August 2001. In that case, the Australian RCC called on the 44,000-ton Norway-flagged container ship, the *Tampa*, to assist a distressed vessel in the Indian Ocean. The *Tampa*, which was owned by Norwegian company Wallenius Wilhelmsen, diverted from its intended course carrying $20 million in cargo from Freemantle to Singapore. Its operators then successfully embarked over 400 migrants at sea originating from Afghanistan, Iraq, Pakistan, and Sri Lanka. The shipmaster attempted to disembark the rescued persons at the nearest port at Christmas Island, but the Australian authorities denied the *Tampa* access. After several days waiting for authorization, the humanitarian conditions on the *Tampa* deteriorated, and the shipmaster directed the vessel towards Christmas Island even at the protest of the Australian authorities. A unit of the Australian Special Armed Services intercepted the vessel, which sparked a diplomatic row and generated major public backlash. The *Tampa* was delayed an additional eight days while an arrangement was reached to transfer the rescued persons to other countries.

15 UNCLOS, art. 98(1).

16 Salvage Convention, art. 10.

17 See e.g. Italian Code of Navigation 1958, art. 1158; Malta Merchant Shipping Act, Chapter 234; Singapore Maritime Conventions Act, Part II, Section 6; Hong Kong Merchant Safety Ordinance, Chapter 369.

18 SAR Convention, annex 1.3.2.

The shipmaster of the *Tampa*, Arne Rinan, and his crew were later hailed as heroes for honouring moral and legal obligations under the difficult circumstances.[19] The Australian government, on the other hand, was heavily criticized, not only for its apparent callousness towards the rescued migrants but also because of the difficult position in which it placed the crew of the *Tampa*. In addition to the dangers imposed on the operators of the *Tampa*, the commercial voyage was substantially delayed, which resulted in losses of several hundred thousand dollars.[20]

In the fallout of the *Tampa* incident, stakeholders in the maritime industry began to consider whether updates to the international legal instruments were appropriate.[21] The International Maritime Organization (IMO) Assembly, the United Nations specialized agency responsible for shipping industry matters, tasked its Maritime Safety Committee to identify ambiguities in the law for proposed updates. As part of this project, an interagency group was established to procure input from international organizations with either a maritime or migration-related mandate, including the IMO, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM) and others.[22]

This resulted in resolutions at the IMO amending both the SAR Convention and the SOLAS Convention. These amendments included language designed to clarify the obligation of state actors to ensure assisting ships are released from their obligations quickly and that an appropriate place of disembarkation is determined without unreasonable delay. New paragraphs were added to both conventions requiring state parties to:

> '[…] *ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea.*'[23]

While the amendments do not unequivocally clarify the circumstances in which a state is required to accept rescued persons, they indicate that the state 'responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety […]' The new paragraphs also require the applicable state to 'arrange for such disembarkation to be effected as soon as reasonably practicable'.

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19 Eduardo Cue, 'Captain, Crew and Owner of "Tampa" Win Nansen Award for Recue at Sea' (*UNHCR*, 19 March 2002) <www.unhcr.org/news/latest/2002/3/3c975a254/captain-crew-owner-tampa-win-nansen-award-rescue-sea.html> accessed 6 December 2019.

20 Jessica E. Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 Pacific Rim Law & Policy Journal 461; Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) Benedict's Maritime Bulletin 83.

21 Frederick J. Kenney Jr. and Vasilios Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on The Treatment of Persons Rescued at Sea' (2003) 12 (1) Pacific Rim Law & Policy Journal 144.

22 Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 International Journal of Marine and Coastal Law 377.

23 SAR Convention, para 3.1.9; SOLAS Convention, chapter V, regulation 33, para 1-1.

Also in 2004, the IMO promulgated Guidelines on the Treatment of Persons Rescued at Sea (2004 IMO Guidelines).[24] Addressing particular problems related to large-scale migrant rescues, the 2004 IMO Guidelines raise relevant principles of international refugee law. The Guidelines point out that it may be necessary to consider whether the rescued persons may have their lives or freedoms threatened in a particular place of disembarkation.[25] If the rescued persons are in fact refugees, state actors may be prohibited from returning such persons to places in which their lives or freedoms are threatened on account of membership in a protected class.[26] This so-called *non-refoulement* obligation may have implications for determining an appropriate place of safety.[27] In practice, this means that state actors must not return migrants who may have colourable refugee status claims to locations where they are likely to face persecution. This may also have implications for private vessels participating in rescues, because vessel operators may need to coordinate with state RCCs to ensure that any rescued persons are disembarked at a location where claims to refugee status may be assessed by applicable state authorities.

Even with the SAR and SOLAS amendments and other legal directives flowing from the *Tampa* experience, the law remains unclear in some respects. Namely, it is uncertain whether a state RCC responsible for coordinating a rescue is obliged to disembark rescued persons into its own territory.[28] If the state coordinating the rescue cannot arrange an alternative safe place of disembarkation, there still may be a 'residual obligation' to accept the rescued persons.[29] However, this may place too much onus on states with expansive SAR regions. An alternative view is that survivors instead should be disembarked at the nearest safe port, regardless of which state coordinates the rescue.[30] Due in part to this uncertainty, some states such as Malta have persistently objected to the legal interpretations reflected in the 2004 IMO Guidelines.[31]

Acknowledging this gap in the law, in 2009 the IMO Facilitation Committee promulgated a document entitled 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' which provides further guidance on the issue. It recommends the following:

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24 Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004, entered into force 1 July 2006), Resolution MSC.167(78) ('*2004 IMO Guidelines*').

25 2004 IMO Guidelines, para.6.1.7

26 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

27 2004 IMO Guidelines, para. 6.17.

28 ibid, para 6.16.

29 Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) Benedict's Maritime Bulletin 83.

30 Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law & Commerce 219.

31 Jasmine Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (2013) 44 Journal of Maritime Law & Commerce 89.

> *'If 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 in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.'*[32]

This approach, however, is not reflected in any of the applicable treaties and is only intended to be a recommendation.[33]

The international community has struggled to develop further rules clarifying the disembarkation obligation, even after the emergence of the Mediterranean crisis. Instead, rules that were developed under tamer geopolitical times remain in place, including the obligation on private shipmasters to execute large-scale rescues. As frequent demand for rescues has continued to materialize, this reliance on private ships to 'preserve the integrity of global SAR services' has been affirmed in policy and practice.[34] Paired with the uncertain status of disembarkation, this has understandably caused anxiety among commercial actors, which are exposed to increased risks and costs when disembarkation is delayed.

3. Evolving SAR Policies in the Mediterranean Sea

While significant levels of maritime migration from Africa to Europe has been occurring for decades, the numbers intensified in the wake of the so-called 'Arab Spring' in which governments across northern Africa and the Middle East were destabilized beginning around 2010. The Syrian civil war caused people to flee the conflict into Turkey and then into Greece over channels in the Aegean Sea. The fall of the Gaddafi government in Libya also created an ungoverned coastline along the southern central Mediterranean, which drew refugees and economic migrants from throughout the African continent to attempt sea crossings towards Malta and Italy. This surge of attempted sea crossings has caused challenges both in terms of allocating primary responsibility for coordinating and participating in rescue operations and determining which states should allow rescued persons to disembark into their territory.

3.1 Rescue coordination and contributions

Prior to the fall of the Gaddafi regime, Italy had coordinated with Libya to push migrant vessels back to Libyan shores. This approach was challenged at the European Court of Human Rights (ECtHR), which determined that this push back policy violates international law.[35] The ECtHR held that

32 IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' FAL.3/Circ.194 (22 January 2009).

33 Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligations Accruing at Sea' [2011] International Journal of Refugee Law.

34 See 2004 IMO Guidelines.

35 *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 February 2012).

Italy's policy of returning migrants who may have had legitimate claims of refugee status back to Libya (a country that is not a party to the Refugee Convention), contravened the European Convention's principles of *non-refoulement*.[36] In 2013, a large-scale incident occurred off the Italian coast of Lampedusa, causing the deaths of more than 350 migrant seafarers. In response to mounting political pressure to prevent such tragedies, Italy instituted an emergency operation called *Mare Nostrum* or 'Our Sea,' designed to prevent large-scale drownings between the coasts of Italy and northern Africa. This ambitious search and rescue initiative conducted by the Italian coast guard employed hundreds of operations, which saved thousands of lives and provided a mechanism for refugee processing under European Union (EU) immigration protocols. But *Mare Nostrum* strained Italian resources and some policy-makers claimed it incentivized dangerous sea crossings between Libya and the Italian coasts.[37] In 2014, it was abandoned after 12 months of operation.

After *Mare Nostrum* ended, maritime crossings in the Mediterranean continued to swell, not only in the Central Mediterranean route, but also in the Aegean Sea between Turkey and Greece. During this period, the state-sponsored search and rescue infrastructure was overwhelmed. The EU border agency FRONTEX initiated several programmes with a dual purpose of maritime border security and search and rescue, but these measures did not match the resources or scope of *Mare Nostrum*. With both state and regional resources unable to adequately respond to the demand for distressed vessel assistance, applicable RCCs often requested that commercial vessels carrying cargo in the Mediterranean Sea serve as first responders. According to data from the Italian coast guard, in 2014 commercial vessels reportedly participated in as many as a quarter of the rescue operations occurring in the Mediterranean Sea.[38]

This put substantial pressure on shipping industry participants in the early months of the crisis. Industry organizations began to speak out, contending that too much reliance was being placed on merchant shipping to provide SAR services. These actors emphasized that using commercial vessels for large-scale humanitarian rescues is especially risky and costly. These concerns intensified in April 2015 when a migrant vessel carrying more than 800 people collided with a Portuguese-flagged con-

36 ibid.

37 Adam Taylor, 'Italy Ran An Operation That Saved Thousands of Migrants from Drowning in the Mediterranean. Why Did It Stop?' (*The Washington Post*, 20 April 2015) <www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/> accessed 6 December 2019; Adam Taylor, 'Why Britain Won't Save Drowning Migrants in the Mediterranean' (*The Washington Post*, 28 October 2014)<www.washingtonpost.com/news/worldviews/wp/2014/10/28/why-britain-wont-save-drowning-migrants-in-the-mediterranean/> accessed 6 December 2019.

38 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf > accessed 6 December 2019; European Political Strategy Centre, 'Irregular Migration Via the Central Mediterranean: From Emergency Responses to Systemic Solutions' (2 February 2017) <https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pd> accessed 6 December 2019.

tainer vessel, the *M/V King Jacob*, which had responded to its distress call.[39] Tragically, nearly all of the migrants on board drowned - one of the deadliest events of its kind in the Mediterranean Sea.[40]

This event highlighted the dangers of relying so heavily on commercial vessels to serve as primary rescue providers. In response to such events, the International Chamber of Shipping collaborated with other industry organizations to update a guidance designed to educate industry participants on best practices for conducting large-scale rescue operations at sea.[41] Industry organizations also raised the argument in political fora that while commercial vessel operators will continue to respond to their humanitarian obligations under international law, merchant ships should not be expected to serve as the primary provider of large-scale rescues.[42]

In 2015-2016, other international and regional organizations also added to the work of FRONTEX. The EU Naval Force instituted Operation Sophia to disrupt migrant smuggling and provide SAR functions when necessary. Likewise, the North Atlantic Treaty Organization (NATO) also committed resources with a similar dual role. The EU entered into an agreement with Turkey in which Turkey committed to accept and resettle migrants who had crossed into the EU along the border between Turkey and Greece. These approaches stemmed the flow of maritime migration in the Aegean Sea, but did little to address the traffic originating off the coast of Libya along the Central Mediterranean route. While the overall numbers of maritime migration dropped significantly in 2016, the number of deaths continued to climb due to the enhanced dangers of the Central Mediterranean route and the increasing unseaworthiness of the vessels being used by migrant smugglers, which ultimately devolved into cheaply-made inflatable rubber dinghies.

Around this same period, humanitarian organizations began to voluntarily participate in SAR.[43] Between 2014 and 2016, organizations including Migrant Offshore Aid Station (MOAS), Médecins Sans Frontières (MSF), Sea Watch, SOS Méditerranée, Proactiva Open Arms, and others began char-

39 Manuela Mesco, 'How Migrants' Ordeal Turned Into Tragedy at Sea' (*The Wall Street Journal*, 21 April 2015) <www.wsj.com/articles/captain-error-caused-migrant-ship-to-capsize-investigators-say-1429614614> accessed 6 December 2019; Mattathias Schwartz, 'Another Mediterranean Catastrophe' (*The New Yorker*, 21 April 2015) <www.newyorker.com/news/news-desk/europes-latest-migrant-catastrophe> accessed 6 December 2019; Jim Yardley and Dan Bilefsky, 'Migrant Boat Captain Steered Toward Tragedy in Mediterranean, Authorities Say' (*The New York Times*, 21 April 2015) <www.nytimes.com/2015/04/22/world/europe/italy-libya-migrant-boat-capsize.html> accessed 6 December 2019.

40 Nick Squires, 'Teenage Survivors Tell of Terror as Migrant Boat Smashed into Rescue Ship and Hundreds Drowned' (*The Daily Telegraph*, 21 April 2015) <www.telegraph.co.uk/news/worldnews/europe/italy/11553741/Teenage-survivors-tell-of-terror-as-migrant-boat-was-smashed-to-pieces-and-hundreds-drowned.html> accessed 6 December 2019.

41 International Chamber of Shipping, *Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Person* (2nd edn, International Chamber of Shipping, 2015).

42 International Chamber of Shipping, 'Shipping Industry Calls on EU Leaders to be Decisive and Immediately Increase Mediterranean Search and Rescue Resources' (22 April 2015) <www.ecsa.eu/news/shipping-industry-calls-eu-leaders-be-decisive-and-immediately-increase-mediterranean-search> accessed 6 December 2019; Steven Erlanger, 'Ship's Captains Call for Uniform Policies on Migrants at Sea' (*The New York Times*, 22 April 2015) <www.nytimes.com/2015/04/23/world/europe/ships-captains-call-for-uniform-policies-on-migrants-at-sea.html> accessed 6 December 2019.

43 Hernan Del Valle, 'Search and Rescue in the Mediterranean Sea: Negotiating Political Differences' (2016) 35 (2) Refugee Survey Quarterly 22.

tering vessels to engage in humanitarian rescues to fill the void left by the insufficient level of state and regional SAR vessels.[44] These NGOs coordinated with state and regional RCCs to engage migrant vessels, often providing initial humanitarian assistance under the instructions of coast guard vessels. The contributions of these actors substantially reduced the SAR burden on operators of commercial vessels, although according to the Italian Coast Guard merchant vessels still rescued more than ten thousand migrants each year in 2015, 2016, and 2017.[45]

In 2017, Europe again turned to authorities on the Libyan coasts for SAR support - this time under the auspices of the interim Libyan Government of National Accord formed after the fall of the Gaddafi regime. The EU, Italy and other regional actors provided resources to support these Libyan initiatives, which began engaging migrant vessels within Libyan territorial waters. Other state coast guards, including those supported by authorities based in Tunisia and Spain have also provided contributions as migration patterns have at times moved towards the Western Mediterranean.[46]

3.2 Disembarkation of Rescued Persons

The contributions of these state, regional, and volunteer actors at least temporarily relieved pressure on operators of commercial vessels to participate in rescues. While coordination among these various SAR contributors has improved over the course of the crisis, the question of disembarkation of rescued persons has become increasingly convoluted. As discussed above, international law is not clear regarding who is responsible for accepting rescued persons on land after survivors are safely on board the rescuing vessel. Such decisions instead have been determined on a case-by-case basis.

From the beginning of the contemporary crisis, Italy has coordinated rescues between various stakeholders and allowed rescued persons to disembark at Italian ports. Under arrangements with Malta and Libya, Italy agreed to assume de facto control over the SAR zones in the Central Mediterranean through coordination administered at the Rome-based maritime rescue coordination centre (MRCC).[47] This Italian leadership facilitated rescue operations and incentivized volunteer and commercial actors to participate in rescues by ensuring efficient and predictable disembarkation of rescued persons.

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44 For a thorough discussion of the contributions of NGO rescuers, see: Eugenio Cusumano and James Pattison, 'The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of State Responsibility' (2018) 31 (1) Cambridge Review of International Affairs 53.

45 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf > accessed 6 December 2019.

46 The New York Times, 'Dozens of Migrants Drown Off Tunisia and Turkey; Hundreds Rescued Off Spain' (3 June 2018) <www.nytimes.com/2018/06/03/world/europe/migrants-tunisia-turkey-spain.html> accessed 6 December 2019.

47 European Political Strategy Centre, 'Irregular Migration Via the Central Mediterranean: From Emergency Responses to Systemic Solutions' (2 February 2017) <https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pd> accessed 6 December 2019.

NGO rescuers initially received broad support from European states involved in SAR operations, including Italy, Malta, Greece, and others.[48] During 2015 and much of 2016, NGO rescuers often assumed primary responsibility for making initial contact with distressed migrant vessels and then either transferred the rescued persons directly to Italy or to state-operated vessels. In fact, under the coordination of the Italian MRCC, state vessels often positioned themselves behind the NGO vessels, which were viewed as being better equipped to provide initial humanitarian assistance.[49]

By the end of 2016, these positive views towards NGO vessels began to deteriorate. Some observers argued that the presence of the NGOs operating in the Central Mediterranean was a pull factor that incentivized migrants to engage in unreasonably risky sea crossings.[50] Allegations also began to surface that NGOs were colluding with migrant smugglers to relay their locations in order to effectively transfer migrants to Europe under the guise of search and rescue.[51] The Italian judiciary responded by initiating investigations into the finances of NGO rescuers to determine any links with migrant smuggling cartels.[52] In July 2017, Italy published a code of conduct for all NGOs participating in rescues at sea.[53] Some, but not all, NGO rescuers agreed to follow the code of conduct.[54] Italy threatened that it would close off port access to NGOs that refused to agree to its terms.[55]

Also in the summer of 2017, Libya announced the establishment of a SAR zone and explicitly excluded NGO vessels from operating there.[56] After this announcement, the Italian MRCC began in-

48 For an overview of the legal and political issues surrounding NGO contributions to rescues in the Mediterranean Sea, see: Adam Smith, 'Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean' (2017) 5 Paix et Securite Internationales 29.

49 ibid.

