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ILLICIT ACTIVITES ON THE HIGH SEAS: PIRACY, DRUG TRAFFICKING AND IUU FISHING

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A chi c'è stato, dall'inizio alla fine

Ai miei genitori, per avermi insegnato quanto sia bella la vita

A mio fratello, per essere il mio migliore amico

Ai miei nonni, per condividere con loro un altro piccolo grande traguardo

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Introduction

This work is the outcome of my personal interest in the law of the sea, which is one of the oldest branches of public international law. Precisely, it examines the main illicit activities and crimes committed on the high sea, which is the marine space beyond national jurisdiction. In fact, the international law of the sea conventionally divides the oceans into jurisdictional zones determined on their distance from the coast.

The regime of the high seas, also known as *mare liberum*, is governed by the principle of freedom: all States, whether coastal or land-locked, have an equal right of legitimate usage regarding the international waters and, on the other hand, it is imposed upon all States a general obligation of non-interference in peacetime towards non-national vessels. Thus, the principle of the exclusive jurisdiction of the Flag State is the other fundamental customary rule governing the high seas. In other words, ships in international waters are subject only to the jurisdiction of the State under whose flag they are sailing.

Generally, the work underlines the recent increase of "MIOs", term which stands for maritime interceptions operations, to counter threats to the maintenance of international security at sea or to suppress transnational organized crimes such as drug trafficking. Thus, this extensive recent practise of interdiction of vessels in international waters seems to challenge the relevance of the fundamental principle of freedom of the high seas.

Both the principles of freedom of the high seas and of exclusive jurisdiction of the Flag State are examined in Chapter I of this work, where a particular attention has been paid to the "genuine link". The existence of this latter is required for ensuring that the Flag State effectively exercises its jurisdiction and control in administrative, technical and social matters over ships flying its flag. On the contrary, the lack of "genuine link" gives rise to the so-called "flags of convenience", which often constitute the vehicle for the commission of illicit activities on the high seas. Afterwards, Chapter I provides a detailed analysis of the "right of visit", which is considered the main exception to the principle of freedom of the high seas. This right is well established in customary international law, and it is embodied in article 110 of the *United Nations Convention on the Law of the Sea* (LOSC). As the reader will see, the article addresses a limited number of cases where a warship is legitimately entitled to intercept on the high seas a foreign ship when there are reasonable grounds to suspect its engagement in piracy, slave trade or unauthorized broadcasting. Moreover, always according to article 110, the boarding is lawful when the suspected ship is a stateless vessel or a vessel with suspicious nationality. The other exception to the principle of exclusive jurisdiction of the Flag State is the "right of hot pursuit", constituting a temporary extension of the Coastal State jurisdiction on the high seas and whose legal implications will be deeply examined always in Chapter I of this work.

Chapter II of the work deals with piracy, which is considered the paradigmatic "universal jurisdiction crime" since all nations are entitled to exercise their jurisdiction on pirates and all states can consequently try pirates for their crimes. In this sense, it is evident the legitimacy of a maritime interception operation undertaken on the high seas against a pirate ship, considering the inclusion of piracy in the exceptions providing the legal

basis for the exercise of the right of visit pursuant to article 110 LOSC. Furthermore, Chapter II provides an accurate *excursus* regarding the acts of violence and depredation committed towards vessels located within the territorial waters of the Coastal States, also known as acts of armed robbery and it focuses on the effectiveness of anti-piracy measures undertaken in three main areas of the globe: South-East Asia, Horn of Africa and the Guinean Gulf. In particular, we will see how the threat of piracy off the Somalian coasts has been specifically addressed even by several UN Security Council Resolutions, which allow States to use all necessary means to repress the phenomenon. Besides, Chapter II also deals with the practice of "catch and release" of captured pirates debasing any effective prosecution and addresses the legal implications arising from the use of private contracted armed personnel on board of merchant vessels for securing the ships from pirate attacks.

Afterwards, Chapter III will analyse the illicit traffic in narcotic drugs and psychotropic substances at sea, also known simply as "drug trafficking". This latter constitutes a major issue for the international community, representing a threat to international and national security worldwide. Moreover, there are evidence of correlation between the spread of drug trafficking and increasing cases of violence having a negative impact on the lives of many communities. Firstly, the chapter focuses on the few provisions of the *United Nations Convention on the Law of the Sea* addressing the phenomenon and it will be underlined the lack in LOSC of a legal basis for the exercise of the right of visit towards ships suspected of being engaged in the illicit traffic in narcotics. Then, it will be discussed the importance of the *1988 UN Narcotics Convention* and its article 17, also known as "boarding provision", which expressly provides a framework for interdiction based on a system of flag-state consent with reference to drug trafficking. Indeed, as we will see, the same right to board is included also in the *1995 Council of Europe Agreement* and in other several multilateral and bilateral treaties aimed at improving the mechanism of article 17 of the *1988 UN Narcotics Convention*. Besides, with the aim of helping the reader to better understand the issues covered, Chapter III will also provide a legal analysis of some concrete drug-smuggling cases regarding the statement of Italian jurisdiction in international waters pursuant to article 110 LOSC and article 17 of the *1988 UN Narcotics Convention*. Instead, the last paragraphs of the chapter focus on the relationship between drug trafficking and the use of fishing vessels and the new advanced narcosubmarines developed for evading interdiction.

Finally, Chapter IV examines the practise of illegal, unreported and unregulated (IUU) fishing, which constitutes a major threat to long-term biological capital and sustainable fisheries. After having explained the meaning of IUU fishing and its conceptual difference with harmful fishing, the chapter focuses on the multilateral actions undertaken internationally to counter the phenomenon. In this sense, the content of the non-binding instrument 2001 FAO's *International Plan of Action to Prevent, Deter and Eliminate IUU fishing* is examined in all its facets. Afterwards, the discussion deals with the *2005 Model Scheme* and the subsequent *2010 Port States Measures Agreement*, which is a legally binding global instrument officially entered into force in 2016 with the scope to combat IUU fishing through the implementation of effective port State

measures. Besides, Chapter IV also provides a brief analysis of the *1995 Straddling Stocks Agreement*, which constitutes a legal basis for interception on the high seas of vessels engaged in IUU fishing. Afterwards, the main national plans of actions (NPOAs) adopted by States to counter IUU fishing are examined and it is provided also a comprehensive analysis of the phenomenon's economic drivers and causes, especially highlighting the role played by flags of convenience and flags of non-compliance in its spread. Furthermore, Chapter IV contains an accurate examination of trade-related measures used to counter IUU fishing and their compatibility with international trade law. Finally, the chapter moves from the traditional management approach and concludes the analysis providing a focus on the transnational criminal dimension of illegal fishing.