50 Duncan Robinson, 'EU Border Force Flags Concerns Over Charities' Interaction with Migrant Smugglers' (*Financial Times*, 14 December 2016) <www.ft.com/content/3e6b6450-c1f7-11e6-9bca-2b93a6856354> accessed 6 December 2019; Stuart A. Thompson and Anjali Singhvi, 'Efforts to Rescue Migrants Caused Deadly, Unexpected Consequences' (*The New York Times*, 14 June 2017) <www.nytimes.com/interactive/2017/06/14/world/europe/migrant-rescue-efforts-deadly.html> accessed 6 December 2019.

51 BBC News, 'Italy Migrant Crisis: Charities "Colluding" with Smugglers' (23 April 2017) <www.bbc.com/news/world-europe-39686239> accessed 6 December 2019; Jenna Belhumeur, 'NGOs Deny Collusion with Mediterranean Smugglers' (*Aljazeera*, 1 June 2018) <www.aljazeera.com/news/2017/05/ngos-deny-collusion-mediterranean-smugglers-170531111554101.html> accessed 6 December 2019.

52 Antonella Cinelli and Steve Scherer, 'Italian Court Investigates Whether Smugglers Finance Rescue Boats' (*Reuters*, 17 February 2017) <www.reuters.com/article/europe-migrants-italy-ngo/italian-court-investigates-whether-smugglers-finance-rescue-boats-idUSL8N1G24W2> accessed 6 December 2019.

53 Massimiliano Di Girgio and Isla Binnie, 'Italy Drafts Code on NGO Migrant Rescues as Thousands More Reach Land' (*Reuters*, 14 July 2017) <www.reuters.com/article/us-europe-migrants-italy/italy-drafts-code-on-ngo-migrant-rescues-as-thousands-more-reach-land-idUSKBN19Z14W> accessed 6 December 2019.

54 Isla Binnie and Antonio Denti, 'Aid Groups Snub Italian Code of Conduct on Mediterranean Rescues' (*Reuters,* 31 July 2017) <https://www.reuters.com/article/us-europe-migrants-italy-ngo/aid-groups-split-over-italys-new-rules-for-migrant-rescues-idUSKBN1AG2FT> accessed 6 December 2019.

55 Lizzie Dearden, 'Italy Threatens to Close Ports to Humanitarian Refugee Rescue Ships as it Reaches "Saturation Point"' (*The Independent*, 29 June 2017).

56 The Maritime Executive, 'Libya Excludes NGO Vessels from 'Rescue Zone' (11 August 2017)<www.maritime-executive.com/article/libya-excludes-ngo-vessels-from-rescue-zone> accessed 6 December 2019.

creasing its utilization of the Libyan coast guard infrastructure to intercept migrant vessels, even when NGO rescuers were in close proximity to distressed vessels.[57] The MRCC also began granting Libyan assets 'on scene command' in which Libyan vessels were delegated the authority to give instructions to other rescuing vessels.[58] After intercepting migrant vessels, the Libyan coast guard would controversially return the migrants to Libya, rather than coordinate disembarkation to Italian territory.[59] This approach caused outrage from observers in humanitarian circles who argued that Europe was outsourcing border security to the Libyans in a way that contributed to human rights abuses by proxy.[60] Others countered that it saved lives by reducing the number of migrants attempting dangerous sea crossings.[61]

The discourse intensified after the Libyan coast guard reportedly interfered with NGO operations, including firing shots at NGO vessels, interrupting rescues, and threatening NGO personnel.[62] These dangerous interactions triggered new legal action against Italy in the ECtHR.[63] It also caused most NGO rescuers to cease operations in the Central Mediterranean.[64] By the end of 2017, only a few NGO vessels were still operating in the Central Mediterranean. Among them was the *M/V Aquarius,* which continued to be deployed under a joint arrangement between MSF and SOS Méditerranée.

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57 Steve Scherer and Aidan Lewis, 'Italy Plans Big Handover of Sea Rescues to Libya Coastguard' (*Reuters*, 15 December 2017) <www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG> accessed 6 December 2019.

58 Paolo Cuttitta, 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End for the Humanitarian Turn (Part II)' (*University of Oxford Law*, 19 April 2018) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0> accessed 6 December 2019.

59 See e.g. Ahmed Elumami, 'Libyan Coastguard Turns Back Nearly 500 Migrants After Altercation with NGO Ship' (*Reuters*, 10 May 2017) <www.reuters.com/article/us-europe-migrants-libya/libyan-coastguard-turns-back-nearly-500-migrants-after-altercation-with-ngo-ship-idUSKBN1862Q2> accessed 6 December 2019; Aidan Lewis, 'Bolstered Libyan Coast Guard Intercepts Packed Migrant Boat' (*Reuters*, 4 November 2017) <www.reuters.com/article/uk-europe-migrants-libya/bolstered-libyan-coast-guard-intercepts-packed-migrant-boat-idUKKBN1D40WN> accessed 6 December 2019.

60 Stephanie Kirchgaessner and Lorenzo Tondo, 'Italy Deal with Libya to 'Pull Back' Migrants Faces Legal Challenge' (*The Guardian*, 8 May 2018).

61 Giulia Paravicini, 'Italy's Libyan Vision' Pays Off as Migrant Flows Drop' (*Politico*, 10 August 2017) <www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/> accessed 6 December 2019.

62 Lizzie Dearden, 'Libyan Coastguard "Opens Fire" During Refugee Rescue as Deaths in Mediterranean Sea Pass Record 1,500' (*The Independent*, 24 May 2017) <www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libya-coastguard-opens-fire-drowned-gunshots-ngos-rescue-boat-a7754176.html> accessed 6 December 2019; The Maritime Executive, 'Libyan Coast Guard Threatens to Kill Migrant Rescue Team' (16 March 2018) <www.maritime-executive.com/article/libyan-coast-guard-threatens-to-kill-migrant-rescue-team> accessed 6 December 2019.

63 See e.g. *Rackete and Others v Italy*, App no 32969/19 (ECtHR, 29 January 2019) Interim Measure; Global Legal Action Network, 'Legal Action Against Italy over its Coordination of Libyan Coast Guard Pull-backs Resulting in Migrant Deaths and Abuse' (8 May 2018) <www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse> accessed 6 December 2019.

64 Jon Henley and Angela Guiffrida, 'Three NGOs Halt Mediterranean Migrant Rescues After Libyan Hostility' (*The Guardian*, 14 August 2017) <www.theguardian.com/world/2017/aug/14/three-ngos-halt-mediterranean-migrant-rescues-after-libyan-hostility> accessed 6 December 2019; Charles Hellller and others, 'It's An Act of Murder: How Europe Outsources Suffering as Migrants Drown' (*The New York Times*, 26 December 2018) <www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html> accessed 6 December 2019.

In March 2018, the controversial League party won critical elections in Italy on a largely anti-immigrant platform.[65] By June 2018, party leader Matteo Salvini was sworn in as Deputy Prime Minister and Minister of the Interior. Salvini committed to reduce illegal immigration to Italy and threatened to prevent NGO vessels carrying rescued migrants from accessing Italian ports. He accused the NGOs of acting as a 'taxi service' to Europe and popularized the Twitter hashtag *#chiudiamoiporti* or 'Let's close the ports!'[66]

In June 2018, Italy, for the first time, denied the *Aquarius* port access when it arrived off Sicily carrying more than 600 rescued migrants.[67] The Italian MRCC had coordinated with the operators of the *Aquarius* to facilitate the rescue of the migrants from several rubber boats in the Central Mediterranean. But on 10 June 2018, as the *Aquarius* approached the Sicilian coast, the Italian government announced it would refuse to allow the vessel to enter port and disembark the migrants. The Italians instead argued that Malta should be required to take the migrants since the *Aquarius* was marginally closer to Malta at the time of the rescue. Malta countered that it was the Italian MRCC who had ordered the rescue in the first place, and Italy should therefore allow disembarkation into its own territory. After several days of standoff, Spain ultimately agreed to accept the migrants for disembarkation.[68] This required the *Aquarius* to undertake a multiple day journey of more than 700 nautical miles from the coast of Sicily to the Spanish port of Valencia. The *Aquarius* did not have enough supplies to safely perform this voyage, so two Italian coast guard vessels had to carry some of the migrants and escort the *Aquarius* across the Mediterranean in rough weather.[69]

Following the *Aquarius* incident, Salvini explained to the media: '[f]oreign NGOs, with foreign crews, flying a foreign flag and financed by foreign institutions will no longer step foot in Italy'.[70] On Facebook, he wrote: '[r]escuing lives is a duty, transforming Italy into an enormous refugee camp is

65 Nick Squires, 'Italian Politician Pledges to Kick Out Half a Million Illegal Migrants if Elected Prime Minister' (*The Daily Telegraph,* 23 January 2018) <www.telegraph.co.uk/news/2018/01/23/italian-politician-pledges-kick-half-million-illegal-migrants/> accessed 6 December 2019.

66 Special thanks to Paolo Zampella for providing this version of the translation; See also: Mary Fitzgerald, '"Close the Doors" – Salvini Tweet Signals Rise of Hard Right in EU' (*The Independent,* 16 June 2018) <www.independent.ie/world-news/europe/close-the-doors-salvini-tweet-signals-rise-of-hard-right-in-eu-37016478.html> accessed 6 December 2019.

67 Gaia Pianigiani and others, 'Italy's New Populist Government Turns Away Ship with 600 Migrants' (*The New York Times*, 11 June 2018) <www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html> accessed 6 December 2019.

68 Nick Squires, 'Italy's Hardline Government Threatens to Pull Back from Migrant Rescue Missions' (*The Daily Telegraph*, 18 June 2018) <www.telegraph.co.uk/news/2018/06/18/italys-hardline-government-threatens-pull-back-migrant-rescue/> accessed 6 December 2019.

69 Megan Specia, 'Aboard the Rescue Ship Where Migrants Have been Stuck for a Week' (*The New York Times*, 15 June 2018) <www.nytimes.com/2018/06/15/world/europe/migrants-ship-mediterranean-europe.html> accessed 6 December 2019.

70 AFP/The Local, 'Italy Will Close Ports to NGO Migrant Ships "All Summer" Despite Drownings' (*The Local*, 29 June 2018) <www.thelocal.it/20180629/italy-will-close-ports-to-ngo-migrant-ships-all-summer-despite-drownings> accessed 6 December 2019.

not'.[71] In the aftermath, other NGO vessels were denied or delayed disembarkation into Italian and Maltese ports.[72]

Italy then took further steps targeting the *Aquarius*. This included using flag state policy to delegitimize the vessel's operations, including allegedly pressuring Panama to revoke the ship's flag.[73] While Salvini denied involvement in the Panama Maritime Authority's decision, he remarked: '[t]hey can change their name and flag another thousand times but Italy's ports will remain shut to these gentlemen'.[74] Human rights groups criticized Panama for submitting to political pressure and revoking the flag in the first place.[75] Meanwhile, Italy threatened to seize the vessel if it entered Italian ports, alleging that the operators had illegally disposed of toxic waste in Italian territory.[76] This pressure led to the decision of the *Aquarius* operator to suspend its Mediterranean SAR initiatives.[77]

In the summer of 2018, an Italian-flagged vessel also returned rescued migrants to Libya for the first time since the ECtHR ruled it to be a violation of international law in 2012.[78] While the vessel, the *Asso Ventotto*, is an oil platform supply vessel supporting offshore activities for Italian energy com-

71 Gaia Pianigiani and others, 'Italy's New Populist Government Turns Away Ship with 600 Migrants' (*The New York Times*, 11 June 2018) <www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html> accessed 6 December 2019; Nick Squires, 'Italy's Hardline Government Threatens to Pull Back from Migrant Rescue Missions' (*The Daily Telegraph*, 18 June 2018) <www.telegraph.co.uk/news/2018/06/18/italys-hardline-government-threatens-pull-back-migrant-rescue/> accessed 6 December 2019.

72 Megan Specia, 'Italy and Malta Block Another Rescue Ship Carrying Migrants' (*The New York Times*, 28 June 2018) <www.nytimes.com/2018/06/24/world/europe/migrant-ship-mediterranean.html> accessed 6 December 2019.

73 Lorenzo Tonda and Karen McVeigh, 'No NGO Rescue Boats Currently in the Central Mediterranean, Agencies Warn' (*The Guardian*, 12 September 2018) <www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean> accessed 6 December 2019; Reuters, 'Panama Revokes Registration of Last Migrant Rescue Ship in Central Mediterranean' (23 September 2018) <www.reuters.com/article/us-italy-migration-aquarius-panama/panama-revokes-registration-of-last-migrant-rescue-ship-in-central-mediterranean-idUSKCN1M30S9> accessed 6 December 2019.

74 ibid.

75 Anastassios Adamopoulos, 'Registries Criticised for Aquarius De-flagging' (*Lloyd's List*, 12 February 2019) <https://lloydslist.maritimeintelligence.informa.com/LL1126215/Registries-criticised-for-Aquarius-deflagging> accessed 6 December 2019.

76 Jason Horowitz, 'Italy Orders Seizure of Migrant Rescue Ship' (*The New York Times*, 20 November 2018) <www.nytimes.com/2018/11/20/world/europe/italy-aquarius-seizure-order.html> accessed 6 December 2019; Lorenzo Tonda, 'Italy Orders Seizure of Migrant Rescue Ship Over "HIV-Contaminated Clothes"' (*The Guardian*, 20 November 2018) <www.theguardian.com/world/2018/nov/20/italy-orders-seizure-aquarius-migrant-rescue-ship-hiv-clothes> accessed 6 December 2019.

77 Mark Fuechec, 'Flag Revoked for Europe's only Civilian Rescue Vessel' (*Lloyd's List*, 2 November 2018) <https://lloydslist.maritimeintelligence.informa.com/LL1124931/Flag-revoked-for-Europes-only-civilian-rescue-vessel> accessed 6 December 2019; Giovanni Legorano, 'Cowed Aid agencies Cease Migrant Rescues in the Mediterranean' (*The Wall Street Journal*, 7 December 2018) <www.wsj.com/articles/cowed-by-italys-crackdown-aid-agencies-cease-migrant-rescues-in-the-mediterranean-1544194964> accessed 6 December 2019; The Maritime Executive, 'Last Migrant Rescue Vessel in Central Med Ceases Operations' (7 December 2018) <www.maritime-executive.com/article/last-migrant-rescue-vessel-in-central-med-ceases-operations> accessed 6 December 2019; Karen McVeigh, 'Deflagging of Refugee Rescue Ship a "Dark Day" for Europe' (*The Guardian*, 12 February 2019)

78 Reuters News Agency, 'Italian Ship accused of taking migrants back to Libya for First Time' (*The Daily Telegraph*, 31 July 2018) <www.telegraph.co.uk/news/2018/07/31/italian-ship-accused-taking-migrants-back-libya-first-time/> accessed 6 December 2019.

pany ENI, rather than an Italian coast guard or naval vessel, the action drew intense criticism from observers.[79] The UNHCR initiated an investigation to determine whether the action contravened Italy's humanitarian obligations under the principle of *non-refoulement*.[80] At the same time, Salvini called for the EU to label Libya a 'safe port' in order to remove the *non-refoulement* barrier, but the EU rejected this request on the grounds that this is a legal issue that cannot be changed by a political statement.

In a culminating event during the summer of 2019, after the NGO vessel Sea Watch 3 was denied disembarkation of dozens of survivors at Lampedusa, vessel operator Carola Rackete defied orders and proceeded to port, allegedly ramming border-control vessels in the process. She was arrested by Italian authorities and charged for violating provisions of the Italian Code of Navigation which prohibit "resisting a warship."[81] Although the charges were ultimately dismissed,[82] shortly thereafter Salvini signed a security decree codifying the ban on NGO rescue vessels and subjecting operators to fines of up to 1 million Euros for entering Italy's territorial waters.[83] An administrative court in Rome suspended the decree on grounds that it violated international law, but Salvini responded once again with a revised NGO ban.[84]

Shortly thereafter, in a surprise move to solidify power, Salvini announced plans to dissolve his own coalition government to make way for new elections.[85] Remarkably, Salvini's League party suffered a defeat and was replaced with a more moderate coalition government.[86] In the aftermath, Italy's hard

79 Caitlin Bodfish, 'Italian Merchant Vessel Returns 108 Migrants to Libya' (*The Italian Insider*, 31 July 2018) <http://www.italianinsider.it/?q=node/7047> accessed 6 December 2019.

80 Hannah Roberts, 'UN Investigates Migrants' Return to Libya by Italian Boat' (*Financial Times*, 1 August 2018) <www.ft.com/content/75086482-957b-11e8-b747-fb1e803ee64e> accessed 6 December 2019.

81 Elisabetta Povoledo, 'Italy Arrests Captain of Ship That Rescued Dozens of Migrants at Sea' (*The New York Times*, 29 June 2019) <https://www.nytimes.com/2019/06/29/world/europe/italy-migrants-captain-arrest.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> accessed 6 December 2019.

Elisabetta Povoledo, 'Ship Captain Who Landed Migrants in Italy Sails Into Political Storm' (*The New York Times*, 5 July 2019)<https://www.nytimes.com/2019/07/05/world/europe/carola-rackete-italy-migrants.html> accessed 6 December 2019.

82 Lorenzo Tondo and Josie Le Blond, 'Italian Judge Orders Release of Ship Captain Who Rescued Refugees' (*The Guardian*, 2 July 2019)<https://www.theguardian.com/world/2019/jul/02/more-than-1m-raised-for-rescue-ship-captain-carola-rackete-italy> accessed 6 December 2019.

83 Jason Horowitz, 'Salvini's Standoff at Sea Highlights Italy's War on Rescue Ships' (*The New York Times*, 16 August 2019) <https://www.nytimes.com/2019/08/16/world/europe/salvini-italy-migrants-open-arms.html> accessed 6 December 2019.

84 'Migrant Ship Heads for Italy's Waters After Judge Overrules Salvini' (*The Guardian*, 14 August 2019) <https://www.theguardian.com/world/2019/aug/14/migrant-ship-heads-for-italys-waters-after-judge-overrules-salvini> accessed 6 December 2019.

85 Jason Horowitz, 'Italy's Government Faces a Confidence Vote Where Nothing is Certain' (*The New York Times*, 19 August 2019) <https://www.nytimes.com/2019/08/19/world/europe/salvini-italy-confidence-vote-elections.html> accessed 6 December 2019.

86 Colleen Barry and Giada Zampano, 'Italy's Bitter Political Foes Unite in Bid to Foil Salvini' (*Associated Press*, 29, August 2019) <https://apnews.com/376d97bb5f4d4a31bc4a64a2fa4af2a3> accessed 6 December 2019.

line policy targeting rescuing vessels appears to have softened.[87] Yet observers have cautioned that populists leadership could soon return to Italy.[88]

This recent political resistance to migrant disembarkation from NGO vessels has not been confined to Italy. During 2019, Malta has also maintained a policy that has kept migrant rescuing vessels waiting outside of port sometimes for weeks until burden-sharing agreements have been made with third party states to accept migrants into their territory.[89] Malta has also become embroiled in its own political crisis unrelated to migration issues.[90] Joseph Muscat has announced plans to resign as Prime Minister as the government appears to be on the verge of an unexpected transition.[91] It remains to be seen what new Maltese leadership might bring to the SAR policy debate.

In the final months of 2019, even amidst these political changes, Italy and Malta, along with France, Germany, and Finland, agreed to a temporary arrangement to systematize disembarkation and re-location of rescued migrants.[92] The proposal was presented to other EU stakeholders at a meeting of interior ministers, but consensus was not achieved. This political impasse leaves the place of safe disembarkation determination continually subject to ad hoc negotiations.[93]

87 Giovanni Legorano, 'Europe Migration Agreement Aims to Bolster Italy's Pro-EU Government' (*The Wall Street Journal*, 23 September 2019) <https://www.wsj.com/articles/europe-migration-agreement-aims-to-bolster-italys-pro-eu-government-11569263050> accessed 6 December 2019.

88 Giovanna De Maio, 'Matteo Salvini is Out but Not Down' (*Brookings*, 4 September 2019) <https://www.brookings.edu/blog/order-from-chaos/2019/09/04/matteo-salvini-is-out-but-not-down/> accessed 6 December 2019; Billy Perrigo, 'The Far Right Lost Power in Italy Two Months Ago. So Why are Migrant Rescue Boats Still Being Refused Entry' (*Time*, 29 October 2019) <https://time.com/5713279/italy-migrant-rescue-boats/> 6 December 2019.

89 See e.g. Darrin Zammir Lupi, '"We are not Fish": Migrants Stranded at Sea Grow Frustrated' (*Reuters*, 4 January 2019) <www.reuters.com/article/us-europe-migrants-ngo/we-are-not-fish-migrants-stranded-at-sea-grow-frustrated-idUSKCN1OY1AR> accessed 6 December 2019; Patrick Kingsley, 'Stranded Migrants Are Finally Brought to Shore After 19 Days' (*The New York Times*, 9 January 2019) <www.nytimes.com/2019/01/09/world/europe/migrant-refugees-boat-malta.html> accessed 6 December 2019; See e.g. Associated Press, 'E.U. Countries Agree to Take Migrants After Rescue Ship Standoff' (*The New York Times*, 13 April 2019) <www.nytimes.com/2019/04/13/world/europe/malta-migrants-ship.html> accessed 6 December 2019; Esther King, 'Malta to Allow German NGO Ship to Dock, Ending Standoff' (*Politico*, 7 July 2019) <https://www.politico.eu/article/malta-to-allow-german-ngo-ship-to-dock-ending-standoff-alan-kurdi-malta-joseph-muscat/>accessed 6 December 2019.

90 Margherita Stancati, 'Malta's Prime Minister Hit by Growing Political Crisis Over Journalist's Assassination' (*The Wall Street Journal*, 29 November 2019) <https://www.wsj.com/articles/maltas-prime-minister-hit-by-growing-political-crisis-over-journalists-assassination-11575071155> accessed 6 December 2019.

91 Juliette Garside, "Malta's PM Quits In Crisis Over Daphne Caruana Galizia Murder' (The Guardian, 1 December 2019) <https://www.theguardian.com/politics/2019/dec/01/malta-pm-joseph-muscat-quits-daphne-caruana-galizia> accessed 6 December 2019.

92 Stephen Calleja and Fances D'emilio, '5 EU Nations Reach Temporary Deal on Rescued Migrants' (*Associated Press*, 23 September 2019) <https://apnews.com/cde0585652614604a5342b30c6219306> accessed 6 December, 2019.

93 Bernd Riegert 'EU Fails to Cement Agreement on Migrants Rescued at Sea'(*Deutche Welle*, 8 August 2019) <https://www.dw.com/en/eu-fails-to-cement-agreement-on-migrants-rescued-at-sea/a-50743383> accessed 6 December 2019.

4. Reactions in the Shipping Industry

As European SAR policy has evolved over time, the shipping industry has increasingly sought inclusion in the discourse. As early as 2015, industry representatives participated in the Shared Awareness and De-confliction in the Mediterranean (SHADE MED) forum.[94] This multi-stakeholder forum provided industry participants the opportunity to discuss best practices and other rescue coordination issues with state and regional actors in the SAR community.

In June 2017, the International Chamber of Shipping also made proposals to the IMO's Maritime Safety Committee urging further action at the UN level to respond to unsafe maritime migration.[95] In response, the IMO organized a meeting between leaders of relevant international organizations and shipping industry stakeholders.[96] This inter-agency meeting was held at the IMO in October 2017 and provided a high-level forum for maritime industry organizations to discuss relevant SAR issues with representatives of the IOM, UNHCR, United Nations Office on Drugs and Crime (UNODC), and others.[97] Participants representing the shipping industry included the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the International Transport Workers' Federation, and the International Federation of Shipmasters Association.[98]

After the meeting, in a letter written by the Secretary General of the IMO, a record of the views of the industry participants was circulated among stakeholders. The participants agreed to include a single statement to form part of the official record. The statement emphasized that commercial ships 'are not configured to take on board large numbers of migrants', and that the number of rescued persons on board might 'significantly exceed the total ship's complement as well as the ship's capacity to provide a safe and secure environment during transit to a place of safety'.[99] It further argued that although international law does require ships to assist and rescue people, there is a 'corresponding requirement on States to provide adequate SAR resources and also to promptly identify and facilitate disembarkation in a place of safety'.[100] The statement also raised the concern that '[c]urrent political changes in Europe may make the provision of a disembarkation port more difficult' and that policies requiring merchant vessels to disembark rescued persons in Libya 'may create civil unrest amongst those rescued and lead to the charge that the ship's master contravened the principle of *non-refoulement*'.[101] Among other proposals, the statement recommended that the international community respect the 'legitimate right of NGOs to conduct rescues to relieve the burden on the merchant fleet'.[102]

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94 EUNAVFOR Med: Operation Sophia 'SHADE MED' <www.operationsophia.eu/shade-med/> accessed 25 January 2019.

95 Letter of IMO Secretary General, 'Outcome of the Inter-Agency meeting with the Maritime Industry on Mixed Migration' (*IMO*, 31 October 2017).

96 ibid.

97 ibid.

98 ibid.

99 ibid.

100 ibid.

101 ibid.

102 ibid.

Industry stakeholders have voiced similar concerns in other published documents. In a statement released on its website, ICS raised the issue that changing disembarkation protocol to include possibly returning rescued persons to Libya could cause serious problems for commercial vessel operators because they would be violating international law 'as well as risking conflict with any rescued people who might object to being returned to Libya'.[103] While the ICS statement commended Italy and Greece for having 'consistently permitted prompt and predictable disembarkation of rescued people from merchant ships' it also raised the concern that '[a]s attitudes in Europe towards illegal immigration harden, the real fear is that shipping might face the prospect of prompt disembarkation of rescued persons being refused […]'.[104]

These fears among industry participants intensified after the *Aquarius* incident. In June 2018, while the fate of the *Aquarius* was still being negotiated as it waited off the Sicilian port, ICS Secretary General at that time, Peter Hinchliffe, participated in an interview with shipping publication Lloyd's List.[105] Hinchliffe noted that having experienced the fallout of the *Tampa* incident in 2001, the shipping industry had been 'extremely concerned' that a commercial vessel would perform a large-scale rescue 'and then find that they were unable to disembark [survivors] to a European country'.[106] He acknowledged that up until that point, the Italian government had never refused a merchant ship access for disembarkation.[107] But he argued that the treatment of the *Aquarius* caused doubt in the shipping industry because 'the Italian government has not made it clear whether or not the same ban, which they appear to be applying to non-Italian flagged NGO ships, would apply to a merchant ship in the same circumstances'.[108] Hinchliffe confirmed the ICS view that shipping industry participants are 'absolutely committed' to the obligation for merchant vessels to recover anyone in a distress situation at sea.[109] However, he also clarified that 'the assurance that a ship having picked up several hundred people can land them somewhere is an absolute prerequisite'.[110] If merchant ships are unable to disembark rescued persons, he explained, this would have a 'serious impact on world trade and on ships passing through the Mediterranean'.[111]

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103 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.

104 ibid.

105 Lloyds's List, 'The Lloyds List Podcast: Migrant Crisis' (15 June 2018) <https://lloydslist.maritimeintelligence.informa.com/LL1123042/The-Lloyds-List-Podcast-Migrant-Crisis> accessed 6 December 2019.

106 ibid.

107 ibid.

108 ibid.

109 ibid.

110 ibid.

111 ibid.

Other industry representatives offered similar statements. The International Transport Worker's Federation (ITF) and the European Transport Workers Federation (ETF) issued a joint statement expressing that they were 'deeply concerned' by the refusal of Italy and Malta to allow disembarkation of the rescued persons on the *Aquarius* and over 'possible future implications for merchant ships that have met their UNCLOS and SOLAS obligations and rescue persons in distress'.[112] ITF General Secretary Stephen Cotton remarked, '[i]t is high time the European Union and its member states got their act together and agreed on a long-term sustainable solution to this long-standing problem at its borders and addressed the issue in a humanitarian manner'.[113] Likewise, ETF General Secretary Eduardo Chagas said that while merchant ships have rescued tens of thousands of people in accordance with their moral and legal obligations, '[…] this is not a lasting solution to a structural problem governments need to solve'.[114] He continued: '[u]sing merchant ships as rescue boats also poses safety risks for seafarers and migrants alike, especially if they are not allowed to enter the nearest ports and have to travel long additional distances'.[115]

As if on cue, only days after the *Aquarius* was denied access to ports in Italy and Malta, a similar incident occurred - this time involving a large container vessel operated by Danish shipping company Maersk Line. On 21 June 2018, the container vessel *Alexander Maersk* received a distress signal while on a voyage carrying cargo from Libya to Malta. It responded to the call and facilitated the rescue of 113 migrants. The *Alexander Maersk* then proceeded towards Sicily where it awaited instructions from the Italian MRCC. On arrival, it waited several miles off the coast of Pozzallo for several days while Italian officials decided whether or not to allow disembarkation.

This delay again mobilized the shipping industry to speak out. Martin Dorsman, Secretary General of the European Community Shipowners' Association (ESCA) issued a scathing statement: 'It is not acceptable that a merchant vessel, saving migrants on its own or called upon to assist in search and rescue activities, is confronted with this kind of problem. Problems that potentially affect the safety and well-being of the migrants and the crew'.[116] ICS's Peter Hinchliffe told Lloyd's List, '[t]his is the scenario that ICS has feared since the sudden growth in migrant rescues a number of years ago […].

112 International Transport Workers' Federation, Press Release, 'Aquarius Ship: ITF and ETF Condemn Actions of Italy and Malta' (14 June 2018) <www.itfglobal.org/en/news/aquarius-ship-itf-and-etf-condemn-actions-italy-and-malta> accessed 6 December 2019.

113 ibid.

114 ibid.

115 ibid.

116 European Community Shipowners' Association, 'European Shipowners Call upon Authorities to Disembark the Migrants on Board the Alexander Maersk As Soon As Possible' (25 June 2018) <www.ecsa.eu/press-releases/european-shipowners-call-upon-authorities-disembark-migrants-board-alexander-maersk> accessed 6 December 2019; World Maritime News, 'Merchant Ships Hostage of Italian Immigration Policy' (26 June 2018) <https://worldmaritimenews.com/archives/255676/merchant-ships-hostage-of-italian-immigration-policy/> accessed 6 December 2019.

The sudden change in the position of the Italian government is extremely concerning'.[117] He urged EU leaders to 'get to grips' with the problem of EU Member States 'refusing to disembark rescued persons that have been correctly rescued by merchant ships as required by international law'.[118] US-based World Shipping Council Chief Executive John Butler told Lloyd's List that while operators of commercial vessels willingly respond to requests for assistance, 'commercial cargo vessels are not designed to carry large numbers of people, and that is why SOLAS also obligates governments to promptly provide a place of safety for the rescued persons'.[119] Denmark's Immigration Minister Inger Stojberg chimed in, noting '[i]t is unreasonable towards Maersk to put them in a situation in which they have a ship full of migrants, not least migrants whom they have been asked to help by the authorities, and this is therefore a question in which the Italians certainly should allow them to be brought to an Italian harbour'.[120] She also pointed out, '[t]his is costing Maersk a lot of money with every hour their ship is off the coast without being able to unload the migrants […]'. On 26 June 2018, Italy relented under the pressure and allowed the migrants to disembark at the port of Pozzallo, Sicily.

Following this event, there were several other provocative incidents involving commercial vessel rescues and disembarkation problems.[121] In July 2018, an Italian-flagged platform supply vessel, the *Vos Thalassa*, was temporarily delayed after performing a migrant rescue.[122] It was reported that the migrants had actually threatened to kill the crew out of fear that they were going to be returned to Libya.[123] The Italian coast guard had to intervene and disembark the migrants onto a coast guard vessel at sea.[124] Another violent event occurred in November 2018 when the Panamanian-flagged cargo

117 Helen Kelly, 'ICS Calls for EU States to Avoid Deaths at Sea Following Italy's Latest Migrant Snub' (*Lloyd's List*, 25 June 2018) <https://lloydslist.maritimeintelligence.informa.com/LL1123166/ICS-calls-for-EU-states-to-avoid-deaths-at-sea-following-Italys-latest-migrant-snub> accessed 6 December 2019.

118 ibid.

119 James Baker, 'Italy Accepts Rescued Migrants from Maersk Boxship' (*Lloyd's List*, 26 June 2018) <https://lloydslist.maritimeintelligence.informa.com/LL1123175/Italy-accepts-rescued-migrants-from-Maersk-boxship> accessed 6 December 2019.

120 Ritzau/The Local,'Italy's Refusal of Maersk Migrants "Unreasonable": Denmark's Immigration Minister' (*The Local*, 25 June 2018) <www.thelocal.it/20180625/italys-refusal-of-maersk-migrants-unreasonable-denmarks-immigration-minister> accessed 6 December 2019.

121 For a discussion of delayed disembarkation involving the Tunisian-flagged Sarost 5, which lasted three weeks, see: Kiri Santer, 'The Case of the Sarost 5: Black Holes for Responsibility in the Central Mediterranean' (*Open Democracy*, 15 August 2018) <www.opendemocracy.net/can-europe-make-it/kiri-santer/case-of-sarost-5-black-holes-of-responsibility-in-central-mediterrane> accessed 6 December 2019.

122 The Maritime Executive, 'Italy Bars Italian OSV from Port After Migrant Rescue' (9 July 2018) <https://www.maritime-executive.com/article/italy-bars-italian-osv-from-port-after-migrant-rescue> accessed 6 December 2019.

123 Alice Cuddy, 'Italian Coast Guard Intervenes in Migrant Rescue 'to Save Crew' (*Euronews*, 10 July 2018) <www.euronews.com/2018/07/10/italian-coast-guard-says-it-intervened-in-migrant-rescue-to-save-crew> accessed 6 December 2019; Nick Squires, 'Italy Questions Migrants who Allegedly Made Death Threats Against Crew of Rescue Ship' (*The Daily Telegraph*, 12 July 2018) <www.telegraph.co.uk/news/2018/07/12/italy-questions-migrants-allegedly-made-death-threats-against/> accessed 6 December 2019.

124 BBC News, 'Italy Accuses Migrants of Hijacking Rescue Ship Off Libya' (12 July 2018) <www.bbc.com/news/world-europe-44806079> accessed 6 December 2019.

vessel *Nivin* stopped to rescue 93 migrants off Tripoli.[125] The *Nivin* then proceeded to its next port of call in Libya, but on arrival most of the migrants refused to disembark the vessel. This caused the captain and the crew to take refuge on the upper decks of the vessel.[126] After ten days, Libyan authorities used tear gas and rubber bullets to forcibly remove the migrants from the *Nivin*.[127]

One of the most remarkable of these incidents occurred in March 2019 when several rescued migrants commandeered a commercial vessel after its operators had rescued them. The Palau-flagged Turkish-owned oil tanker *El Hiblu 1* was on a voyage from Istanbul to Libya when it received a distress call. The shipmaster responded and rescued over 100 migrants in the territorial waters of Libya off the coast of Tripoli. The shipmaster of the *El Hiblu 1* then set course towards Libya to disembark the rescued migrants. According to the shipmaster, once the rescued migrants realized they were heading back to Libya, several of them demanded that the ship divert the course to Europe and threatened the crew with force. The shipmaster claimed that several men attacked the cockpit with heavy metal tools and threatened to smash the ship and leave it in pieces. Fearing for his life and the safety of the crew, the shipmaster relented and notified the RCC in Malta that he was being forced to proceed to Malta. In response, Maltese special operations team intercepted the *El Hiblu 1* using three vessels and a helicopter, returned control to the shipmaster, and escorted the vessel to Boiler Wharf, Malta. On arrival, several teenage migrants were arrested for hijacking the vessel and three of them were ultimately charged with crimes punishable by up to 30 years in prison.[128] The shipmaster later accused Maltese officials of treating him disrespectfully as if he had illegally facilitated migrant smuggling. In the aftermath, he declared to the media: 'I swear in the name of God, if I find a million people dying in front of me in the sea, I will never rescue them after what I saw here in Malta'.[129]

Shipping industry organizations again reacted with unified outrage. Guy Platten of ICS remarked: 'If a ship is directed to disembark rescued people in Libya, it creates a potential for conflict between the crew and desperate frustrated people that might object to being returned. Given the numbers picked up in such large-scale rescue operations, the crew of the rescuing ship can easily be outnumbered and overwhelmed'.[130] He also emphasized that the seafarers are civilians severely affected by

125 Lori Hinnant, 'Dozens of Migrants Refuse to Leave Container Ship in Libya' (*Associated Press*, 14 November 2018) < https://apnews.com/2056be67824b4c55846918ea89afe6c1> accessed 6 December 2019.