Chapter I: **The High Seas: the marine space beyond national jurisdiction**

1. Principle of Freedom of the High Seas: its twofold meaning and its limits

The high seas, also known as international waters, comprise the marine space beyond national jurisdiction. In other words, from a spatial point of view, the sea becomes "international" once the continental shelf is overtaken. Before going in depth with the analysis of the main principles of the high seas, it is fundamental to briefly highlight how the international law of the sea divides the marine space into jurisdictional zones. Only through this general overview we will be able to fully understand the peculiarities of the principles governing the high seas.

The first category of marine space includes the ones falling under national jurisdiction and it contains the internal waters, the territorial sea, the contiguous zone and the exclusive economic zone (EEZ). The internal waters and the territorial sea are subject to the territorial sovereignty of the coastal state, without limits both *ratione materiae* and *ratione personae*: the coastal state exercises its legislative and enforcement jurisdiction all over the matters and all over the people regardless their nationalities. Differently, the contiguous zone and the EEZ up to the continental shelf in legal sense are located beyond the territorial sovereignty of the Coastal State but they do always fall into its national jurisdiction. In other words, the Coastal State has some "sovereignty rights" over this zone, which are limited *ratione materiae* by international law.

The second category includes the marine space settled beyond national jurisdiction and it comprises the high seas and the so-called "Area". This latter is the deep seabed and ocean floor beneath the international waters, and it is located beyond the continental shelf in legal sense. Moreover, the Area and its resources are governed by the principle of the common heritage of mankind, which protects its exploitation stating that the exercise of sovereignty and sovereign rights by any State shall not be recognized[1].

After this first excursus, our analysis can finally focus on the High Seas. The international waters have been defined by the LOSC (*1982 United Nations Convention for the Law of the Sea*) as the parts of the sea not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State[2]. Scholars have discussed whether the high seas should be classified as *res nullius* or as *res communis*. While the former classification would highlight how the high seas do not belong to anybody, the latter would instead consider these waters as belonging to the entire human community. However, the modern doctrines tend to address this dispute with limited importance[3].

The main principle governing the high seas is the freedom principle. This latter dates to the 17th century, when Hugo Grotius, acknowledged as the "father of modern international law", affirmed that the ocean was an international territory where all nations had the right to free trade. On one hand, it clarifies how in the spatial

[1] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, pp. 7-11
[2] LOSC 1982, art. 86
[3] G. Gidel, Le Droit International public de la mer: le temps de paix, 1981, pp. 213-224

scope of the international waters does not apply the national jurisdiction of any State. On the other hand, it also stresses how each State has granted the freedom of performing several and different activities on the high seas, despite always in accordance with international law. This double content of the freedom principle has led scholars to use the terminology "twofold meaning", which is specified in depth by Article 87.1 LOSC. This provision states that all States, even if they are Coastal States or land-locked ones, can have access to the high seas and are free to a) navigate, b) overflight, c) lay submarine cables and pipelines, d) construct artificial islands and other installations permitted under international law, e) fish, d) promote scientific research[4].

Originally, the freedom of high seas included only the freedom of navigation and the freedom of fishing. Afterwards, the freedom of overflight has been added due to the technological advance that human beings reached in the field of aircraft. Instead, the freedom to lay submarine cables and pipelines and construct artificial islands and the latter freedom of promoting scientific research have been included once the *1958 Convention on the High Seas* was stipulated. However, the Article 87.1 LOSC also highlights that the freedom of the high seas shall be promoted in accordance with all the conditions and clauses specified LOSC itself and in general by the international law of the sea. This means that the freedom of the high seas is "relative": it does not have an absolute content, especially taking account of the needs to preserve the conservation of marine living resources and to protect the marine environment[5]. In fact, the principle has been often restricted by both customary international law and multilateral treaties. Other limits regard specifically the activities mentioned in the article. For instance, the freedom of navigation mentioned in letter a) of Article 87.1 does not permit a ship detained in a port due to a legal proceeding against it to leave the Port State and entering the international waters[6]. Moreover, also protesting at sea is an activity that shall be performed in accordance with the freedom of navigation and does not constitute *inter se* a lawful use of the high seas[7].

About letter c) of Article 87.1, concerning the freedom to lay submarine cables and pipelines, it is fundamental to stress the strong nexus with the protection of the marine environment: whenever a submarine cable or pipeline is buried under the seabed, there is the need to balance this freedom provided by Article 87.1 LOSC with the equally valuable interest aimed at preserving biodiversity. There are two main different types of cables: the communications cable transporting data and the power cables transmitting electricity. Instead, the pipelines are intended to transport both oil and gas. The importance of the freedom to lay these cables and pipelines is witnessed by the *UN General Assembly Resolution 65/37A/2010*, which defines them as "critical communications infrastructures vitally important to the global economy and the national security of all states". In fact, services that people use each day such as Internet access and as consequence use of social networks, mails, media and calls services rely on their correct function. The first submarine power cable has been

[4] LOSC 1982, art. 87
[5] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 189
[6] M/V Lousia (Saint Vincent and the Grenadines v Kingdom of Spain), Judgment, ITLOS Reports, 2013, p. 36
[7] The Arctic Sunrise Arbitration (The Netherlands v the Russian Federation), Award on Merits, 2015, para. 227

installed by Sweden in 1954 and from that time the ILC (*International Law Commission*) started to consider the freedom to lay power cable as an activity covered by the spectrum of the freedom of high seas[8].

Despite cables and pipelines are mentioned together in Article 87.1 LOSC, they have a very different environmental impact. In fact, while several studies have confirmed that the installation of cables has a minimal impact on marine biodiversity in areas beyond national jurisdiction, the pipelines can potentially cause an effective and long-term harm to the environment. In this context, the *UN General Assembly Resolution 72/279*, authorizing the new international legally binding instrument (ILBI) aimed at protecting the marine biodiversity especially through the promotion of the EIAs (*Environmental Impact Assessments*), does not mention explicitly submarine cables and pipelines. However, it states that "the work and the results of the conference should be fully consistent with the provisions of LOSC", without providing any distinguished treatment to cables and pipelines in view of their different environmental impact. Under these circumstances, the ONG *International Cable Protection Committee*, known as the main representative of the entire cable industry, claimed that submarine cables should be considered compatible with the nature of "*Marine Protected Areas*" (MPA) and the EIA requirements are unnecessary considering their unharmful effects on biodiversity. In other words, the ONG wants to prompt the international community to adopt a flexible approach in protecting the environment and marine biodiversity without restricting the high seas freedom when unnecessary. The main point of this new approach would be a case-by-case regulation of different activities, providing for instance a different treatment in light to the environmental standards to the lay of cables and the lay of pipelines in high seas[9].