126 Sam Magdy, 'Migrants Forced Off Ship After Refusing to Return to Libya' (*Associated Press*, 21 November 2018 < https://apnews.com/0866c2612f5647a5a356a7887068a1b5> accessed 6 December 2019.

127 Anastassios Adampoulos, 'Migrants Forced Off Cargo Ship in Libya' (*Lloyd's List*, 21 November 2018) <https://lloydslist.maritimeintelligence.informa.com/LL1125208/Migrants-forced-off-cargo-ship-in-Libya> accessed 6 December 2019.

128 The Associated Press, '3 Teenage Migrants are Charged in Malta with Hijacking Ship at Sea' (*The New York Times*, 31 March 2019) <www.nytimes.com/2019/03/31/world/europe/migrants-hijacking-ship-malta.html> accessed 6 December 2019.

129 Elene Becatoris and Maggie Michael, 'Ship Takeover by Migrants Raises Concerns for Rescues at Sea' (*Associated Press*, 31 March 2019) <www.apnews.com/fa5d40293aa84c558d8140404130c567> accessed 6 December 2019.

130 International Chamber of Shipping, 'ICS Deeply Concerned by Mediterranean Migrant Rescue Incident' (28 March, 2019) <www.ics-shipping.org/news/press-releases/view-article/2019/03/28/ics-deeply-concerned-by-mediterranean-migrant-rescue-incident> accessed 6 December 2019.

these traumatic situations and urged coastal states to facilitate a safe place of disembarkation 'both for those rescued and for the seafarers involved in the rescue'.[131] John Stawpert of ICS also remarked: '[w]hat we need is action at a high level – at state level and also international level – to ensure that ships that find themselves in this sort of situation, through no fault of their own, get immediate assistance'.[132] Martin Dorsman of the European Community Shipowners' Association agreed, writing on Twitter that European shipowners were 'highly worried' about the situation and noted that the failure to properly source international SAR operations in the Central Mediterranean may cause 'serious consequences for merchant vessels and its crews'.[133]

Meanwhile, Italy's Matteo Salvini took the opportunity to promote his political narrative, remarking, 'these are not migrants in distress, they are pirates'.[134] While shipping industry participants have generally refrained from invoking such antagonistic rhetoric, rights groups have alleged that merchant vessels are increasingly avoiding getting involved in rescues altogether.[135] Data from the Italian Coast Guard does suggest that after the *Aquarius* and *Alexander Maersk* incidents, commercial vessel participation dropped sharply. In June 2018, commercial vessels performed 736 rescues, but after these events and throughout the remaining six months of 2018 commercial vessels rescued a total of only 109.[136] This might be partially explained by a lower number of total attempted sea crossings during that period, but the Italian Coast Guard has not even published the numbers of migrants rescued by merchant vessels in 2019, which perhaps supports a more cynical view. [137]

131 ibid.

132 Elene Becatoris and Maggie Michael, 'Ship Takeover by Migrants Raises Concerns for Rescues at Sea' (*Associated Press*, 31 March 2019) <www.apnews.com/fa5d40293aa84c558d8140404130c567> accessed 6 December 2019.

133 Anastassios Adamopoulos, 'Shipowners Worried for Crew After Vessel Hijacked by Migrants' (*Lloyd's List*, 28 March 2019) <https://lloydslist.maritimeintelligence.informa.com/LL1126827/Shipowners-worried-for-crew-after-vessel-hijacking-by-migrants> accessed 6 December 2019.

134 Lorenzo Tondo and Jennifer Rankin, 'Rescued Migrants Hijack Merchant Ship Off Libya' (*The Guardian*, 27 March 2019) <www.theguardian.com/world/2019/mar/27/rescued-migrants-hijack-merchant-ship-off-libya> accessed 6 December 2019.

135 Frances D'Emilio, 'Aid Groups: Ships Not Willing to Save Mediterranean Migrants' (*Associated Press*, 12 August 2018) <https://apnews.com/6aa38aaebe754815bf8286830ba9e8f9> accessed 6 December 2019; Tom Kington, 'Captains 'Hide Ship Locations in Med to Avoid Migrant Rescues' (*The Times*, 1 August 2018) <www.thetimes.co.uk/article/captains-hide-ship-locations-in-med-to-avoid-migrant-rescues-pq6bxjklh> accessed 6 December 2019; Humanitarian organizations have alleged that Merchant ships are not responding to their obligations to rescue and have even allegedly filed civil lawsuits raising such claims, see: Juan Medina, 'Migrant Charity Files Complaint Against Cargo Ship, Libya' (*Reuters*, 21 July 2018) <www.reuters.com/article/us-europe-migrants/migrant-charity-files-manslaughter-complaint-against-cargo-ship-libya-idUSKBN1KB-0MV> accessed 6 December 2019.

136 Guardia Costiera, 'SAR Activity in the Central Mediterranean Sea from January 1 to December 31, 2018'< https://www.guardiacostiera.gov.it/en/Pages/search-and-rescue.aspx#> accessed 6 December 2019.

137 Nevertheless, the international media continues to highlight anecdotal involvement of merchant shipping in migrant rescues, see: Lorainne Kihl, 'La Marine Marchande, Victime Collatérale de la Politique Migratoire en Méditerranée' (*Le Soir*, 18 June 2019) <https://www.lesoir.be/231251/article/2019-06-17/la-marine-marchande-victime-collaterale-de-la-politique-migratoire-en> accessed 6 December 2019.

5. Conclusion

The Mediterranean rescue crisis has generated varying political attitudes at different stages. The humanitarian concerns that drove enhanced state-orchestrated SAR initiatives in the early days of the crisis mellowed as coastal states struggled to manage the overwhelming demand for assistance and immense scale of arrivals. As volunteer NGO rescuers entered the scene, their contributions were initially welcomed, but scepticism increased over time as they repeatedly arrived at European ports carrying survivors by the hundreds. Politicians in Mediterranean states along the frontlines capitalized on this hardening of popular sentiments, using them to justify restrictive disembarkation policies requiring third party states to accept migrants for resettlement before allowing recuing vessels to access their ports. But without a systematic arrangement on burden-sharing between states, these negotiations have remained unpredictable and politically-charged affairs, which has contributed to dangerous delays reminiscent of the *Tampa* incident that drove the modernization of SAR obligations nearly two decades ago.

This dilemma has placed operators of commercial vessels in a Catch-22 situation. On the one hand, they are morally and legally obliged to respond to requests for assistance at sea and to coordinate with state RCCs to deliver survivors to a place of safety. If they fail to comply with these obligations, people in need of assistance could die, and the shipmaster could also face criminal prosecution. But on the other hand, if merchant ship operators do honour their legal obligations, they depend on states to quickly determine a safe place for disembarkation. If states abrogate these responsibilities, private shipmasters cannot fulfil their own duties without putting lives at risk and suffering substantial economic harm.[138]

Even throughout this period of frequent large-scale rescues, shipping industry participants have regularly recommitted to their SAR responsibilities. But as state actors politicize these obligations, making it difficult to disembark survivors, attitudes within the shipping industry may evolve as well. Moving forward, as EU policymakers attempt to develop a workable burden-sharing consensus on rescue and disembarkation protocol, it must be recognized that the fate of commercial vessel participation in rescues is linked to the continued contributions of other rescuers, including volunteer NGOs. With the operational viability of NGO rescuers currently in doubt, a void has emerged that could cause increased reliance on commercial resources. While members of the merchant fleet have attempted to avoid politicization of the issue, evolving EU policies have increasingly mobilized industry voices. ICS and other industry representatives continue to relay the position that the primary concern is humanitarian.[139] At the same time, when merchant seafarers have placed their lives on the line to save others, they expect and deserve immediate SAR support from state actors under the complimentary obligation to provide it.

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138 Human Rights Watch, 'EU/Italy/Libya: Disputes Over Rescues Puts Lives at Risk' (25 July 2018) <www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk> accessed 6 December 2019.

139 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.

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The European Union is not a State: International Responsibility for Illegal, Unreported and Unregulated Fishing Activities

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Abstract

This paper focuses on the responsibility of the European Union in the context of illegal, unreported and unregulated fishing activities. It aims to debate some of the legal issues that characterize its role as a global actor dealing with marine resources and the protection of the environment. For this purpose, I analyse an Advisory Opinion of the International Tribunal for the Law of the Sea in order to describe the interplay between obligations of due diligence and attribution of conduct. Finally, I focus on international customary law possibly binding EU Member States. The paper points out the unnecessary level of complexity employed by ITLOS to establish the responsibility of the EU excluding that of its Member States and constructs a simplified form of EU responsibility applying the articles developed by the International Law Commission on the responsibility of international organizations.

Keywords: European Union; international responsibility; normative control; European exceptionalism; responsibility of international organizations; illegal, unreported and unregulated fishing activities

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1. Introduction

This paper focuses on the responsibility of the European Union (EU) in the context of illegal, unreported and unregulated (IUU) fishing activities. It aims to debate some of the legal issues that characterize its role as a global actor dealing with marine resources and the protection of the environment. For this purpose, I will analyse an Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS)[1] (first section) in order to describe the interplay between obligations of due diligence (second section) and attribution of conduct (third section). Finally, I will focus on international customary law possibly binding EU Member States (fourth section).

Due to the significant absence of judicial practice concerning the international responsibility of the EU, this Advisory Opinion serves as a fundamental decision in the discussion on the complexities of its status in international law and, in particular, under the law of the sea. The reason I wish to discuss this opinion after a conspicuous number of academic commentaries, is that I would like to present

1 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4.

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a way to reduce the complexities of the argumentative structure employed by ITLOS. I believe that the intention to preserve the status of the EU as a *sui generis* international organization played an unnecessary role, which complicates the argumentation and negatively affects the protection of biodiversity. Conversely, I will apply to the present case the articles developed by the International Law Commission (ILC) on the responsibility of international organizations (ARIO), which are not mentioned by ITLOS even though they were extensively debated during the proceedings.[2]

I have three main claims that clearly diverge from the position of ITLOS: the standard of due diligence applicable to the EU is different from the standard of due diligence that is applicable to Member States; the relevant conduct is attributable to the EU on the basis of Article 6 ARIO and not on the basis of the so-called 'normative control'; EU Member States cannot hide behind the institutional veil, but bear obligations based on customary international law to provide all means to enable the organization to fulfil its obligations.

2. The Advisory Opinion

The Sub-Regional Fisheries Commission (SRFC) is an international organization established in 1985 which has seven Member States (Cape Verde, The Gambia, Guinea Bissau, Mauritania, Senegal, Guinea and Sierra Leone). Its purpose is to strengthen cooperation between these countries in the field of fisheries management.[3] In 1993, the SRFC Member States signed a Convention on the Definition of the Conditions of Access and Exploitation of Fisheries Resources off the coastal zones of SRFC Member States. This was reviewed in 2012 by the Convention relating to the definition of the minimum conditions of access and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC Member States.[4] The 2012 Convention conferred to its members the right to authorize access to fishing vessels belonging to non-members to the allowable surplus of resources in the maritime areas under their jurisdictions, establishing a system of fishing licences and the conditions for the management of the resources. As of 2013, there are eighteen agreements in force between SRFC Member States and between a third party and an SRFC State.[5] The EU, the only international organization involved, currently has two agreements with Cape Verde and Mauritania.[6]

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2 ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries', Yearbook of the International Law Commission, 2011, vol II, part two, UN Doc A/66/10 (ARIO). See, for instance, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Verbatim Record of the public sitting, 5 September 2014) ITLOS/PV.14/C21/4/Rev.1.

3 FAO, 'Regional Fishery Bodies Summary Descriptions SRFC' <www.fao.org/fishery/rfb/srfc/en> accessed 2 January 2020.

4 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (adopted 8 June 2012, entered into force 16 September 2012), permanent secretariat (Minimal Conditions Convention).

5 SRFC, 'Request for an Advisory Opinion to the International Tribunal for the Law of the Sea', Written Statement (November 2013), annex III, p. 85 (SRFC Written Statement).

6 European Commission, 'Cape Verde: Fisheries Partnership Agreement' <https://ec.europa.eu/fisheries/cfp/international/agreements/cape_verde> accessed 2 January 2020; European Commission, 'Mauritania: Fisheries Partnership Agreement' <https://ec.europa.eu/fisheries/cfp/international/agreements/mauritania> accessed 2 January 2020.

The SRFC reported several cases of IUU fishing activities in the areas it regulates. IUU activities are a threat to the conservation of ecosystems, causing the drastic decline in major stocks of fish resources in the sub-region. Moreover, they cause financial losses for West African countries and endanger local communities of artisanal fishermen. The 2012 Convention defines IUU activities, distinguishing between three practices:

> 4.1 'Illegal fishing': fishing activities:
> - conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
> - conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
> - in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
>
> 4.2 'Unreported fishing': fishing activities:
> - which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
> - undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
>
> 4.3 'Unregulated fishing': fishing activities [:]
>
> - in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
>
> - in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.[7]

Concerning the facts of the case, for the purposes of this paper it is relevant to point out that in 2010 one of the SRFC Member States boarded two vessels which were fishing under a memorandum of understanding signed with an international organization.[8] The vessels were in breach of the legislation of the coastal state, leading to an outstanding fine. The owner recognized the violation and paid part of the fine on the spot. Consequently, the vessels were released with the assurance of paying the

7 Minimal Conditions Convention, art 2.

8 The circumstances were anonymized in the SRFC written statement (n 5) 15, but we can safely assume it was the EU, the only international organization signing fishing agreements with SRFC Member States.

entire fine within an agreed period. However, it transpired that the remaining fine was not paid, and the SRFC Member State asked the international organization to take the appropriate measures to pay the fine. In response, the international organization declared itself incompetent both to oblige the flag state to pay the fine and to pay in lieu of the flag state.

Following this event and many others that do not strictly concern the EU but non-member flag states, the SRFC requested an Advisory Opinion from ITLOS. It referred four questions on the interpretation of obligations binding states and international organizations arising from IUU activities conducted by private vessels:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?

2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?

3. Where a fishing licence is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?

4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?[9]

The Tribunal clarified the meaning of the questions, explaining that the first question concerned the obligations of non-member flag states of the SRFC in cases where vessels flying their flag are engaged in IUU fishing within the exclusive economic zones of the SRFC Member States. The second question concerned the responsibility arising from the violation of such obligations, which is not addressed by the applicable law. The third question concerned the apportionment of responsibility between a flag state and the international organization that concluded the agreement that granted its fishing licence. The last question concerned the obligations of SRFC Member States.

As a preliminary step, the Tribunal discussed its competence to issue advisory opinions; a controversial issue that is not discussed in this paper.[10] I will consider how the Tribunal responded to the first three questions. For the purposes of this paper, the exact content of the obligation binding flag states is relevant only when useful in explaining the parallel question of the obligation binding the EU, which will be discussed in the next section. Question four is outside the scope of this paper.

The Tribunal answered the first and second questions on the obligations and responsibility of the flag state by establishing, first, that under the law of the sea 'the primary responsibility for taking the

9 *Advisory Opinion* (n 1) para 2.

10 Massimo Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission' (2016) 29 Leiden Journal of International Law 441.

necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State'.[11] Under the United National Convention of the Law of the Sea (UNCLOS), the coastal state has sovereign rights for the purposes of conserving and managing the living resources within its Exclusive Economic Zone (article. 56(1)(a)) and is authorized to board, inspect and arrest vessels engaged in IUU fishing in violation of its laws (article 73(1)).

Subsequently, ITLOS reconstructed the responsibility of the flag states relying on three sets of sources: general provisions of UNCLOS; specific provisions of the 2012 Convention to which only SRFC states are parties; and specific provisions in bilateral fishing agreements between the costal state and the flag state. UNCLOS contains general provisions concerning flag states' duties in articles 91, 92, 94, 192 and 193. It also imposes specific obligations to flag states in articles 58(3) and 62(4), for the particular case of fishing activities carried out by nationals of the flag state. The 2012 Convention requires that fishing vessels belonging to non-Member States obtain a fishing licence and land all their catches in the ports of a Member State. Moreover, it imposes specific obligations concerning the declaration of catches, prohibition of equipment and giving notice of their entry and exit from maritime zones. Finally, bilateral fishing agreements contain further obligations for the flag state, requiring it to assure compliance with the regulations of the SRFC Member States in order to respect the principle of sustainable exploitation.

In sum, the Tribunal contended that flag states are under an obligation of conduct to assure compliance by vessels flying their flags with the laws and regulations concerning conservation measures adopted by the coastal state.[12] The flag state is under an obligation of due diligence to take all necessary measures to ensure compliance and to prevent IUU fishing. Consequently, the Tribunal stated that the responsibility of the flag state arises from the violation of its due diligence obligation concerning IUU activities conducted by vessels flying its flag. However, it recognized that neither UNCLOS nor the 2012 Convention provide guidance on the issue of liability of the flag state.[13] It applied the general rules on responsibility of states for internationally wrongful acts, recognizing that responsibility does not arise from the failure of the vessels to comply with the laws of the coastal state, but from the due diligence obligation. This means that the flag state is not obliged to assure compliance by its vessels, but to take adequate regulations and impose its vigilance to prevent IUU activities. In sum, flag states are responsible if they omit to impose and enforce sufficient regulations.

Concerning the standard of due diligence which applies to a flag state, the Tribunal did not provide specific instructions, contending that it is free to determine the means 'in accordance with its legal system'.[14] However, it did mention that flag states are required to establish 'enforcement mechanisms to monitor and secure compliance' with coastal state legislation, including sanctions that are 'suf-

11 *Advisory Opinion* (n 1) para. 106.

12 See, in general, the commentary by Valentin Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47 Ocean Development & International Law 327.

13 *Advisory Opinion* (n 1) para. 142.

14 ibid, para 138.

ficient to deter violations and to deprive offenders of the benefits' of illegal fishing.[15] As the International Court of Justice contended in the *Pulp Mills* case, a due diligence obligation does not only entail the adoption of appropriate rules, but also a certain level of vigilance.[16] As I will contend in the next section, the obligation of vigilance and the enforcement of sanctions is particularly relevant for differentiating between the standard of due diligence that is applicable to states and the standard that is applicable to the EU.