Besides, the main doctrine shares the opinion according to which the activities that the States are free to perform are not limited to the ones explicitly mentioned in Article 87.1: other activities can potentially be carried out[10]. However, the Article 301 LOSC clarifies that in international waters any kind of military activities prohibited by the *Charter of the United Nations* cannot be performed, fixing an important limit to the extent of the freedom. It specifically focuses the attention on use of force and threats against the political independence and territorial integrity of any State[11].

In the context of the freedom of the high seas and its limits, the so-called MPAs (*Marine Protected Areas*) deserve a specific focus due to their capability of constituting a limit to the aforementioned. The main point to be highlighted is that LOSC does not include in its text a specific provision regarding the conservation of marine biological diversity in the High Seas and in the Area. Moreover, there is not a precise definition of the High Seas MPAs in the international community. In this sense, a fundamental importance acquires the *OSPAR*

[8] T. Davenport, The High Seas Freedom to lay submarine cables and the protection of the marine environment: challenges in high seas governance, Symposium on governing High Seas Biodiversity, 2018, pp. 139-140
[9] T. Davenport, The High Seas Freedom to lay submarine cables and the protection of the marine environment: challenges in high seas governance, Symposium on governing High Seas Biodiversity, pp. 141-143
[10] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 188
[11] LOSC 1982, art. 301

Convention for the Protection of the Marine Environment in the North-East Atlantic (1992). According to it, a "MPA" is a maritime area where protective, conservation, restorative or precautionary measures have been instituted for the purpose of protecting and conserving species, habitats, ecosystem or ecological processes of the marine environment. The importance of their establishment can be clearly understood analysing these data: in the last four decades, the 22 percent of marine vertebrates have declined in number and the causes of it can be fully found on the unchecked and unregulated human impact[12]. In addition, quite all the legal frameworks aimed at preserving the marine biodiversity in the areas beyond national jurisdiction have been perceived as inadequate and obsolete. As consequence, the UN Members have worked on the establishment of high seas marine protected areas under the *BBNJ Convention*[13].

This latter is an intergovernmental conference that the *UN General Assembly* has decided to convene on 24 December 2017, in order to elaborate the text of an internationally legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The meetings of the conference have been planned for four sessions. The first session took place from 4 to 17 September 2018, the second session from 25 March to 5 April 2019, the third session from 19 to 30 August 2019. Due to the global Covid-19 pandemic, the fourth and last session initially convened in March 2020 has been procrastinated until the emergency will be under control. Today, there are 4 different high seas MPAs that have gained a worldwide recognition: the Pelagos Sanctuary, the North-East Atlantic Protected Area, South Orkney Islands Southern Shelf Protected Areas, and the Ross Sea Protected Areas. In all these areas, different restrictions on navigation, fishing and environmental damage activities are enforced, determining a limitation to the principle of freedom on the high seas. The main management measures which are operative regard the monitoring of ship navigation, the tracking of living resources and habitats and a constant control of the different levels of pollution in the regions involved. However, it has also to be highlighted that these management measures do not only impose restrictions on the contracting parties but often provide some exception rules aimed at making more elastic their framework. For example, the conservation measures of the South Orkney Islands Southern Shelf allow the fishing activities carried out for scientific research and based on a specific agreement with the established *Scientific Committee*. Another example can be found in the *2002 Agreement for the Creation of a Sanctuary for Marine Mammals in the Mediterranean* which, while prohibiting any kind of capture of mammals, permits "non-fatal captures" in an emergency or for on-site scientific research[14].

2. Flag States and the Principle of Exclusive Jurisdiction

[12] Y. Wang, Reasonable Restrictions on Freedom of High Seas by "Marine Protected Areas on the High Seas": an empirical research, Journal East Asia and International Law, 2019, pp. 245-246

[13] UN General Assembly resolution 72/249, Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 2017

[14] Y. Wang, Reasonable Restrictions on Freedom of High Seas by "Marine Protected Areas on the High Seas": an empirical research, Journal East Asia and International Law, 2019, pp. 247-258

The counter-principle governing the high seas together with the freedom one is the principle of exclusive jurisdiction of the Flag State, which has gained over time an international customary nature[15]. The main piece of legislation in which it is affirmed is Article 92.1 LOSC, stating that ships on the high seas shall be subject only to the jurisdiction of the State under whose flag they are sailing, except in cases expressly provided in the LOSC and in other international treaties[16].

In other words, the State granting a ship the right to sail under its flag shall be known as Flag State and it must be recognized its exclusive right to exercise jurisdiction over all the ships flying its flag. This means that other States do not have the right to exercise any kind of prescriptive or enforcement jurisdiction over foreign ships in high seas. Moreover, it has been highlighted that the exclusive jurisdiction affirmed in Article 92 does not constitute the only case provided in LOSC: for instance, Article 60.2 LOSC attributes exclusive jurisdiction to coastal states in relation to the installation of artificial islands and other structures in the exclusive economic zone. Besides, analysing the provision, the principle of exclusive jurisdiction of flag states at high seas clearly expresses a rebuttable presumption: it is operative unless one of the exceptional cases applies. A focus deserves the use of the terminology "jurisdiction" next to the adjective "exclusive". In fact, the term "jurisdiction" is applied without providing its specific definition and in a context, the international law one, where this term is often used with different meanings and with different purposes[17].

The main doctrine shares the opinion the exclusive jurisdiction constitutes upon the Flag State a proper duty to exercise it and not a mere right. Moreover, it also agrees the term jurisdiction shall be regarded considering its two sides: the legislative and the enforcement ones over all the ships flying the flag of the State in question.

2.1 The "genuine link" and flags of convenience

The principle of exclusive jurisdiction operates by means of the nationality of the ship: a ship can fly the flag of a State only if it has obtained the juridical link of nationality of that specific State. This principle is clearly expressed in article 91.1 LOSC, stating that "ships have the nationality of the State whose flag they are entitled to fly"[18], also requesting the presence of a genuine link between the State and the ship. The nationality of a ship distinguished from the one of individuals has been recognized only in the 19th century, not in concurrency with the birth of the freedom of high seas. Precisely, it appeared in 1820s in several bilateral treaties among States aimed at protecting commerce and navigation, with the intent of setting the conditions under which the States would recognise the nationality of each other's trade vessels[19].