Finally, the Tribunal faced the third question, concerning the responsibility of international organizations, and of the EU in particular. First, it narrowed the scope of the question contending that it only concerned the organizations that are referred to in article 305 (1)(f) and article 306 UNCLOS, and its Annex IX, to which their Member States have transferred competence on fisheries. Therefore, the Tribunal limited its answer to the EU, the only international organization which is part of UNCLOS, and noted that only the exclusive competence of the EU on fisheries is relevant. Then, it relied on article 6(1) Annex IX UNCLOS to link the responsibility of the EU to its competences and considered that 'an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its Member States, may be held liable if a Member State fails to comply with such obligation and the organization did not meet its obligation of "due diligence"'.[17] In sum, ITLOS applied a so-called 'state analogy', contending that the legal framework that is applicable to states is also applicable to the EU on the basis of the attribution of exclusive competences.[18]

Moreover, concerning the flag state which is a member of the EU, the Tribunal considered that it is not part of the fishing agreement concluded only by the organization and, therefore, it cannot be considered responsible for the conduct of the vessels flying its flag. However, the ITLOS repeated that under article 6(2) Annex IX UNCLOS, joint and several liability of the EU and the state concerned could arise if they do not provide information on who is competent for a specific matter.

This Advisory Opinion raises a number of issues concerning the effective protection of biodiversity in the case in which private fishing vessels have access to fishing zones thanks to agreements concluded by the EU and not by their flag states. In particular, the Tribunal relied extensively on the comments made by the European Commission, which adopted a clear defensive strategy. On the one hand, the EU claimed to be the sole responsible entity freeing Member States from any responsibility, and, on the other hand, it claimed that EU regulations and relevant applicable norms did the outmost to prevent IUU fishing.[19] However, the facts of the case showed a different story, under which the

15 ibid, para 139.

16 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, para 94.

17 *Advisory Opinion* (n 1) para. 168.

18 On the meaning of the state analogy in the law of international organizations, see: Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2018).

19 European Commission, 'Request for an Advisory Opinion Submitted by the SRFC (Case no 21)', Second Written Statement (March 2014); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Verbatim Record of the public sitting, 4 September 2014) ITLOS/PV.14/C21/3/Rev.1.

conferral of competences limited the capacity of the EU to enforce sanctions and give reparation for the wrongful act.[20] Indeed, the facts of the case as presented by the SRFC dangerously resemble those circumstances in which Member States circumvent their international obligations by conferring on an international organization the competences to conclude agreements with third parties.[21] The origin of my concern is that the EU and the Tribunal relied on the attribution of exclusive competences on the protection of biodiversity to claim that the EU needs to be treated as a flag state in the law of the sea regime, even if it lacks general capacity to take every relevant conduct, such as instituting criminal proceedings.

I believe that a better solution can be found on the basis of the framework established by the ILC articles on the responsibility of international organizations and maintaining a clear distinction between the two constitutive elements of international responsibility: the violation of a primary obligation and the attribution of conduct.

3. The Primary Obligation Binding the EU

The application of the state analogy led the Tribunal to not distinguish between the obligation binding the EU and the obligation binding States. ITLOS described the meaning of due diligence obligations relying on the Seabed Disputes Chamber and the International Court of Justice, as an obligation 'to deploy adequate means, to exercise best possible efforts, to do the utmost'.[22] As mentioned already, the content of the obligation is described relying on the provisions of UNCLOS, and in particular article 58(3) and article 62(4), under which the flag state has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States. In general, 'the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States'.[23] However, according to the Opinion, due diligence is an obligation of conduct that both flag states and organizations have to ensure that vessels flying their flag, or the one of their Member States, are not involved in IUU fishing.

The absence of distinction by ITLOS relates to the fact that whilst the number of international obligations that now extend to international organizations is substantive, legal scholarship lacks a comprehensive study on how the traditional distinction between obligations of conduct and obli-

20 See, in particular SRFC written statement (n 5).

21 For an analysis of this circumstance in the EU context, see: Esa Paasivirta, 'Responsibility of a Member State of an International Organization: Where Will it End - Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations' (2010) 7 International Organization Law Review 49.

22 *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10, at 40-41, para. 110; *Pulp Mills* (n 16) 79, para. 197.

23 *Advisory Opinion* (n 1) para. 136.

gations of result affects their operations.[24] Some complexities arise from the unclear distinction between primary and secondary rules that affects the perception of due diligence obligations, either as primary obligations of conduct or as secondary rules concerned with the implementation of primary obligations of result.[25] More issues derive from the adoption of a concept of due diligence obligation either as a way to compensate the absence of fault in international responsibility or to share responsibility among a plurality of actors.[26] The ILC excluded that fault, or diligence, constitutes a third fundamental element that characterizes international responsibility.[27] For instance, one of the fields interested in international organizations' due diligence concerns the 'duty of care' that organizations and Member States have towards civilian personnel deployed in missions abroad, in order to prevent a reasonably foreseeable harm occurring to them.[28] The legal issue is to clarify the nature of the duty of care as an obligation that guarantees the safety of international organizations' personnel. It could be a primary obligation to employ all means to avoid a certain violation, or a secondary rule to implement the responsibility that arises from the violation of an obligation of result (personal injuries). Furthermore, it could be a way to assess the fault of an IO in the causation of the harm or a way to share the responsibility between the IO, its Member States, and the actor that materially commits the harm.

The question that arises from the characterization of the EU obligation as one of due diligence, concerns how it operates in the context of international organizations. In particular, two issues are relevant: whether the EU possesses jurisdiction over fishing vessels and whether the standard of conduct applicable to states is different from the standard applicable to the EU.[29]

The possession of jurisdiction is a fundamental requirement for a legal subject to be able to fulfil due diligence obligations. As the ICJ stated in *Pulp Mills*: 'A State is thus obliged to use all the means

24 With few exceptions, see: Evelyne Lagrange, 'La responsabilité des organisations internationales pour violation d'une obligation de diligence' in Société Française pour le Droit International (ed), *Le Standard de due diligence et la responsibilité internationale* (Pedone 2017); Paolo Palchetti, 'La violation par l'Union Européenne d'une obligation de diligence' in Société Française pour le Droit International (ed), *Le Standard de due diligence et la responsibilité internationale* (Pedone 2017). See also: Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 European journal of international law 1133.

25 On the distinction primary and secondary, see: Giorgio Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) Rivista di Diritto Internazionale 97.

26 Study Group on Due Diligence in International Law, 'First Report' in International Law Association Report of the Seventy-Sixth Conference (Washington DC 2014) (International Law Commission, London 2014); Study Group on Due Diligence in International Law, 'Second Report' in International Law Association Report of the Seventy-Seventh Conference (Johannesburg 2016) (International Law Commission, London 2016); Joanna Kulesza, *Due diligence in international law* (Brill 2016); Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) 20 Journal of Conflict and Security Law 61; Robert P Barnidge, 'The due diligence principle under international law' (2006) 8 International Community Law Review 81.

27 Timo Koivurova, 'Due Diligence' *Max Planck Encyclopedia of Public International Law* (OUP 2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034> accessed 2 January 2020.

28 Andrea de Guttry and others (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel* (T.M.C. Asser Press 2018).

29 Palchetti (n 24) 150.

at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction'.[30] The controversial question that ITLOS did not ask is whether international organizations are able to possess jurisdiction and, in particular, whether the EU has jurisdiction over the activities carried out in vessels flying the flag of a Member States.[31] Indeed, the fact that EU law applies to the territory of its Member States, including fishing vessels, does not automatically mean that the EU itself, and not its Members, has jurisdiction on IUU fishing activities. The Tribunal bypassed this issue considering that the EU has to be treated exactly as a state and, therefore, it is exercising its proper jurisdiction in the context of exclusive competences. The second issue, concerning whether the standard of conduct is the same for states and for organizations, is also related to the attribution of competences. Indeed, the fundamental issue is whether the Tribunal should take into consideration the competences attributed to the organization in order to define the content of the due diligence obligation binding on the EU.

All in all, ITLOS did not discuss the content of due diligence obligations binding on the EU and relied on the same standard applicable to states. However, only if the EU is treated as a state will the jurisdiction and the content of the obligation of due diligence be the same for the two different subjects. Instead, the attribution of competences limits what can be asked of an international organization and 'to do the outmost' assumes a different meaning for a state than for an international organization. In particular, Evelyne Lagrange contended that organizations have a lower threshold, limited to general principles of good governance.[32] However, she also claimed that her argument does not apply when international organizations act '*exactement comme un Etat*'. I do not think that international organizations ever act exactly as a state, even in the field of the law of the sea. In particular, I would like to stress the difference between the regime in which an organization acts and the status of international organizations in international law. Even in the context of the law of the sea, the Tribunal failed to provide a clear answer that could have contributed to explain what the EU must do in concrete situations. For instance, does the EU have obligations of vigilance and of the imposition of sanctions even if these matters – i.e. criminal proceedings – are outside its exclusive competences, as declared by the EU itself? Do Member States have a role to play when their attribution of competences does not cover fundamental functions? I will come back to these questions after a discussion on how competences also bias the attribution of conduct.

30 *Pulp Mills* (n 16) para 101.

31 In the different context of human rights obligations, see Samantha Besson, 'The bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution?' (2015) 32 Social Philosophy and Policy 244.

32 Lagrange (n 24). See also: International Law Association 2016 (n 24) 39ss, and 43 in particular.

4. The Attribution of Conduct to the EU

ITLOS attributed the relevant conduct to the EU relying on the so-called 'normative control', which is a rule to attribute the conduct of Member States to an international organization not included in ARIO. For instance, this is a proposal by Frank Hoffmeister:

> Conduct of organs of a Member State of a regional economic integration organization.
>
> The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred.[33]

Similar draft articles found the endorsement of the European Commission, which claimed that the status of the EU in international law requires that in matters that fall under its exclusive competence, the relevant conduct is attributable to itself even if carried out by its Member States.[34]

I should first point out that in the context of the protection of biodiversity and of due diligence obligations, the EU acts primarily through its organs and not through its Member States. In the context of IUU activities and the ITLOS Advisory Opinion, the EU would be responsible if it omitted to pass the legislation to do the outmost to prevent the wrongful act. The relevant conduct is an omission which is directly attributable to EU organs. There is no reason to rely on normative control to claim that EU regulations on IUU fishing are attributable to the EU itself. ITLOS would have reached a better result if it had distinguished between the conduct that is directly attributable to the EU and the conduct that is directly attributable to its Member States. On the former, it could have relied on article 6 ARIO, which states: 'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.'[35]

However, the relevance of the conduct of Member States is triggered by the fact that the full respect of the due diligence obligation, contracted with a third party, requires a conduct that is attributable to Member States under article 4 of the ILC project on state responsibility (ASR).[36] I believe that article 6 ARIO can also cover this hypothesis on the basis of dual attribution, under which the same

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33 Frank Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 European Journal of International Law 723, 746.

34 As discussed in: José Manuel Cortés Martín, 'European exceptionalism in international law? The European Union and the system of international responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill 2013).

35 ARIO (n 2).

36 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', Yearbook of the International Law Commission, 2001, vol II, part two, UN Doc A/56/10.

conduct is attributable to both the EU and to its Member States at the same time.[37] Indeed, under article 6(2) ARIO, 'the rules of the organization apply in the determination of the functions of its organs and agents' and under article 2(c) an '"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization'. If, under EU law, Member States are considered as organs of the organization for the fulfilment of specific tasks, there is no reason why the conduct should not be attributed to it and, at the same time, to its members. I contend that dual attribution would drastically reduce the complexities of the actual system, enhancing a form of shared conduct.[38] This hypothesis was considered by the ILC, but only in the context of military operations.[39]

Conversely, the ILC and the EU had different and opposing views on how to give relevance to the conduct that is attributable to Member States under article 4 ASR. The EU claimed the existence of a secondary rule on the attribution of conduct that gives relevance to the normative control possessed by the organization. The ILC claimed that a primary obligation can establish that an organization is responsible for an act that is attributable to a Member State.

The ILC did not include an article on normative control to attribute the conduct to an international organization, claiming that the project does not require a special rule to deal with the attribution of exclusive competences. It relied on the attribution of responsibility without the attribution of conduct. The Special Rapporteur on the responsibility of international organizations contended that the attribution of responsibility without attribution of conduct is based on the nature of the primary obligation binding the organization.[40]

Under ILC lenses, Annex IX UNCLOS is a primary and not a secondary obligation which contains an exception to the general rules of responsibility that require a conduct to breach an obligation.[41] In Gaja's words: 'It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States'.[42] This theory has two main shortcomings. First, the absence of conduct is a complex issue to bypass by claiming an exception. Second, under this theory the nature of the obligation plays a fundamental role. An organization could be responsi-

37 Compare: Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 43, and: Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 International Organizations Law Review 87, 111.

38 In a different context, see: Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcom Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013).

39 Giorgio Gaja, Second Report on Responsibility of International Organizations, UN doc. A/CN.4/541 (2004) para 6.

40 ibid, para. 10 ss.

41 Tullio Treves, 'The European Community and the Law of the Sea Convention: New Developments' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Nijhoff 2002).

42 Gaja (n 37) para. 11.

ble for the violation of an obligation of result despite the attribution of conduct.[43] However, an obligation of due diligence is an obligation of conduct. International organizations could be responsible if the obligation imposes on them a result despite the attribution of conduct to their Member States, but they cannot be directly responsible if due diligence requires a conduct that is only attributable to Member States.

Conversely, ITLOS relied on the EU position and prepared the reader for the application of normative control when it exclusively focused on the transfer of competences over fisheries.[44] However, this finding is treated as a matter of fact, without explaining the relationship between the obligations contained in UNCLOS and the obligations that the EU assumed with SRFC Member States. The Tribunal merely stated that the EU had submitted its declaration of competences under article 5(1) Annex IX UNCLOS, which distinguishes between exclusive and shared competences, and concluded that for the case at hand only EU exclusive competences were relevant.[45] Thus, the Tribunal bypassed the attribution of conduct, stating that responsibility is where competences are.[46]

Normative control is applied when the Tribunal did not attribute the conduct to avoid interfering with the distribution of competences and their complex distinction between shared and exclusive. However, competences are not clear-cut and the limits of this approach are evident when the prevention of IUU fishing activities involve fundamental competences that Member States retain.[47] For instance, the Tribunal did not accept the proposal of the International Union for the Conservation of Nature and Natural Resources, which in its written intervention underlined the matters in which the EU has no competence, such as instituting criminal proceedings against vessels.[48] A similar lack of competence was alleged in the case raised by SRFC in its written statement to ITLOS, when the EU refused to pay the fine claimed by an SRFC Member State.[49] The reasoning employed by ITLOS provides for a sufficient level of protection of biodiversity only if the state analogy is applied in full and the EU is considered as a federal state and not an international organization. The ITLOS reasoning is flawed because the EU still relies on the attribution of competences by Member States and does not enjoy a general capacity to perform any relevant action.

From the EU perspective, the reason to focus on exclusive competences in the attribution of conduct lies in the need to avoid interferences from external regimes. The interpretative monopoly of the European Court of Justice would be threatened if a third actor interpreted competences to allocate

43 Giorgio Gaja, 'How does the European Community's international responsibility relate to its exclusive competence?', *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004).

44 *Advisory Opinion* (n 1) para 157.

45 ibid, para 164.

46 ibid, para 168.

47 Joni Heliskoski, 'EU declarations of competence and international responsibility' in Malcom Evans and Panos Koutrakos (eds), *The international responsibility of the European Union* (Hart 2013); Casteleiro (n 35) 110.

48 International Union for Conservation of Nature and Natural Resources, World Commission on Environmental Law, Specialist Group on Oceans, Coasts and Coral Reefs, '(case no 21) request for an advisory opinion submitted by the sub-regional fisheries commission, Written Statement (November 2013) para. 78.

49 SRFC written statement (n 5).

responsibility.[50] However, this necessity has the undesirable consequence of giving too much power to the rules of the organization. Indeed, internal rules would have the effect of determining the attribution of conduct between the organization and its Member States, despite injured third parties. Normative control is based on the internal institutional link established between the organization and its Member States, which is created by the internal law of the organization. In areas of exclusive competence, Member States act as organs of the organization, their conduct becomes the conduct of the organization and the institutional rules are considered internal law, trying 'to satisfy the central operational features of EU legal system based on "executive federalism"'.[51] Member States vanish behind the institutional veil of the organization when the rules are considered to be internal law, conferring exclusive competences.

During the proceedings, the EU demanded the application of a *lex specialis*, which would derogate from the general regime established by the ILC in its draft articles and apply the theory of normative control to attribute the responsibility to the EU. Endorsing this position, ITLOS did not even mention ARIO and did not explain how the relationship *lex specialis/lex generalis* applies in the present case.[52] In particular, it should be noted that normative control cannot be understood under the *lex specialis* principle if considered as a norm that is based on the status of the EU in international law and not as a norm considered in the primary obligation. Indeed, under normative control, the internal legal nature of the competences that connect the Member States with the international organization prevents the application of an international *lex specialis* on the basis of internal rules. The rules are not *lex specialis* in relation to international law because they belong to a different legal system. The attribution of conduct to the organization based on exclusive competence cannot be considered as a form of *lex specialis* developed to meet the specificities of the EU, since it necessarily involves that EU law is not international law. Consequently, normative control is a special secondary norm on the attribution of conduct only if considered in the regime in which the organization acts. This is the case for Annex IX UNCLOS, which establishes that the responsibility for the failures to comply with its obligations falls on the party to the convention that has the competence over the specific matter, as declared under its article 5.

In conclusion, normative control is of little help because the differences between states and the EU also affect the attribution of conduct. States possess a self-contained structure and an act of their organs or agents is directly attributable to them, with a margin of controversy which is relatively

50 The same issue is faced for the EU accession to the European Convention of Human Rights (ECHR), see: Turkuler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 European Journal of International Law 565.

51 Pieter-Jan Kuijper and Esa Paasivirta, 'EU international responsibility and its attribution: from the inside looking out' in Panos Koutrakos and Esa Paasivirta (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 54.

52 Article 64 ARIO (n 2): 'These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

low.[53] From the external perspective of international law, the national law that applies in determining the quality of state organs or agents appears to be a matter of fact. Conversely, international organizations, and the EU among them, do not possess a self-contained legal system that is comparable to states' structure. They are so-called 'transparent' institutions, under which the law that applies in determining the quality of the organ or agent is not clearly identifiable as belonging to an internal legal system developed by the international organization. Quite the contrary, it is often considered as belonging to international law.[54] The definition of organ or agent is subjected to the specific rules of each organization, but there is no clarity on whether these rules are, from an international law perspective, a matter of fact, or if they are applicable law that determines who is responsible between an organization and its Member States.[55] Consequently, adopting this approach, there is no clarity whether the acts of Member States within the organization can be considered as an act of the organization as such.[56] For instance, a collective act of EU Member States prepared in the EU context can arguably be distinguished from an act of the EU itself.[57] Conversely, the dual attribution of conduct to both the EU and its Member States would provide certainty and simplicity. Obviously, this does not mean that both entities are also responsible, because they do not share the same primary obligation in every circumstance. As discussed in the previous section, only the EU bears the obligation of due diligence, which was contracted with SRFC Member States. The last step that needs is to be taken is to ascertain whether Member States bear different obligations that could be relevant in this context.

5. Member States and Customary International Law

ITLOS rightly observed that only the EU contracted obligations with SRFC costal states and, consequently, EU Member States do not have obligations based on the fishing agreements. In practical terms, the outcome is that vessels flying EU Member States' flags do enjoy fishing rights granted by the membership of their flag states to the EU, but their flag states do not have treaty obligations towards SRFC Member States. I contend that this position is untenable and that EU Member States do not completely disappear behind the institutional veil of the organization. The final section of this paper will discuss whether Members States do incur international obligations, even if they did not sign the agreement with SRFC Member States.

The position of Member States in a treaty concluded by the organization has been one of the most

53 Djamchid Momtaz, Gérard Cahin and Olivier de Frouville, 'Attribution of Conduct to the State' in James Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

54 Gasbarri (n 35).

55 Catherine Brölmann, 'Member States and International Legal Responsibility' (2015) 12 International Organizations Law Review 358.

56 Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

57 Enzo Cannizzaro, 'Denialism as the Supreme Expression of Realism A Quick Comment on NF v. European Council' (2017) 2 European Papers 251.

debated issues faced by the ILC and the 1986 Vienna Conference.[58] The troubled history of article 36bis of the ILC project explains the complexity of the topic.[59] Special Rapporteur Reuter identified two different situations in which an agreement produces rights and obligations for Member States:

> 1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty. 2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of areas of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to: (i) rights, which the member State is presumed to accept, in the absence of any indication of intention to the contrary; (ii) obligations when the member State accepts them, even implicitly.[60]

Reuter's proposal is based on the idea that third states when concluding an agreement with the organization are de facto contracting with its Member States too. The text of the article was modified during the debate of the ILC and the final draft is different:

> Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and the negotiating organizations.[61]

This proposal seeks to obtain a balance between the interests of third parties and the interests of the organization. Finally, the outcome in the 1986 Vienna Conference is the deletion of the provision, including only a saving clause in article 74(3) of the 1986 Vienna Convention: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of

58 Catherine Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: the History of Draft Article 36 bis' in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag* (Brill Nijhoff 1998) 121.

59 Neri Sybesma-Knol, 'The New Law of Treaties: The Codification of the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations' (1985) 15 Georgia Journal of International and Comparative Law 425.

60 Paul Reuter, Sixth report on the question of treaties concluded between States and international organizations or between two or more international organizations, UN Doc A/CN.4/298 (1977) 128.

61 Discussed and adopted at the 1740th meeting, ILC, Yearbook of the International Law Commission 1982, Vol I, 261–263, para 21–40.

obligations and rights for States members of an international organization under a treaty to which that organization is a party'.[62]

Under article 36bis Members States would have been directly involved in the treaty concluded by the organization. In practical terms, every agreement would have been a mixed agreement and Member States would have been directly responsible for the treaty concluded only by the organization. Endorsing this proposal, Brownlie contested the principle of independent responsibility of international organizations, claiming that it is 'contrary to existing general international law and to all the principles of the law of treaties and the law of State responsibility because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization'.[63] These words resonate in the ITLOS Advisory Opinion, under which EU Member States avoided obligations by conferring to the EU the exclusive competence to conclude agreements on access to fisheries.

Applying the first version of article 36bis to the present case, the fishing agreement concluded with SRFC Member States by the EU would also bind EU Member States, and they would share with the EU an obligation to do the outmost to prevent IUU activities. This approach safeguards the interest of third parties, which will always find an entity to address their claims. Circumstances such as those mentioned in the SRFC submission would not arise. However, this scenario would undermine EU autonomy and independence from Member States. Under this theory, both UNCLOS and the fishing agreement are primary obligations and flag states, Members of the EU, do not find a different treatment in comparison with other flag states. Article 36bis and other version of this approach, under which Member States are always responsible for the wrongful act committed by the organization, is rarely upheld by scholarship because it is against the principle of independent responsibility.[64]

The opposite approach is based on the idea that Member States do not have any obligations derived from the treaty concluded only by the EU. The state analogy is applied and international organizations would not be that different from federal entities.[65] Under this theory, the internal relationship between the organization and the Member States does not affect third parties. For instance, article 216(2) TFEU, which imposes on Member States an obligation to implement the international agreements concluded by the EU, is a matter of EU law. Indeed, EU law would be different from international law. In this case, the autonomy of the organization is enhanced by its constitutional structure, and Member States would not be responsible for the ships flying their flags. Even this approach is rarely upheld in the literature, because it goes against the limited competences conferred by Member

62 For an analysis, see Giorgio Gaja, 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary' (1988) 58 British Yearbook of International Law 253.

63 2892nd meeting, ILC, Yearbook of the International Law Commission, 2006, Vol 1, 157, para 17.

64 Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005).

65 Bordin (n 18) 149.

States and the distinction between exclusive and shared competences.[66] However, ITLOS did support this extreme version of constitutionalism by claiming that the standard of due diligence which applies to states also applies to the EU.

It should be stressed that Member States are neither parties to the fishing agreement which was concluded only by the organization, nor can they be considered third parties to it. Indeed, international law is developing primary obligations, based on customary international law, that acknowledge the dual position.[67] I contend that it is necessary to recognize the progressive development of a norm establishing that Member States do not assume direct rights or obligations from the treaty concluded by the organization, but, nonetheless, they have a primary obligation to do the outmost to allow their organization to respect the treaty provisions, granting competences, funds and material aid. This obligation is based on the status of international organizations in international law and not on the particular treaty signed with a third party. Bordin speaks in terms of 'an evolving rule of incorporation for international organizations'.[68] Rosalyn Higgings, as Rapporteur of the Institute of International Law on the topic 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' expressly stated that:

Our brief survey of the international law relating to the conclusion of treaties by international organizations suggests that, while states are not parties to such treaties, neither are they 'third parties', in the sense that they may not engage in acts that run counter to the effective implementation of such treaties. If the obligation of an international organization is engaged through contract, or a duty of care, the legal consequences for a Member State entail a requirement to put the organization in funds to meet such obligations.[69]

Indeed, international institutional law is developing rules showing that Members States are affected by the legal effects of the agreement concluded only by the organization. For instance, according to article 40 ARIO, Member States have a primary obligation to take all appropriate measures in order to enable the organization to fulfil its obligations of reparation.[70] The ILC upheld the principle of independent responsibility, but also identified limited circumstances in which it is possible to invoke the responsibility of Member States. In the present case, article 61 is particularly relevant because it establishes that:

> A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

66 See, in general, Finn Seyersted, *Common law of international organizations* (Martinus Nijhoff Publishers 2008).

67 Bordin (n 18) 168: 'There is nothing preventing general international law from developing so as to provide for rules that make sense of "layered subjects"'.

68 ibid, 184.

69 Institut de Droit International, 'Annuaire de l'Institut de Droit International' (1995) 284.

70 Paolo Palchetti, 'Exploring Alternative Routes: The Obligation of Members to Enable the Organization to Make Reparation' in Maurizio Ragazzi (ed), *Responsibility of International Organizations Essays in Memory of Sir Ian Brownlie* (Brill 2013).

Article 62 is also relevant, even if its application is rather limited:

> 1. A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

The fact that Member States do not disappear through the creation of an organization is also reflected in Annex IX UNCLOS, under which organizations and Member States are jointly and severally responsible for failing to provide a declaration of competence.[71]

6. Conclusion

To sum up, the paper pointed out the unnecessary level of complexity employed by ITLOS to establish the responsibility of the EU and exclude that of its Member States. In particular, I focused on the interplay of two elements – violation of international obligations and attribution of conduct – to contest the application of a concept of the EU under which the attribution of so-called exclusive competences would trigger the application of a state analogy. I described that this approach involves unnecessary risks for the protection of biodiversity. In particular, the absence of fundamental competences to prevent IUU fishing, such as the possibility to institute criminal proceedings against private vessels, impairs the effective protection of fisheries resources. Indeed, ITLOS did not explain how EU competences would guarantee the same standard of due diligence that is required of flag states.

Conversely, this paper constructed a simplified form of EU responsibility applying the 2011 project of the ILC. Concerning primary obligations, I described forms of indirect participation of Member States to the treaty concluded only by the organization, relying on the obligations identified by the ILC, which bound Member States to provide sufficient means to their organizations. In particular, I claimed that the standard of due diligence that is applicable to the EU is lower than the standard that is requested of flag states, because the EU does not possess a general capacity to take every possible action. However, Member States do not disappear behind the institutional veil of the organization and they assume a form of responsibility towards third entities. Consequently, I supported a form of shared responsibility which is not based on joint and several obligations, but on differentiated forms of responsibility deriving from the same wrongful act. It is a way to balance the autonomy of the organization with the autonomy of its Member States.

Concerning the attribution of conduct, the case at hand is a paradigmatic example of the possibility to claim dual attribution, under which the conduct of Member States is, at the same time, the conduct of their organization. In the case of omission, such as the absence of sufficient vigilance to enact relevant regulations to prevent IUU fishing activities, the possibility to attribute the same conduct to

71 Treves (n 39).

both entities is straightforward. Indeed, there is no reason to rely on the so-called normative control to claim that Member States act as quasi-organs of the EU. Dual attribution bypasses the relevance of the internal attribution of exclusive competences on which the complexities of normative control is based. Alternatively, the omission of the EU to enact sufficient legislation is directly attributable to the EU itself. In the case at hand, the limited responsibility of the EU does not obliterate the responsibility of its Member States, which arises from the violation of a different international obligation that derives from their status of members. Therefore, the answer to the abstract question addressed to ITLOS is that, potentially, both entities can be responsible for the violation of different obligations and different conducts.

Maritime Safety and Security Law Journal

The EU Maritime Security Strategy and Climate Change: The Case of Maritime Transportation and New Challenges Ahead

*Borja Montes Toscano**

Abstract

Climate change has become one of the most critical concerns for mankind and urgent action is needed. The European Union (EU) Global Strategy of 2016 also considers climate change as a severe factor that may disrupt economic growth and endanger both citizens and territory. The International Maritime Organization (IMO) sought, but failed to reach, a binding international instrument to regulate shipping pollution. Consequently, the EU decided to act approving Regulation 2015/757 on the monitoring, reporting and verification (MRV) of carbon dioxide emissions from maritime transport. This article analyses the different kinds of jurisdictions foreseen in the United Nations Convention on the Law of the Sea (UNCLOS), the role of current actors and the latest steps taken by the IMO.

Keywords: Climate Change, EU Law, International Law of the Sea, Maritime Transportation, International Maritime Organization, Extraterritoriality.

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1. Introduction: The Common Concern of Climate Change and the Role of the IMO

CO_2 emissions from ship pollution constitute one of the most important concerns for states and supranational institutions: From 1990 to 2008 emissions from EU-related shipping increased by more than 48%.[1] Worldwide, total ship pollution amounts to more than a billion of CO_2 tons per year[2] and is set to increase from 50% to 250% in 2050. Hence, at the global level these emissions represent 3%[3]

1 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Integrating maritime transport emissions in the EU's greenhouse gas reduction policies' COM (2013) 479, 2.

2 For further information regarding International Maritime Organization (IMO) 2014 report on greenhouse gases (GHG), see: IMO, 'Third IMO GHG Study 2014' <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Greenhouse-Gas-Studies-2014.aspx> accessed 17 May 2020.

3 COM (2013) 479 (n 1) 3.

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DISCLAMER: The views and opinions of the author expressed herein do not state or reflect those of his alma mater, the associations he belongs to or the organization he works for.

of total emissions and may reach 5% by 2050.[4] Climate-based risks and threats are already evident even if some actors continue to harbour doubts. In light of this, several governments 'securitised' the environment. A key focal point is how pollution has increased the vulnerability of the high seas. The high seas are key for maritime transportation and trade and are part of the 'global commons', a common concern of mankind.

This paper analyses EU Regulation 757/2015,[5] which adopts a system of monitoring and verification to control CO_2 emissions from shipping pollution. Climate change has become a real threat requiring urgent action by regional actors such as the EU. Global actors encounter many obstacles in the quest to adopt a binding norm: discussions to build consensus and develop solutions are critical, but also time-sensitive. This paper will analyse the scope of application of the norm, taking into account the existing norms in force and other international law sources. The paper will also take into account the different actors concerned in order to understand the scope of obligations of each of them.

Climate change has been considered a problem of 'common concern'[6] as it can alter the physical, chemical and biological characteristics of the oceans. Consequently, its effects can jeopardize the lives of human beings, causing social and economic impact and even violating fundamental rights.[7] At the international level, Articles 192, 194 and 204 UNCLOS already acknowledge the problem of maritime pollution. However, in 1982 the perceived problem and profile of climate change was such that it had yet to be included on the international agenda of governments and supranational institutions. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was signed and called for the widest possible cooperation from states and different actors to tackle climate change.[8]

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4 European Commission, 'Time for international action on CO_2 emissions from shipping' (2013) <https://ec.europa.eu/clima/sites/clima/files/transport/shipping/docs/marine_transport_en.pdf> accessed 17 May 2020.

5 Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L 123/55.

6 The United Nations General Assembly (UNGA) acknowledged this in: UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53. The 2015 Paris Agreement also considered climate change as a common concern of mankind, see: 'Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015' United Nations Framework Convention on Climate Change (UNFCCC) (26 January 2016) UN Doc CP/2015/10/Add.1, 2.

7 Zlata Drnas-Clément, 'Channelling of the International Responsibility in Case of Damage to the Oceans and Seas as a Result of Climate Change' in Pablo Antonio Fernández Sánchez (ed), *New Approaches to the Law of the Sea - In Honor of Ambassador José Antonio de Yturriaga-Barberán* (Nova science publishers, 2017) 167.

8 Article 2: '[T]he ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system […]'.

Further efforts led to the adoption of the Protocol of Kyoto (1997).[9] Article 4(5) of the Protocol establishes the sharing of burden in connection with climate change commitments. Moreover, in connection with the specific problem of maritime transportation (in relation to the limitation or reduction of emissions of greenhouse gases), Article 2(2) specified that the IMO should pursue this. The organization's scope of functions is set out in Article 2[10] of the 1948 IMO Convention, which is considered to constitute a very broad marine pollution remit. As for the internal structure of the organization, Article 38 of the convention establishes the Marine Environment Protection Committee (MEPC) as the organ in charge of considering any matter in relation to the prevention and control of marine pollution from ships.

Under the IMO's framework, several legal instruments related to technical requirements for maritime safety and pollution prevention have been adopted such as the International Convention for the Prevention of Pollution from Ships (MARPOL),[11] International Convention for the Safety of Life at Sea (SOLAS)[12] and International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW).[13] In addition, since 1997 several discussions on climate change and the emissions from shipping have taken place and the IMO has provided periodical reports detailing the organization's progress on this issue. In 2011, the IMO passed binding measures to reduce emissions from international shipping and added a chapter IV to the annex VI of the MARPOL convention.[14] The measures entered into force in January 2013 and introduced a Mandatory Energy Efficiency Design Index (EEDI) for new ships; all ships were also required to have a Ship Energy Efficiency Management Plan (SEEMP). In 2013, the IMO also discussed the use of mechanisms such

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2302 UNTS 148.

10 Article 2: '[I]n order to achieve the purposes set out in Part 4 the Organization shall: (a) Subject to the provisions of Article 3, consider and make recommendations upon matters arising under Article 1 (a), (b) and (c) that may be remitted to it by Members, by any organ or specialized agency of the United Nations or by any other intergovernmental organization or upon matters referred to it under Article 1 (d); (b) Provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary; (c) Provide machinery for consultation among Members and the exchange of information among Governments; (d) Perform functions arising in connexion with paragraphs (a), (b) and (c) of the Article, in particular those assigned to it by or under international instruments relating to maritime matters and the effect of shipping on the marine environment; (e) Facilitate as necessary, and in accordance with Part X, technical co-operation within the scope of the Organization'.

11 International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 12 ILM 1319 (MARPOL).

12 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered in force 25 May 1980) 14 ILM 959 (SOLAS).

13 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) 1361 UNTS 75 (STCW).

14 IMO Resolution MEPC.203(62) (adopted 15 July 2011, entered into force 1 January 2013) 'Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Inclusion of regulations on energy efficiency for ships in MARPOL Annex VI)' <http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.203(62).pdf> accessed 17 May 2020.

as the Emissions Trade Scheme (ETS) regime[15] and in 2016, at the celebration of the 70th anniversary of the MEPC, a roadmap was agreed in relation to the global compilation of maritime emissions.[16] Thereafter, the 71st intersession meetings (July 2017) and the 2nd meeting of the Working Group agreed on an initial strategy regarding reduction of maritime emissions. On 13 April 2018 Resolution MPEC 304(72) was adopted with the aim of establishing an initial strategy regarding greenhouse gas (GHG) emissions from ships. Despite no binding instrument yet having been adopted, it seems that the IMO has taken a relevant step to solve this problem. Nevertheless, certain scholars have criticised the pace of development of IMO treaties;[17] it may take longer than expected to adopt a binding norm or agreement. However, it may be too late to address the emerging and critical concern that is climate change.

2. Interrelation Between EU Maritime Security Strategy and Climate Change Action

On the basis of Article 21(1) and (2) of the Treaty on the European Union (TEU),[18] the EU has taken the lead as a global actor promoting action against climate change[19] and, since 2007, in enhancing maritime security. The EU has sought unilateral action to find solutions for maritime transportation and climate change by filling the normative gaps that were not addressed directly by the IMO. In October 2007, the EU Commission passed the maritime security strategy with the aims of horizontally integrating sector-based maritime policies and actions and enhancing Europe's capacity to face challenges of globalization and competitiveness, climate change, degradation of marine environment, marine safety and security, and energy security and sustainability.[20]

Maritime security is a new and unregulated field where the EU is taking additional steps to 'securitize' it. The implementation reports related to the European Security Strategy (2003 and 2008) did

15 The European Council invited the EU Commission to present by the first quarter of 2019 a proposal for a strategy for long-term EU greenhouse gas emissions reduction in accordance with the Paris Agreement, taking into account the national plans. See: European Council, 'European Council meeting (22 March 2018) – Conclusions' EUCO 1/18, 3.