[15] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 189
[16] LOSC 1982, art. 92
[17] A. N. Honniball, The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States, International Journal of Marine and Coastal Law 31, 2016, pp. 504-508
[18] LOSC 1982, art. 91
[19] V. P. Cogliati-Bantz, Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law, Nordic Journal of International Law, 2010, p. 387

Under international law, each State can freely determine the conditions that a ship must fulfil in order to be considered a national of the State in question. This State right has been specified always in article 91.1 LOSC, stating "every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag". The same conclusions have also been affirmed by the jurisprudence of the ITLOS, specifically in *M/V "Saiga" (No.2)* case-law, in which the Tribunal ruled how the procedures and the criteria used to grant the nationality to ships fall within the exclusive jurisdiction of the Flag State.[20] However, it has to be said that the rule according to which the nationality of a vessels is to be decided taking into account the legislation of the country under whose flag the ship is flying dates back to the international practice adopted since 1830's. Since then, the discipline focusing on the vessels' nationality began to be provided not only by international conventions but also by diplomatic correspondences, prize regulations and decisions of both domestic and international courts. In other words, the nationality of ships became a proper legal concept and jurisdictional issue[21].

Moreover, another fundamental requirement that must be present between the State and the ship flying its flag is the so-called "genuine link", which has been subject to several reports and analysis. In fact, a specific requirement stating the need of a particular connection between the State and the ship such as the genuine link was not originally assumed by international law: classical scholars used to not consider it necessary. A first step towards the harmonization of domestic legislations in this fields has been made in the *Venice Session of the Institute de Droit International* in 1896, in which the participants fixed the first national ownership requirements, highlighting that the criteria adopted by a State to grant its nationality to a ship should not differ too much from the principle adopted by majority of the States. Although the work of the Institute was not considered to constitute rule of international law, it gained importance in the *Second Report of the Yearbook of the International Law Commission (ILC)* in 1951: during the session, the participants concluded that the States were not totally free to determine the procedures aimed at granting the ships' nationalities. Instead, the States, in defining these requirements, should at least take into consideration some general principles of international law.[22]

In this sense, an important contribution has been given by the Netherlands, the first country to prompt the use of the term "genuine connection" during the sessions in defining the relationship between the ship and the State. The implicit intent was achieving a degree of uniformity in shaping the legal concept of the ship nationality. In this sense, a specific committee within the ILC was created for the purpose of drafting the article

[20] The M/V 'Saiga' (No.2) case (Saint Vincent and the Grenadines v Guinea), Judgment, ITLOS Reports 1999, p.37, para. 65.
[21] H. Wheaton, Elements of International Law, 1846, p. 390; J. C. Bluntschli, Le droit international codifié, 1881, p. 199; F. von Liszt, Das Völkerrecht systematisch dargestellt, 1902, p. 203
[22] The text adopted read: "In general, a State may fix the conditions on which it will permit a ship to be registered in its territory, and to fly its flag; yet the general practice of States has established minimum requirements which must be met if the national character of ships is to be recognized by other States. These minimum requirements are: The ownership of the vessel must, to the extent of 50 per cent, be vested in: (a) Nationals of or persons domiciled in the territory of the State; (b) A partnership in which more than half the partners with personal liability are nationals or persons domiciled in the territory of the State; (c) A joint-stock company organized under the laws of the State and having its head office in its territory." The text, re-numbered Article 10, was modified by the Rapporteur in the Sixth Report on the High Seas in 1954. Yearbook of the ILC, 1954, p. 10

5 of the Convention as a general principle. The approved text of the provision was the following: "Each State shall fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of a ship by other States, there must exist a genuine link between the State and the ship"[23]. Afterwards, the provision was renumbered Article 29 and became officially part of the *ILC's Final Report*. In this context, it arose also a different question: what it would happen whenever a State grant to a ship its nationality in evident violation of the international general principles. The main point was if another State in this peculiar case could or not refuse to recognize the right to fly of a ship whose nationality had been acquired in contrast to the rules. Therefore, it was voted and included in the provision a specific non-recognition clause. In the following years, article 29 has been substantially modified since the *First Conference on the Law of the Sea*, in which several States such as Ethiopia were very critic with the use of the term "genuine link", considered too vague, while others such as Italy and France highlighted the necessity of a more comprehensive text stressing how the genuine link should guarantee the exercise of effective jurisdiction and control over the ship[24].

More precisely, Italy has played a fundamental role with the submission of an amendment to the article with the following text: "Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control over ships flying its flag"[25]. This contribution was considered essential because for the first time it was made a distinction between the freedom of each country to fix the procedure aimed at conferring the nationality at its own discretion and the outcome that the criteria or procedure adopted must guarantee, which must be always the same and it must consist in the effective exercise of control over the ship by the flag state[26]. Moreover, also France provided its own contribution to the provision suggesting adding the expression "in administrative, technical and social matters", which has also been approved too. However, it was contextually delated the non-recognition clause which was added in the precedent meeting: several States shared the opinion that such clause could easily breach the principle of sovereignty[27].

Therefore, it was made clear that the violation of the duty to exercise jurisdiction and control gave rise not to a right of non-recognition of the ship's nationality by other States but only to a duty of the Flag State. In other terms, there was not a specific requirement upon the effective nationality of the ship. In the end, the concept of genuine link has been explicitly included in the article 91.1 LOSC, although the concept itself has been subject to several interpretations by different countries[28]. For instance, the French text of the article suggests that the link must be "*substantiel*", in English translation "*substantial*", consequentially referring more to a

[23] Yearbook of the ILC, 1956, p. 66
[24] V. P. Cogliati-Bantz, Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law, Nordic Journal of International Law, 2010, pp. 394-395
[25] UNCLOS I, IV Official Records, 1958, p. 123
[26] UNCLOS I, IV Official Records, 1958, p. 61
[27] UNCLOS I, II Official Records, 1958, p. 20
[28] Draft articles on the Law of Treaties with commentaries, Yearbook of the ILC, 1966, p.219

quantity of factors. Instead, the Spanish text of the article uses the expression "*una relaciòn auténtica*" and, as the English text, provides an interpretation underling a true link and a relation that is built not artificially. Some scholars have assumed that this true link must be found in the nationality of the ship and in the conditions of attribution of this latter[29].

Differently, the *International Tribunal for the Law of the Sea* (ITLOS) made an important statement in the case *"The M/V Saiga"* going in another direction: the genuine link and its assessment is strongly related to the duty of the flag state to exercise an effective jurisdiction and control and to the need of securing this duty's implementation. The criteria according to which a State may challenge other States by reference to the validity of the ship's registration are not established by the genuine link[30]. This approach has led to the conclusion that there is no limitation under international law of the sea to the domestic law requirements for the conferral of nationality of ships. The only exceptions admitted are the restrictions that States may have agreed in treaties. Always referring to the role of the genuine link, an important clarification has been made by the *International Maritime Organization* (IMO) after the invitation by *UN General Assembly* in 2003[31] and the report of the Secretary-General, which highlighted the need to provide an accurate definition of the genuine link "to ensure that States do not register any vessels unless they have the means for enforcing upon them all the relevant international rules and standards"[32].