16 IMO, 'Greenhouse Gas Emissions' <http://www.imo.org/en/OurWork/environment/pollutionprevention/airpollution/pages/ghg-emissions.aspx> accessed 17 May 2020.

17 Aoife O' Leary & Jennifer Brown, 'The Legal Bases for IMO Climate Measures' (Sabin Center for Climate Change Law | Columbia Law School, June 2018) 10 <http://columbiaclimatelaw.com/files/2018/06/OLeary-and-Brown-2018-06-IMO-Climate-Measures.pdf> accessed 17 May 2020.

18 Articles 21(1) and (2) TEU (excerpts): '[T]he Union […] shall promote multilateral solutions to common problems, in particular in the framework of the United Nations…. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (h) promote an international system based on stronger multilateral cooperation and good global governance'.

19 Such leading role was reaffirmed by the European Council during two meetings held in 2017. See: European Council, 'European Council meeting (22 and 23 June 2017) – Conclusions' EUCO 8/17, 6; European Council, 'European Council meeting (14 December 2017) – Conclusions' EUCO 19/17, 4.

20 Basil Germond, *The Maritime Dimension of European Security – Seapower and the European Union* (Palgrave Macmillan, 2015) 109.

not include maritime security in particular.[21] In 2014, the EU approved the Maritime Security Strategy (EUMSS) with the objective of '[p]romoting better rules-based maritime governance and make effective use of the EU instruments at hand'.[22] The strategy has different sub dimensions: maritime safety, maritime surveillance (developing global maritime domain awareness at the EU level and monitoring Europe's maritime borders), good governance at sea, marine environment protection, and energy security. Both the EU Commission and the European External Action Service (EEAS) have played key roles in the adoption of the EUMSS. Finally, the EU adopted its Global Strategy in 2016. In this document, the EU considers that climate change causes further disruption regarding economic growth, endangers the territory and the people and exacerbates conflict.[23]

Once the EU Integrated Maritime Policy was adopted in 2007, the EU Commission established a working programme and considered as projects of particular importance: a strategy to mitigate the effects of climate change on coastal regions and the reduction of CO_2 emissions and pollution by shipping.[24] The EUMSS considers climate change as a strategic security interest[25] and also identifies nine risks and threats;[26] however, the EUMSS only links climate change with the maritime transport system and maritime infrastructure.[27] Why did the EU decide to exclude the other risks involving climate change? Taking into account that environmental threats, inevitably linked to the notion of marine pollution, should also include climate change,[28] it must be noted that the EU Maritime Security Action Plan 2018 considered climate change as 'potentially destabilising' and 'risk multiplier'.[29]

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21 See also: Marianne Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Palgrave Macmillan, 2018) 7.

22 Council of the European Union, 'European Union Maritime Security Strategy' 11205/14, 10.

23 European External Action Service (EEAS), 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (2016) 7, 9, 13 and 27 <http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf> accessed 17 May 2020. On this issue, Claire Dupont asserts that: '[C]limate Change can thus be considered a good example of collective securitisation in Europe', see: Claire Dupont, 'The EU's collective securitisation of climate change' (2019) 42 (2) West European Politics 369.

24 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An Integrated Maritime Policy for the European Union' COM (2007) 575 final, 3.

25 'European Union Maritime Security Strategy' (n 22) 7; '[T]he protection of the environment and the management of the impact of climate change in maritime areas and coastal regions, as well as the conservation and sustainable use of biodiversity to avoid future security risks'.

26 ibid, 7-8. The risks and threats are, e.g. piracy, terrorism at sea or from the sea, criminal activities including drug and human trafficking, weapons of mass destruction (WMD) proliferation, illegal immigration, fisheries protection, and marine environmental protection.

27 ibid, 8.

28 On this issue, see: Pablo Antonio Fernández Sánchez, 'El Cambio Climático en la Estrategia Europea de Seguridad Marítima' in Rosa Giles Carnero (ed), *Desafíos de la Acción Jurídica Internacional y Europea frente al Cambio Climático* (Atelier, 2018).

29 Council of the European Union, 'Council conclusions on the revision of the European Union Maritime Security Strategy (EUMSS) Action Plan (26 June 2018)' 10494/18, 10.

Since 2007, the EU[30] has developed a strategy to tackle climate change. One of the main results of this action has been the EU ETS[31] which aims to reduce greenhouse emissions and to enhance mitigation efforts at a national, regional and global level. After the entry into force of the Lisbon Treaty in 2009, climate change became 'institutionalized'. Specifically, Article 191 of the Treaty on the Functioning of the European Union (TFEU) pursues the promotion of measures to combat climate change at the international level. For a better understanding of the EU institutional scope, Article 1 of the Treaty of the EU (TEU) allows member states to transfer 'competences' to the EU in order to reach common goals. On the basis of the principle of subsidiarity, competences with respect to environmental matters are shared with member states under Article 4 TFEU. However, the EU may act when member states cannot sufficiently achieve common goals enshrined in EU treaties and norms.[32]

3. EU Takes Action Under the Umbrella of 'Unilateralism'

3.1 EU Regulation 757/2015: Scope of Application and Obligations

The lack of a binding IMO instrument for the reduction of greenhouse emissions from shipping has precipitated EU Regulation 2015/757 of the European Parliament and of the Council on the MRV of carbon dioxide emissions from maritime transports. The norm was adopted in April 2015 and is considered to be one of the main priorities of EU Climate Action.[33] The main aim of the norm is mitigating the effects of climate change in shipping through an annual emission verification report.

30 European Commission, 'Commission proposes an integrated energy and climate change package to cut emissions for the 21st Century' (2007) <http://europa.eu/rapid/press-release_IP-07-29_en.htm?locale=en> accessed 17 May 2020.

31 This regime entered into force in January 2005 and is currently regulated by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 and Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L 8/3. See also Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms [2004] OJ L 338/18 and Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L 129/1. Article 2 of the 2003 Directive establish the different sectors where the norm is applicable, as mentioned in Annexes I and II. The EU ETS is going to be implemented in four stages, and the third is currently being set up (2013-2020).

32 To delve into this issue see: Josephine A. W. van Zeben, *The Allocation of Regulatory Competence in the EU Emissions Trading Scheme* (Cambridge University Press, 2014) 41-43.

33 In 2009, the EU Commission urged as a key priority the development of a comprehensive and coherent approach to reducing GHG emissions from international shipping, and also advised on the implementation of a global MRV system as a priority in IMO negotiations in 2013. European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Integrating maritime transport emissions in the EU's greenhouse gas reduction policies' COM (2013) 479 final, 5 and 8.

According to Article 2, the norm applies to ships above 5,000 gross tonnages in respect of CO_2 emissions released during their voyages:

a) From their last port of call to a port of call under the jurisdiction of a member state;

b) From a port of call under the jurisdiction of a member state to their next port of call;

c) Within ports of call under the jurisdiction of a member state.

The system MRV shall be applicable to both CO_2 emissions and any other relevant information that may facilitate the calculation of fuel consumption as well as the energetic efficiency of the ship. Annex I of the Regulation establishes the different methods for monitoring CO_2 emissions.[34] Since 2015, several norms have been passed in order to clarify the scope of application of the norm for both companies and member states.[35]

The first stage of the norm has been completed, as companies submitted[36] to the verifiers a monitoring plan for each of their ships indicating the method chosen to monitor and report. CO_2 emissions and other relevant information as can be found in Article 6(3) of the Regulation. From 1 January 2018, companies will, on the basis of the verification report enshrined in Article 13 of the norm, monitor CO_2 emissions for each ship annually by applying the appropriate method to determine CO_2 emissions and following the requirements stated in Articles 9 and 10 (Article 8). From 2019, by 30 April each year, companies will submit to the EU Commission and to the authorities of flag states concerned an emissions report concerning CO_2 emissions and duly verified (Article 11).[37] Where ships and companies fail to comply with these measures (monitoring and reporting) member states may implement the necessary measures to establish a system of penalties (Article 20).

34 In accordance with Regulation 757/2015 Annex I, the methods of monitoring CO_2 emissions are: (a) Bunker Fuel Delivery Note (BDN) and periodic stocktakes of fuel tanks; (b) bunker fuel tank monitoring on board; (c) flow meters for applicable combustion processes; (d) direct CO_2 emissions measurements.

35 European Commission, 'Commission Delegated Regulation (EU) 2016/2071 of 22 September 2016 amending Regulation (EU) 2015/757 of the European Parliament and of the Council as regards the methods for monitoring carbon dioxide emissions and the rules for monitoring other relevant information' OJ L 320/1; European Commission, 'Commission Implementing Regulation (EU) 2016/1927 of 4 November 2016 on templates for monitoring plans, emissions reports and documents of compliance pursuant to Regulation (EU) 2015/757 of the European Parliament and of the Council on monitoring, reporting and verification of carbon dioxide emissions from maritime transport' OJ L 299/1; European Commission, 'Commission Implementing Regulation (EU) 2016/1928 of 4 November 2016 on determination of cargo carried for categories of ships other than passenger, ro-ro and container ships pursuant to Regulation (EU) 2015/757 of the European Parliament and of the Council on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport' OJ L 299/22.

36 European Commission, 'Report from the Commission to the European Parliament and the Council Two years after Paris – Progress towards meeting the EU's climate commitments' COM (2017) 646 final, 17-18.

37 On 30 June 2019, the European Commission published for the first time information on the CO_2 emitted by ships over 5000 gross tonnage when performing maritime transport activities related to the European Economic Area (EEA). European Commission, 'Commission publishes information on CO2 emissions from maritime transport' <https://ec.europa.eu/clima/news/commission-publishes-information-co2-emissions-maritime-transport_en> accessed 17 May 2020.

As the EU has filled in the gaps that the IMO did not directly address, the latter has taken further action. The IMO[38] adopted the Fuel Oil Data Collection System (DCS) for international shipping, requiring ships of 5,000 gross tonnage or above to start collecting and reporting to their flag state the consumption data for each type of fuel oil they use. As prescribed by Rule 22, the flag state must transfer this data to the IMO Ship Fuel Oil Consumption Database and the SEEMP shall include a description of the methodology that will be used to collect the data and the processes that will be used to report the data to the ship's flag state.[39]

3.2 The Global Reach of EU Law: Unilateralism and Territorial Extension

Why did the EU decide to take unilateral action? First of all, the EU is fulfilling a customary obligation of due diligence in international environmental law.[40] In international environmental law, unilateral measures[41] fill a lacuna where an international norm is not discernible. These unilateral norms consist of amendments or annexes to existing treaties. Richard Bilder identified 5 different forms of unilateral environmental action: a) Those which face domestic problems; b) those which protect the territory of other states or other people present there from environmental threats that may arise in the territory of the regulating state; c) those directed to protect common spaces, such as aerial space or the high seas from those threats that may arise in the regulating state; d) those addressed to protect the population and the territory of the regulating state from those threats coming from abroad; and e) those threats directed to protect states from threats coming from abroad.[42] In relation to the International Law of the Sea, André Nollkaemper notes that that:

> '[a] multilateral framework does not entirely exclude unilateral action here either, as evidenced by unilateral extensions of jurisdiction and unilateral standards (even if these are compatible with international standards) and unilateral enforcement, for instance regarding fisheries conservation and environmental protection.'[43]

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38 IMO Resolution MEPC.278(70) (adopted 28 October 2016, entered into force 1 March 2018) 'Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto - Amendments to MARPOL Annex VI (Data collection system for fuel oil consumption of ships)' <http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.278(70).pdf> accessed 18 May 2020.

39 See also IMO, 'Data collection system for fuel oil consumption of ships' <http://www.imo.org/en/ourwork/environment/pollutionprevention/airpollution/pages/data-collection-system.aspx> accessed 17 May 2020.

40 Such obligation was admitted by the International Court of Justice (ICJ) in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para 29; On similar grounds, see: *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, [2010] ICJ Reports 2010, 14, para 101. The ICJ said that a state is obliged to use all means at its disposal to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state.

41 Unilateralism shall be defined as the pursuit of international goals without cooperating with other actors involved.

42 Richard Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 (1) Vanderbilt Journal of Transnational Law 51, 59-60.

43 André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Encyclopedia of Public International Law* (March 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1682> accessed 17 May 2020.

Although some scholars[44] defend unilateral measures in environmental law, several declarations issued at multilateral summits have not been very supportive.[45] Therefore, states (in this case the EU) may decide to turn to unilateral measures and soften the jurisdictional boundaries that limit extraterritorial action.[46] As per Article 191(1) TFEU[47] the EU has taken the lead in tackling climate change. The EU institutions, member states and other actors involved have tried to offer leadership in EU and international climate change politics.[48] In light of this, the EU has been performing the role of 'contingent unilateralism'. According to scholars,[49] such a 'contingent' character is based on the geographical extension of EU ETS and, consequently, EU climate change norms. The extension of such norms depends on the existence of an international agreement or further action undertaken by third states. Therefore, unilateral action will be avoided where goods or services are subject to an adequate protection that includes the same safeguards. This was also explicitly affirmed by Directive 2008/101/EC regarding the reduction of greenhouse emissions from aviation:

> '[…][b]ilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures to avoid double regulation could constitute a step towards global agreement'.[50]

On these grounds, can this Regulation be considered to have an 'extraterritorial' dimension? In order to consider a measure as territorial or extraterritorial, several factors must be taken into account such as the nature of the conduct and where it took place. The extraterritoriality of a norm entails the

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44 Radka Sedlackova, 'Legal obstacles to EU leadership on climate change' (2012-2013) 17 (2) Eastern & Central European Journal on Environmental Law 37, 45; According to Radka Sedlackova, the unilateral action has contributed to the development of customary international law. Therefore, it is preferred unilateral action, instead of no action; see: Henrik Ringbom, 'Global Problem—Regional Solution? International Law Reflections on an EU CO_2 Emissions Trading Scheme for Ships' (2011) 26 (4) The International Journal of Marine and Coastal Law 613, 634-635. Following Ringbom, unilateral measures are possible: (i) if there is a strong link between the regulating state and environmental threat in question; (ii) if there is sufficient strong link between the measure and the environmental risk in question.

45 'Rio Declaration on Environment and Development' Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) UN Doc A/CONF.151/26 (Vol. I), principle 12: '[…] Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided […]'.

46 Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 (1) American Journal of International Law 1, 8.

47 Article 191(1) TFEU: '1. Union policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment;

— protecting human health;

— prudent and rational utilisation of natural resources;

— promoting measures at international level to deal with regional or worldwide environmental

problems, and in particular combating climate change'.

48 Rüdiger K.W. Wurzel, James Connelly & Duncan Liefferink (eds), *The European Union in International Climate Change Politics, Still taking a lead?* (Routledge, 2017) 3.

49 To delve into this issue see: Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 (2) European Journal of International Law 469.

50 Directive 2008/101/EC (n 31), para 17.

'extension' of its effects and application beyond its borders under the principles for extraterritorial jurisdiction in public international law: the active personality principle, the passive personality principle, the protective principle, or the universality principle.[51]

Scholars like Joanne Scott differentiate between two kinds of extraterritoriality: a) Direct application of EU Law to parties or activities that take place in third states, without any territorial link to the EU; and b) territorial extension, which entails EU governance in activities not situated on its territory. However, the application of EU Law shall be based on any territorial connection.[52] Such 'territorial extension' was partially studied by some scholars in relation to the extension of certain laws to certain persons (foreigners in foreign ships in territorial waters) beyond its waters: '[I]nternational law might allow for an extension of certain laws to such persons, but this could not happen automatically, and would require legislation. In the absence of such legislation, the ordinary law of the local state would not extend over the waters in question […]'[53]

The 'territorial extension' modality was partially admitted by the Court of Justice of the European Union (CJEU). In its judgment on the inclusion of aviation activities into the EU ETS cap and trade system, the CJEU concluded that the directives concerned did not entail an extraterritorial application: 'that directive is not intended to apply as such to international flights flying over the territory of the member states of the EU or of third states when such flights do not arrive at or depart from an aerodrome situated in the territory of a member state'.[54] In other words, this norm did not intend to regulate greenhouse emissions beyond its territorial limits. The 'extension' or territorial link is justified because the flights analysed took off from or landed at an airport situated in EU territory.

If the EU starts promoting these standards and acts as a global actor to tackle climate change, third states (some of them underdeveloped) must comply with them. However, several underdeveloped

51 As a remarkable example on this controversial area, the European Court of Human Rights (ECtHR) has pronounced several judgments regarding the possible application of the European Convention on Human Rights (ECHR) beyond its borders: The judgment *Bankovic* showed a strict approach to jurisdiction and admitted that the Convention would only apply to those areas under the effective territorial control of a contracting party. However, in another remarkable case, *Al-Skeini*, the ECtHR stated that the personal model of jurisdiction ('exercise of sovereign powers') shall enable the ECHR to be applied beyond its *legal space*. See: *Bankovic and others v Belgium and others* App no 52207/99, (ECtHR [GC], 12 December 2001), para 80; *Al-Skeini and others v UK* App no 55721/07 (ECtHR [GC] 7 July 2011), paras 134-136.

52 Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 (1) American Journal of Comparative Law 87, 89-90 and 115. Although such distinction is not currently recognized in international law, Scott considers that both the territorial principle and the territorial extension are compatible. In addition, the CJEU has acknowledged the conformity of such distinction with customary international law, see: Case C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C:2011:864, para 129: '[…] the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory […]'.

53 D. P. O'Connell & I. A. Shearer, *The International Law of the Sea: Volume II* (1st edn, Clarendon Press, Oxford University Press, 1984) 741.

54 Case C-366/10 (n 52), para 117.

states do not have the necessary means to comply with EU norms and have no choice but to apply less stringent standards.[55] The setting of differential standards or obligations entails treating states differently, in accordance with their special circumstances.[56] Usually, these kinds of differential standards appear in instruments such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and Article 2 of the Paris Agreement.[57] Further, EU norms, such as the Aviation Directive, are not in contradiction with the Principle of Common But Differentiated Responsibilities (CBDR) because an implicit example can be observed in the directive regarding the inclusion of aviation activities into the EU ETS cap and trade system. These norms will not be applied to those states that do not belong to the European Economic Space until 31 December 2023.[58] Therefore, the EU has set a precedent in order to respect environmental standards from developing countries which should be referenced in other areas such as data protection, for example. In relation to the specific field of maritime transportation, the Regulation should also respect the principle: the IMO has recently recognized the CBDR principle to be considered as a guiding principle and take into account the current capabilities in light of different circumstances.[59]

4. Applicable Jurisdiction: Port State Jurisdiction v Flag State Jurisdiction v Coastal State Jurisdiction

Article 2 of the Regulation refers to ports outside the territory of the EU. Can we consider this norm to be 'extraterritorial' or does it amount to a case where the norm 'territorially extends'? The analysis of CO_2 emissions comprises the complete trip made by the ship, including the emissions produced

55 Incidentally, in some other areas (such as the inclusion of climate change in the concept of 'national security') some underdeveloped states are reluctant to take further action, see: Rosa Giles Carnero, 'El cambio climático como riesgo y amenaza para la seguridad: derivaciones en el desarrollo del régimen jurídico internacional en materia de clima' (2016) 36 Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades 315, 325.

56 Peter H. Sand, 'Lessons Learned in Global Environmental Governance' (1991) 18 (2) Boston College Environmental Affairs Law Review 213, 224.

57 'Adoption of the Paris Agreement' (adopted 12 December 2015, entered into force 4 November 2016) United Nations Framework Convention on Climate Change (UNFCCC) UN Doc CP/2015/L.9/Rev.1. Article 2(2): '[T]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

58 Both Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (2014) OJ L 129/1 and Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 OJ L 350/7 have modified Article 28 of EU Directive 2003/87/EC with the aim of postpone its application beyond 2023. Article 1(6)(b) of 2017 Regulation amends Article 28(1) as follows: '[a]ll emissions from flights to and from aerodromes located in countries outside the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in article 28b'.

59 IMO Resolution MEPC.304(72) (adopted 13 April 2018) 'Initial IMO strategy on reduction of GHG emissions from ships', para 3.2 <http://www.imo.org/en/OurWork/Documents/Resolution%20MEPC.304%2872%29%20on%20Initial%20IMO%20Strategy%20on%20reduction%20of%20GHG%20emissions%20from%20ships.pdf> accessed 19 May 2020.

in journeys from or to ports in third states. Parameters such as total distance travelled, total time spent at sea, total transport work or average energy efficiency[60] feature in data regarding the annual monitoring plan foreseen in the Regulation.

Therefore, it seems that this norm may meet the requirements to become 'extraterritorial' and, consequently, may contradict flag state jurisdiction (Article 92 UNCLOS). However, some EU environmental norms have been considered as unilateral and scholars have questioned whether these norms can be 'extended' or not to avoid its qualification as 'extraterritorial'. Excessive definitions of territoriality may lead to misunderstanding with extraterritorial measures,[61] meanwhile an overly expansive interpretation of the territorial principle may lead to the doctrine of effects[62] for those facts that have taken place beyond a state's jurisdiction but it may suffer its negative consequences. Such events may justify a legitimate exercise of jurisdiction by the state affected.[63]

EU Regulation 757/2015 should be best considered as a norm that 'territorially extends'. Such territorialisation of the conduct can be confirmed by the fact that ports impose conditions to have access to domestic territory and markets if an economic operator satisfies certain standards.[64] Taking into account that Customary International Law (CIL) does not explicitly acknowledge the right of foreign ships to enter ports,[65] the measures applied by ports have a clear 'territorial' character.[66] The main measure to 'punish' those that do not meet the agreed standards should be the denial of entry into

60 Article 10(g), (h), (i) and (j) EU Regulation 757/2015.

61 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford University Press, 1995) 76.

62 The 'effects principle' refers to the (civil) jurisdiction a state may exercise when foreign conduct produces substantial effects on its territory. See: Menno T Kamminga, 'Extraterritoriality', *Max Planck Encyclopedia of Public International Law* (November 2012) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=S5B-2M5&result=1&prd=MPIL > accessed 17 May 2020.

63 Thomas Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19 (4) European Journal of International Law 799, 812; D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 (1) British Yearbook of International Law 1, 7.

64 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press, 2015) 95. If shipping is finally included in the ETS system, on similar grounds regarding the activity of aviation, some scholars asserted that the ETS system is no longer based on the physical presence of an aircraft, but rather on the exploitation of services provided by aerodromes in EU territory, which would justify the territorial extension of EU ETS. See: Christine Bakker & Francesco Francioni, *The EU, the US and Global Climate Governance* (Routledge, 2016).

65 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Reports 1986, 14, para 213; See also: A. V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 (3) San Diego Law Review 597. On page 610, the author asserts that: '[P]ractice suggesting that a right of entry exists is rare'.

66 Robin Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-territoriality?' (2016) 31 (3) The International Journal of Marine and Coastal Law 442, 444; It must be noticed that the 'extraterritoriality' or extension of the norm was not acknowledged by the IMO in the 1990's decade: the legal committee of the IMO considered that ship reports could refer to the territorial sea and exclusive economic zone but not to the high seas, see: IMO, 'Legal Issues Regarding Mandatory Ship Reporting Systems and Vessel Traffic Services' IMO Legal Committee Note by the Secretariat (12 August 1992) Doc LEG 67/8/1 + Add. 1, 2, 3 4, Annex paras 44–46.

the port, as is foreseen in Article 20(3) of the Regulation[67] and Article 211(3) UNCLOS.[68] A port may introduce laws that may arise *en route* to port[69] and also can impose clear territorial measures that can prevent common goods being endangered. According to Article 7(2) of the 2000 Directive on port reception facilities for ship-generated waste and cargo residues, a member state can require a ship to deliver its waste before departure from its port if there are good reasons to believe that there will not be adequate facilities at the intended port of delivery. Such measures will be taken with the aim of preventing marine pollution.[70]

In order to cope with greenhouse emissions from shipping the scope of application of this norm should have been the coastal zones of EU member states, i.e., coastal state jurisdiction, as Articles 211(4)[71] and 220(3)[72] UNCLOS are the key norms to be applied. In addition, coastal state jurisdiction[73] deals with key interest questions such as maritime security or environmental protection[74] in its

67 EU Regulation 757/2015, Article 20(3): '3. In the case of ships that have failed to comply with the monitoring and reporting requirements for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of entry may issue an expulsion order which shall be notified to the Commission, EMSA, the other member states and the flag state concerned [...]'.

68 Article 211(3) UNCLOS: '[S]tates which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2'.

69 Bevan Marten, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-territoriality and the Future of Shipping Regulation' (2016) 31 (3) The International Journal of Marine and Coastal Law 470, 487.

70 Article 7(2) of the Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship generated waste and cargo residues [2000] OJ L 332/81.

71 Article 211(4) UNCLOS: '[C]oastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels'.

72 Article 220(3) UNCLOS: '[W]here there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred'.

73 Coastal states have their 'territorial' jurisdiction over demarcated zones in UNCLOS: (a) Internal waters-article 8; (b) territorial sea-article 2 and (c) exclusive economic zone-article 45.

74 Article 211(5) UNCLOS: '[C]oastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference'.

affected maritime zones.[75] In addition, Regulation 11 of the Annex to the SOLAS Convention 1974 focuses on the subject of mandatory ship reporting systems. Coastal states are also entitled to establish unilaterally such a reporting system in the territorial sea on the condition that the operation does not result in undue interference with the innocent passage of foreign ships,[76] as regulated in Article 19 UNCLOS.

However, the EU Regulation is a clear example of the extension of the limits of the port state jurisdiction. Despite the lack of international practice on this provision, Article 218 UNCLOS[77] is key as it enables ports to prosecute offences committed in ports or coastal maritime zones. Given that Article 92 UNCLOS establishes close ties between a state and those ships that fly its flag (flag state jurisdiction), it is useful to consider what their role might be. In recent decades, international maritime regulations have considered that flag states have the primary responsibility over their ships,[78] as flag states must ensure that ships waving their flag comply with technical requirements regulated by the IMO and EU. MARPOL 73/78 and UNCLOS (Article 94) have enabled flag states to exercise prescriptive and enforcement jurisdiction to prevent vessel source pollution, including greenhouse emissions. On the other hand, some scholars concede that flag states may be unwilling or unable to adopt norms in this field or to enforce them due to several causes such as flags of convenience or the 'open registration' of ships.[79] In other words, port states can significantly complement the work of flag states in addressing substandard ships.[80] In this respect, the MEPC, in its 74th session held from 13 to 17 May 2019, adopted a resolution encouraging cooperation with ports to reduce emission from shipping.[81]

Therefore, port states' jurisdictions can develop an important task regarding the application of dif-

75 Bevan Marten (n 69) 495.

76 Rüdiger Wolfrum, 'The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective' in Lilian del Castillo (ed) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea Liber Amicorum Judge Hugo Caminos* (Brill Nijhoff, 2015), 96.

77 Article 218(3) UNCLOS: '[W]hen a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag state for investigation of such a violation, irrespective of where the violation occurred'.

78 There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as stated by Article 5 of Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) [450 UNTS 11] and articles 91-92 UNCLOS. Similarly, see: *S. S. Lotus (France v Turkey)* [1927] PCIJ Series A No. 10, 22: '[I]nternational law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas'.

79 Yubing Shi, *Climate Change and International Shipping: The Regulatory Framework for the Reduction of Greenhouse Gas Emissions* (Brill, 2016) 289.

80 Ho-Sam Bang, 'Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control' (2008) 23 (4) The International Journal of Marine and Coastal Law, 715.

81 IMO, 'Marine Environment Protection Committee (MEPC), 74th session, 13-17 May 2019' <www.imo.org/en/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-74th-session.aspx> accessed 17 May 2020.

ferent norms, as can be seen in Part XII of UNCLOS (Protection and Preservation of the Marine Environment). This jurisdiction has been relevant to fill in the gaps generated by the lack of jurisdiction in the high seas, the inefficiency of flag state jurisdiction and the lack of agreed international norms. In addition, Article 220(1) UNCLOS clearly expands the territorial jurisdiction of the port for those violations that take place in the maritime zones where it exercises sovereignty and certain sovereign rights in the 200 nautical miles exclusive economic zone. Therefore, port state jurisdiction must distinguish clearly those maritime zones where a state exercises its sovereign powers from those where its only exercises limited jurisdiction, such as the Exclusive Economic Zone (EEZ) and contiguous zones.[82] In order to support this kind of jurisdiction, some scholars assert that port state jurisdiction represents a compromise between coastal state jurisdiction and flag state jurisdiction: a) As ports are more prone to apply environmental standards than flag states; and b) port state jurisdiction is preferred to coastal state jurisdiction because it has less impact on the freedom of navigation and is safer.[83]

It must be noted that EU Regulation 757/2015 does not give full and exclusive jurisdiction to ports in order to monitor CO_2 emissions as Article 19 states that the flag state, on the basis of information collected enshrined in Article 21 and published by the EU Commission, shall adopt the necessary measures to ensure compliance with the monitoring and reporting requirements (as established in Articles 8-12 of the norm) to ships flying its flag. Therefore, a concurrent jurisdiction exists between the port and the flag state on this aspect. On this issue, Henrik Ringbom[84] cites the EU Directive 2009/16/EC in order to consider the EU as an active actor in turning certain jurisdictional rights of coastal and port states into obligations for its member states. However, he does not think that states' obligations relating to ship-source pollution can be shared. As the primary obligations are usually centred on the flag state, coastal and port states shall share obligations in relation to a pollution incident, but only when they take positive enforcement measures against a ship. As the Regulation does not give so much room to coastal state jurisdiction, perhaps the exercise of coercion to enforce norms can justify the exercise of jurisdiction and the 'territorialisation' of the facts through the port state. In case of normative gaps, the role of the port state may be strengthened in any European or international norm including an exclusion clause in order to enable ports to exercise their prescriptive jurisdiction as coastal states have more limited rights over foreign-flagged vessels. A coastal state that seeks to exercise control beyond the territorial sea and into the EEZ, must work directly with the flag state to fulfil both flag state and coastal state obligations, or to develop and exercise port state jurisdiction.

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82 Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* Hamburg Studies on Maritime Affairs 26 (Springer International Publishing Switzerland, 2014), 15. As stated by Article 33 UNCLOS, in a contiguous zone to the territorial sea, the coastal state is entitled to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulation and to punish such infringements from 12 to 24 nautical miles; Meanwhile in the EEZ the coastal state is entitled to explore and exploit, conserve and manage the natural resources superjacent to the seabed and of the seabed and its subsoil up to 200 nautical miles (Articles 56-57 UNCLOS).

83 Daniel Bodansky, 'Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond' (1991) 18 (4) Ecology Law Quarterly 719, 739.

84 Henrik Ringbom, 'Ship-Source Marine Pollution' in André Nollkaemper, Ilias Plakokefalos & Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 265, 271-272.

5. Conclusion

The Regulation will be applied gradually in accordance with the deadlines foreseen in the norm. In regard to its specific impacts, the introduction of MRV may decrease fuel consumption up to 2% which will entail a reduction of fuel cost of €9.4 billion up to 2030. In addition, the total administrative costs (including verification) for the entire sector may amount to €80 million per year.[85]

Both the EU Maritime Security Strategy and the EU Global Strategy have acknowledged that climate change should be considered a security threat. The most worrying concerns could be the acidification of oceans or even climate refugees. Climate change will necessitate a reconceptualization of the international concept of security and new definitions of current threats must be sought in order to better tackle the challenges. It is true that these strategies mainly depend on the Common Foreign and Security Policy. But, at the time of writing, this Regulation has just been adopted by the EU Commission because it only foresees in the monitoring and verification systems. However, if new amendments are required and new suggestions (such as the inclusion of 'coercion' to compel third parties to comply with the norms) arise, the Council of the EU may participate as Common Security and Defence Policy (CSDP) issues need to be dealt with at an intergovernmental level. If this were to occur, the response of the EU may be slowed down as is currently the case with the IMO.

In relation to the scope of application of the norm, it does not have a clear 'extraterritorial character'. Flag states, port states and coastal states are stakeholders in this issue due to their prescriptive and enforcement jurisdiction foreseen in UNCLOS. Articles 52 TEU and 355 TFEU regulate the territorial scope of the EU treaties and EU secondary law. Moreover, as the CJEU noted, taking into account Article 227 of the former Treaty establishing the European Community (EC Treaty), this provision did not preclude EU rules from having effects outside its territory.[86] However, such a territorial extension of EU Law may clash with its prevalence over international norms in certain situations: As observed in connection with the *Kadi* decision;[87] EU law autonomy may sometimes prevail in cases of conflict, even concerning international agreements.

EU environmental norms have been considered as 'contingent' by several scholars and the EU has taken the lead on several occasions to combat various threats and common concerns in areas such as the protection of human rights, food standards, environmental law and, recently, data protection

85 European Commission, 'Revision of Regulation of the European Parliament and the Council amending Regulation (EU) 2015/757 on monitoring, reporting and verification of carbon dioxide emissions from maritime transport, in view of an alignment with the IMO data collection system' (21 June 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi_com%3AAres%282017%293112662> accessed 17 May 2020.

86 Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR 1996/4-5/I-2253, para 14.

87 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:2008:461, para 285: '[I]t follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty'.

(through the new General Data Protection Regulation (GDPR)). Sometimes the EU has attempted to influence third parties during bilateral or multilateral negotiations or even including human rights clauses in different agreements. These facts point to the conclusion that if EU policies on climate change protection and shipping are widely adopted, a crystallization of CIL will take place in order to develop and strengthen public international law. Such 'adoptions' may entail 'practice', which will be attributed to both states and international organizations that could create new international law rules.[88]

However, this norm tries to fill in the gap that has hitherto eluded the IMO (due to the lengthy procedures to adopt binding norms) and does so through a territorial institution like a port. Taking into account the EU Maritime Security Action Plan 2018, duplication of work strands is aimed to be avoided by the parties involved and initiatives to reduce greenhouse emissions must be sought in accordance with the IMO's initial strategy on the reduction of greenhouse gas emissions from ships.[89] Therefore, it should be considered that this measure is provisional until the time consensus is reached at the IMO for a binding norm. As example of the spirit of cooperation between the EU and the IMO in this field, the EU Commission recently proposed an amendment to the EU Regulation 757/2015 in order to take appropriate account of the IMO DCS with the aim to enable companies and administrators to streamline and reduce administrative efforts as well as to preserve the objectives of the Regulation.[90]

Although the right of entrance to a port cannot be taken for granted, all ships shall enter on a voluntary basis. Therefore, ships must comply with the requirements established in the Regulation. This prominent role of the port state jurisdiction analysed in this paper may create contradictions between European and international norms regarding the actors involved in mitigating greenhouse emissions.[91] Should the other UNCLOS jurisdictions take part in this controversy? Exchange of information between flag states with port states is key in ensuring reliability of data and ascertaining which steps have been taken. However, the enforcement jurisdiction for both flag state (Article 217 UNCLOS) and port state jurisdictions (Article 218 UNCLOS) will be key in strengthening the flow of data and allocating responsibilities between the states concerned (flag state and port state). As the coastal state also has competences over the maritime zones foreseen in UNCLOS, if further action cannot be taken by a coastal state against foreign-flagged vessels that are not complying with the environmental regulations on ship pollution, the port can play a complementary key role in enforcing environmental measures.

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88 Olivier Corten, *Méthodologie du droit international public* (Editions de l'Université Libre de Bruxelles, 2017) 153.

89 'Council conclusions on the revision of the European Union Maritime Security Strategy (EUMSS) Action Plan' (n 29) 10.

90 European Commission 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/757 in order to take appropriate account of the global data collection system for ship fuel oil consumption data' COM (2019) 38 final, 2.

91 It must be recalled that the EU is bound by international law, including customary international law, when exercising its powers, as stated by the CJEU in: C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECLI:EU:C:1992:453, para 9; C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, para 45; C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, paras 40-43.

The EU Commission's obligations, as foreseen in the Regulation, may not be circumvented because this EU body is the main safeguard with a supervisory mandate in relation to the applications of EU treaties and norms. On the other hand, the IMO's role should be enhanced as well in order to reach a binding global norm on this urgent matter. In any case, EU Regulation 757/2015 foresees that an international norm will be adopted in the short term as Article 22(3) states that:

'[I]n the event that an international agreement on a global monitoring, reporting and verification system for greenhouse gas emissions or on global measures to reduce greenhouse gas emissions from maritime transport is reached, the Commission shall review this Regulation and shall, if appropriate, propose amendments to this Regulation in order to ensure alignment with that international agreement.'