Moreover, also the *Food and Agriculture Organization* (FAO) focused on the necessity to have an effective genuine link between State and fishing vessels flying their flags in order to eliminate the practise of illegal, unreported and unregulated (IUU) fishing by ships flying "flags of convenience"[33]. In this sense, it was approved in 1993 the *Compliance Agreement*, which entered in force in 2003 and asked each Party to take appropriate measures to guarantee that all the vessels do not promote activities which collide with the conservation of species. The main point is that this agreement does not prohibit the conferral of the nationality by a State to a vessel that has already been registered in another State, but it only disallows the conferral of the right to fish[34]. An important meeting witnessing the FAO's concern on the definition of the genuine link has been held in 2009 in Rome: the *FAO's Report of the Expert Consultation on the Flag State Performance*. In this latter, it has been highlighted that, despite the fact the criteria for the conferral of nationality fall under the exclusive jurisdiction of each State, the vessel's registration must always a comprehensive inquiry by the flag state about the history of the vessel in question and its ownership. The main reason is that often the open

[29] V. P. Cogliati-Bantz, Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law, Nordic Journal of International Law, 2010, pp. 398-402
[30] The M/V 'Saiga' (No. 2) (St Vincent and the Grenadines v. Guinea), 1 July 1999, I.T.L.O.S. Reports 1999, p. 42
[31] UN Doc. A/RES/58/240, 2003, para. 28
[32] Report of the Secretary-General, UN Doc. A/58/65, 2003, p. 72, para. 249
[33] Rome Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the FAO Ministerial Meeting on Fisheries on 12 March 2005, para. 5
[34] A. D'Andrea, The 'Genuine Link' Concept in Responsible Fisheries: Legal Aspects and Recent Developments, FAO Legal Papers Online No.61, 2006, p. 16

registries do not require individuals to be national of their flag state, which consequentially is not in the position to implement an immediate control[35].

When the inquiry reveals that vessels have been found in the past non-compliant with the rules, these vessels should not be registered unless there is a change of ownership. The Report contains also a regime ensuring that no vessel can fish without a specific authorization, which is granted only when the sustainability of the exploited stocks is not put in danger. In conclusion, we can affirm there is not an express sanction against the user in case of lack of genuine link, intended as a net of links between the ship, the shipowner and the Flag State. The principal difficulties in ensuring the presence of the genuine link arise in front of the so-called "flags of convenience" (FOC). This expression has been used by the *United Nations* to address the practise of shipping under which there is no genuine link between the State and the ships, more specifically when the State does not effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag[36].

In other words, the Flag States allow shipowners to register their ships under their flags even if they do not have a real connection with them. An important contribution to the identification of such countries has been given by the *Organization for Economic Cooperation and Development* (OECD), which provided a list including: the Panlibhon group (Panama, Liberia, and Honduras), Costa Rica, Lebanon, Cyprus, Malta, Somalia, Morocco, San Marino, Haiti, and Sierra Leone. The *International Transport Workers' Federation* added Antigua and Barbuda, Gibraltar, Sri Lanka, and Vanuatu to the list, while the *International Trade Federation* also considers the Cayman Islands, Seychelles, and Oman[37].

Next to the FOC countries, several shipping registers belonging to States providing a favourable tax framework for shipowners have defined themselves as *"Quasi Flags of Convenience registers".* To this category the OECD included the Bahamas, Bermuda, and the Netherland Antilles, while Singapore has established itself from being a FOC to a quasi-FOC country. Always to this category of tax heavens registers can be included the *Norwegian International Ship Register*, the *Danish International Register of Shipping*, and the *French International Register*[38]. In this context, it is fundamental to point out that there are two different types of registers: closed registers and open registers. The first category allows flying under the flag of the State's register only the ships that can be considered nationals, meaning that an Italian cannot register his ship under the Russian flag. The second category instead allows the shipowner to register its ship under the register in question regardless of the nationality.

For instance, it is an open register the United Kingdom: an Italian shipowner can register his vessel under the British flag without any problems whatsoever. In turn, the open register can be distinguished in national ones

[35] G. Lugten, FAO Fisheries and Aquaculture Report No. 918, p. 44
[36] B.A. Boczek, Flags of Convenience: An International Legal Study, Harvard University Press, 1962, p.3
[37] R. L. Rowans, H. R. Northrup, and M. J. Immediata, International Enforcement of Union Standards in Ocean Shipping, British Journal of Industrial Relations, 1977, p. 338
[38] UNCTAD, Review of Maritime Transport, 2008, p.47

and international ones. The national registers provide to the foreign companies listed the same treatment as any other business in the country. Instead, the international registers offer foreign shipowners tax incentives for the registration. What must be pointed out is that the phenomena of flags of convenience (FOC) and quasi-flag of convenience (quasi-FOC) prosper in relation to open international register, whenever the shipping regulations are weak and lax. Under these registers, the shipowners are in the position to reduce the crew costs due to the less expensive labour, while the States earn a revenue from the registrations and an annual fee. However, the open registers States must enforce in their regulations all the standards and rules concerning the labour conditions of the crew, the safety of navigation, the measures aimed at the conservation of the marine environment and species, considering that illegal fishing is often a practise promoted by flags of convenience[39].

The term "flags of convenience" has been used for the first time at the *U.S. Senate Committee on Interstate and Foreign Commerce,* when a representative affirmed that the registration of its company operating in the grocery sector was made under the flag of Honduras because of its convenience[40]. In this context, the United Kingdom promoted a specific committee of inquiry for the identification of the common peculiarities to all flags of convenience countries. The outcome has been six different features: possibility to non-citizens to own and control the flag ship of the FOC country; unrestricted access to ship registration; favourable tax regime; countries whose national income depends substantially on registration fees; flag ships manning open to non-nationals; no means for the effective control of the shipping companies[41].

These characteristics determined the rapid growth of the FOC shipping, covering in the 90's already the 30 percent of the world's fleet tonnage. Nowadays the use of open registers in the shipping industry is dominating global trade at the point that in 2015 71.3 percent of vessels were registered in this manner[42]. The first country to develop an open register has been Panama in 1916, followed by Honduras and Liberia respectively in 1943 and 1949. About the favourable tax regime, FOC countries differently from the other States charge only an initial cost for registration and an annual fee, without imposing other taxes on the incomes derived from crew operations. Consequently, the costs upon a ship-owner flying the US flag are two or three times higher than the ones upon a ship-owner flying under the flag of a FOC country. The USA have always been the main user of the FOC system: due to the very high wages the American government in the last years started a campaign of promotion of the Panama and Liberia's registers, politically friendly countries. The principal American companies that took advantages from the FOC system are the oil companies and the ones operating in the manufacture of steal, coal and paper. On the other hand, the advantages for FOC countries consist not only in the considerable national income generated but also in the employment opportunities for their nationals. A

[39] H.W. Welfers Bettink, The Genuine Link and the 1986 Convention on Regulation Conditions for Ships, Open Registries, 1987, p.77

[40] Rodney P. Carlisle, Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience, The United States Naval Institute, 1981, p. 142

[41] Report of the Committee of Inquiry into Shipping (The Rochdale Report). HMSO, London, 1970, p. 16

[42] A. Van Fossen, Flags of Convenience and Global Capitalism, 2016, pp.359-377 and J. Ford and C. Wilcox, Shedding light on the dark side of maritime trade: A new approach for identifying countries as flags of convenience, Marine Policy, 2019, pp. 298-303

crucial issue regarding flags of convenience is the respect of the necessary safety standards. In fact, several times ships flying registered in open registers have been caught in the performance of illicit activities. Panama considered to close is register while Costa Rica did exactly that after discovering the involvement of ships flying its flag in illegal acts[43].

In order to respond to these safety concerns, several Convention have been stipulated among States. For instance, under the *International Labour Organization* (ILO) the parties approved in 1976 the so-called *Merchant Shipping Convention*, also known as *Umbrella Convention No. 147*. Moreover, always regarding safety standards, in 1980 the *Safety Life at Sea* entered into force, while in 1977 the *International Regulations for the Prevention of Collisions at Sea* have been approved. Another international agreement which deserves to be mentioned is the *Convention on the Prevention of the Pollution at Sea*, stipulated in 1973 always within the IMO and dealing with marine pollution issues.

The FOC system has also met oppositions by different entities. In the 1970's, the *Group of 77*, representing historically the less-developed countries, elaborated the *UNCTAD Liner Code of Conduct*, ratified in 1983 and establishing the so-called 40-40-20 principle[44]. According to the latter, the cargo should be divided 40 percent to the national vessel of the importer, 40 percent to the national vessel of the exporter, with the remaining 20 percent left to cross-traders. However, the impact of the code of conduct has been low for two main reasons: the less developed countries own only the 16 percent of the world fleet tonnage and the code's provision due to their no-mandatory nature remain ignored[45]. Also, seamen's unions opposed shipping under flags of convenience, especially the *International Transport Workers' Federation* which started issuing blue cards to ships employing crews under specific conditions. Moreover, in 1981 the traditionally maritime countries such as Great Britain and Norway, seeing the reduction of their commerce income due to the expense of the FOC system, joined the less developed ones in promoting the adoption within the *UNCTAD Shipping Committee* of a resolution recommending the turning of open registers in normal ones[46].

The main consequence of the constant and plural opposition to the FOC system has been the attempt of several registries to define themselves as quasi-FOC registries, characterized by a proper genuine link to their flag ships. The quasi-flags of convenience countries offer all the advantages of the FOC ones: the main difference is that they are able to develop the necessary administrative machinery to effectively impose any government or international regulations and they also request a substantial requirement for some of the shipping registered under their flags. In this sense, FOC countries can enforce all the regulations needed in order to guarantee the accurate level of ship management and safety, and they can also impose strict systems of identification upon the shipowners. Moreover, they usually do not impose any taxes on the seamen's income. They are quasi-FOC countries the Bahamas, Hong Kong, Bermuda, Gibraltar, Isle of Man, the *Norwegian International Shipping*

[43] OECD Study on Flags of Convenience, Journal of Maritime Law and Commerce, 1973, pp. 234-235
[44] R. S. Toh and S. Phang, Quasi-Flag of Convenience Shipping: The Wave of the Future, 1993, p. 34
[45] M. Dordrecht, Protectionism and the Future of International Shipping, 1984, pp. 385-408
[46] UNCTAD, Flags of Convenience, Journal of World Trade Law, 1981, p. 466

Registry and Singapore. For instance, the ships registered in Bermuda, Bahamas and Gibraltar fly the British flag and are subject to the British regulations on manning and safety. Another peculiar case is the *Norwegian Internationally Shipping Register*, established in Bergen when Norway suffered the loss of more than three quarters of its shipping tonnage from 1977 and 1987: the register aimed at retaining the Norwegian fleet and attract other ships. For the registration is sufficient that the foreign company has a representative in Norway. Besides, the foreign company is exempted from paying the Norwegian income tax and the Norwegian nationality for officers is not a precondition. However, the condition imposed is that the ships flying the Norwegian flags must be managed by Norwegian companies both commercially and technically[47].

Among the countries acknowledged as FOC ones, the only one exercising freely its sovereignty is Singapore, situated in the Southeast Asia and founded in 1819 as an English free port. Today it is the major port in terms of shipping tonnage in all the world and it owns its register, the *Singapore Shipping Registry*, established under the *Merchant Shipping Act* in 1966 in order to reflect the country's independent status. Originally, only ships owned by Singapore companies can fly Singapore flag. However, in 1969, with the intent of creating more job opportunities, Singapore opened its registry towards vessels owned by non-nationals: Singapore became since that year a proper flag of convenience[48]. Furthermore, vessels composed by a crew of at least the 25 percent of Singaporeans paid half of the annual tonnage tax fixed normally imposed. Moreover, the profits earned from shipping operation outside Singapore were exempted from the income tax and consequently the overall shipping tonnage of the country grew consistently from 23 million gross tons in 1969 to 7.66 million gross tons in 1980, especially due to the financial incentives.

However, not exercising an effective control over the flags ships, the country remained envisaged of the stigma of belonging to the FOC system. That is why in 1981 Singapore decided to convert her register to a quasi-FOC one, enforcing the *Merchant Shipping Regulations* in 1981 and establishing a proper genuine link. The registrations were limited to ships with an ownership by nationals or companies owned by Singapore. The country also promoted a process of modernization of its fleet determining that only vessels with less than fifteen years old and that provided annually evidences of seaworthiness can be registered. Moreover, to be considered a quasi-FOC country, Singapore ratified the *SOLAS Convention* promoting safety at sea, the *MARPOL Convention* relating to the prevention of ocean pollution, and the *International Regulations for the Prevention of Collisions at Sea*[49].

Besides, with the intent of enhancing the growth of its shipping registry, in 1991 Singapore legislated the *Approved International Shipping Enterprise Scheme* (AIS), granting to shipping company with an AIS status for at least 10 years not only corporate and personal income tax exemptions but also others financial incentives

[47] Washington Report, Worldwide Shipping, 1987, pp. 9-10
[48] Marine Department Annual Report, 1991, p. 1.
[49] Chew Tee Kheng, Singapore: Tax Incentives for Shipping Enterprise, Asia-Pacific Tax and Investment Research Centre, 1991, p. 395

for ships registered elsewhere. The only companies that can benefit of this treatment are the ones with not less than 10 percent of its feet registered under the Singaporean flag[50].

3. The Right of Visit: the legal basis for the Interception of Vessels at High Seas

The right of visit is considered the principal legal basis for the interception of vessels flying a foreign flag on the high seas. Before going in the depth with its analysis, it is fundamental to clarify the concept of "maritime interception operations", the so-called MIOs. Although several definitions of MIOs are provided by national governmental documents, it does not exist a common definition internationally recognized. Generally, the term is used to refer both the interception of vessels at sea and to their interdiction. This latter term encompasses all the possible actions of interferences over a foreign vessel, not only the mere action of stopping it. In any case, maritime interception operation is an expression which does not have a proper legal background since it has never been included in a legal framework for its own.

The *Royal Netherlands Navy* has used the term MIO in 2014 with reference to the action to stop certain categories of goods or individuals at sea area. In 2005, the NATO defined "MIO" in the *Allied Tactical Publication* (ATP) as: "operation encompassing seaborne enforcement measures to intercept the movement of certain types of designated items into or out of a nation or specific area"[51]. Instead, the Dutch definition underlined MIO can also include the interception of persons, interpretation which has also been adopted by NATO in its updated publication in 2013[52].

Some scholars have used the expression MIO for naval operations performed in a regime of armed conflict[53]. However, the principal doctrine refers to MIOs as measures taken only in time of peace, not in wartime. Nevertheless, it must be noticed that in practise and on an operational level there is no distinction between the interception of vessels based on the law of naval warfare and the ones carried outside this framework such as in period of peace and crisis. Overall, the term MIOs is used for each naval operation taking place outside the jurisdiction of a State involving the stopping of goods and persons on a foreign flagged vessel.

In this context, it must be pointed out that most of the times the legal basis applied for a MIO operation is the so-called right of visit. However, the laws applicable for justifying a maritime interception and the right of visit are not completely coincident. In fact, in the broad area of the international maritime security law, also other provisions different from the right of visit are applicable to the interception of foreign vessels: the international maritime security law focuses on legal authorities that Coastal State may have in their maritime zones and deals with the so-called maritime safety. Differently, the law of MIOs focuses on the possible

[50] R. S. Toh and S. Phang, Quasi-Flag of Convenience Shipping: The Wave of the Future, 1993, pp. 37-38
[51] NATO ATP 71, 2005, p. 1
[52] NATO ATP 71, 2013, p. 1
[53] M. Weller, The Oxford Handbook of the Use of Force in International Law, Oxford University Press, 2015, pp. 1057–1076

exercise by ships of a State's authority outside the sovereign territory of the State and deals with the international peace and security.

Going in depth with the analysis of the "right of visit", considered the core of the interception of vessels on the high seas, we must distinguish the right of visit in peacetime from the right of visit during wartime. The first one is provided in article 110 of the LOSC. The second, mostly known as "right of visit and search" is exercised during international armed conflicts. However, it has been argued that the right of visit has also legal basis not limited to the peacetime or wartime rights, for instance such right can legally arise from an authorization from the *UN Security Council*, an ad hoc consent or even from an international agreement. In general, the right of visit can be defined as the rules governing the authority during a visit of a foreign-flagged vessel by a warship. What needs to be highlighted is that the right of visit gives rise to an activity, the visit, which is not for itself an end, but which is instead always the mean served for another specific aim or purpose. In other words, this right, granting the access to a foreign vessel, put the States in the position of verifying and eventually stopping an illegal activity, a breach of a UN resolution or exercising an authority under the law of naval warfare. The mere access to a foreign flagged vessel is never the object of the right of visit. This means that then aim of the visit must be in all cases strongly related with the right of visit and determines the lawfulness of the right itself.

The first manifestation of right of visit analysed in this work is the one arising from international agreements concluded among States. In this case, the discipline of the right and its scope are clearly expressed in the articles of the agreement in question. The agreement primarily considered is the *United Nations Convention on the Law of the Sea* (LOSC), dealing with the right of visit on the high seas under the article 110. This means that the purpose of the provision is extremely defined and that the right of visit cannot be exercised under LOSC with reference to other activities equally illegal and disreputable such as drug trafficking or terrorist operations. This provision is known for having a "limited character": the right of visit under LOSC can be exercised only in the limited cases of piracy, slave trade, unauthorized broadcasting, and stateless vessels or vessels with suspicious nationality[54]. The scholar Klein saw in the restrictions to the exercise of this right yet another confirmation of the supremacy of the rule of mare liberum over the one of mare clausum in the governing of high seas[55]. In this sense, the right of visit is built as the main exception to the exclusive jurisdiction of the Flag State.

In article 110 LOSC, the right of visit is considered to substantially giving rise to an act of interference, justified only when there are "reasonable grounds of suspecting", that can come both from the commander of the warship or from the intelligence of the State whose flag the ship is flying. These acts of interference shall not derive from powers conferred by specific treaties, otherwise only the States Parties to such treaties are

[54] LOSC 1982, art. 110
[55] N. Klein, The right of visit and the 2005 Protocol on the suppression of unlawful acts against the safety of maritime navigation, Denver Journal of International Law and Policy, 2005, pp. 287–332

entitled to exercise the right to visit. The verification of this suspect can be performed simply sending a boat to the suspected ship for checking its documents. If the suspicions remain, the verification continues with a further examination boarding the vessel. Moreover, if the verification reveals the groundlessness of the suspicions, the article states the need of an appropriate compensation for any loss or damages that have been caused[56]. Of course, the obligation of compensation arises also when an act of boarding is undertaken when there is not suspicious at all.

Besides, another important point to be underlined is that the boarding is granted only for the purpose of visiting: even when after the visit it is discovered that the suspicions were right, this does not give a subsequent title to act against the ship's crew and any enforcement jurisdiction can be exercised[57]. The outcome of the visit must be only assessing if one of the four legally foreseen situation are or not ongoing.

Another important feature of article 110 LOSC is how its application is geographically limited to the high seas. However, in the middle of a military operation, the circumscribed zone of the high seas can be further limited to a specific operational area. Nevertheless, whenever the boarding of vessel for instance suspected of piracy is performed outside the settled operational area, the activity itself does not become automatically unlawful: in such situation the commander of the visiting ship is acting beyond its military orders but perhaps he can always justify its action in compliance with national commands[58].

As already said before, there are manifestations of the right of visit also with reference to legal basis other than an international agreement such as LOSC. For instance, the right of visit of a foreign-flagged vessel can be exercised on the grounds of an ad hoc consent among States. In such cases, as in manifestations of the right to visit based on article 110 LOSC, the scope and authority of the visit does not automatically include the power to perform jurisdictional enforcement activities[59]. In fact, there is not a specific legal framework to which the authority is related, and the act of interference will be subject to the conditions posed by the consenting State[60]. In other words, the extent of the interdiction will be settled by the State on a case-by-case basis and can also consist in the mere boarding without including the inspection, search and seize of the ship. The only need is that the ad hoc consent should be sufficiently concrete in defining the guidelines of the permitted activity, as it has been stated in the case-law *Medvedyev and others against France*, whose judgement has been released by the *European Court of Human Rights* in 2010[61].

[56] P. Wendel, State Responsibility for Interferences with the Freedom of Navigation in public international law, Hamburg Studies on Maritime Affairs 11, Springer, 2007, p.113
[57] D. Guilfoyle, Shipping interdiction and the law of the sea, Cambridge University Press, 2009, p. 78 and E. Papastavridis, The interception of vessels on the high seas, Hart Publishing, 2013, p.80
[58] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 155-164
[59] J. Kraska, Broken taillight at sea: The peacetime international law of visit, board, search and seizure, Ocean and Coastal Law Journal, 2010, pp. 1–46
[60] T. Gill, The Handbook of the International Law of Military Operations, Oxford University Press, 2010, pp. 229–234
[61] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 159-160

The case is about the request of permission by the French authorities to Cambodia for the interception of the vessel *Winner*, flying the Cambodian flag and suspected of drug trafficking. The facts date back to 2002. France obtained the ad-hoc consent from Cambodian government based on a diplomatic note exchange. Consequentially, the French ship successfully intercepted the *Winner* near the Cape Verde Islands. The French authorities based its action on three different legal bases: article 108 LOSC on the Illicit traffic in narcotic drugs or psychotropic substances, the fact that in view of France the Cambodian ship was refusing the identification and the diplomatic note. The first two arguments were considered unfounded: article 108 does not provide a right of boarding and Cambodia is not a party of the *United Nations Convention on the Law of the Sea*; the ship *Winner* was flying the Cambodian flag and its nationality was more than ascertained. However, the French claim was accepted upon the basis of the diplomatic note, which the ECHR considered an ad hoc agreement between the two States and a proper source of international law[62]. Nevertheless, the diplomatic note was also considered not covering the right of France to establish measures of depravation of liberty on the crew, since the fate of the crew was not sufficiently clearly treated on the agreement. The ad-hoc consent was intended only for the purposes of the interception, inspection, and legal action against the Cambodian ship. In other words, France did not have any enforcement jurisdiction for arresting the crew on board because this prerogative was not made sufficiently clear in the agreement.

Although, situations of concurrent jurisdiction can exist whenever the Flag State, exercising its exclusive jurisdiction over the ship, grants an ad-hoc consent to the boarding State for the enforcing of its own jurisdiction. The Flag State, in the guise of consenting state, can waive its jurisdiction towards the one of the boarding state or simply allow such State to exercise its jurisdiction on its behalf. Most of the times the ad-hoc consent is given when there are reasonable grounds for suspecting that illicit activities are taking place in the vessel[63].

The right of visit can have as legal basis also an authorization of the *Security Council of the United Nations*. The extent of its scope will depend on the UN resolution dealing with the operation in the specific conflict. The UN resolutions do not explicitly mention the terms “boarding and searching” with reference to an allowed act of interference. Instead, it is commonly used the expression “inspect” for meaning the granted right to board a vessel or cargo and seize the illicit goods carried. What must be pointed out is that the measures performed in the interception, since their scope depends on each resolution adopted, may vary from operation to operation. However, the resolutions relating the embargoes of Iraq (2003), Former Yugoslavia (1993), Haiti (1994) and Sierra Leone (2010) presents all the same expression with reference to the scope of the authorities: “to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation” of the resolutions in question[64]. This standard phrase does not contain

[62] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, p. 126
[63] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 159
[64] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 180

any parameter of suspicion, meaning that the interested area, any vessel can be stopped, even when there is nothing to suspect.

Moreover, the purpose of the visit depends on the text of the resolution, for instance in the sanctioning of the influx of arms, oil, or other goods. This means that in certain cases the purpose can be very restricted, allowing the visit of only vessels exporting illicitly a certain product from a specific country. Other times, the resolutions allow the stop of a wide category of commodities and consequently it is left a consistent margin of interpretation to the commander of the ship in deciding to which type of product the is made the reference.

An important point to highlight is that, while article 110 LOSC provides a compensation for the damages occurred whenever the suspicion is determined to be unfounded, such types of procedure for the losses suffered are not automatically undertaken in relation to embargo operations when goods are confiscated at sea. In this context, a peculiar case is the one when a maritime interception operation is undertaken based on an authorization of the *Security Council* using the expression "all necessary means". This wording has been interpreted in the sense that the mandate includes the use of military forces under article 42 *UN Charter* for the fulfilling of the mission as an ultimate means. This phrase clearly allows the visit ad search of vessels in the pursuit of the mandate and the main argument used is that those acts of interference, being lesser means in comparison to the use of force, do fall without doubts under the scope of the mandate[65].

However, in such cases when "all necessary means" can be deployed, the proper definition of the purpose and the scope of the authority is left to the commander that is interpreting the mandate, considering that those must be determined in relation to the aim of the resolution itself[66].

3.1 Piracy: a first overview

Under international law, piracy constitutes a universal jurisdiction crime, since each State is entitled to capture and process pirates regardless of their nationality, the victim's nationality, the flag the pirate ship is flying and even regardless of the maritime zone where the act of piracy is undertaken. In chapter II of this work, piracy will be deeply discussed in all its aspects. Differently, the aim of this brief paragraph is highlighting the relationship between piracy and the right of visit under article 110 LOSC: when there are reasonable grounds to suspect that a ship on the high seas is engaged in piracy, a warship is entitled to board and visit such vessel[67]. An internationally recognized definition of piracy can be found in article 101 LOSC.

3.2 Slave Trade

Slave trade is prohibited in all its form by article 4 of the 1948 *Universal Declaration of Human Rights* (UDHR). In fact, this latter explicitly states: "no one shall be held in slavery or servitude, slavery and the slave

[65] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 184
[66] M. Fink, Maritime Interception and the Law of Naval Operations, 2018, pp. 185
[67] LOSC 1982, art. 110

trade shall be prohibited in all their forms"[68]. Regarding this practise, the LOSC provides always in article 110 the possibility to exercise the right of visit, which today is universally recognized. However, during history, several efforts and steps have been made for reaching an effective suppression of slave trade and an obstacle to such aim has been without doubts for years the absence of a universally recognized visitation treaty. In this sense, an important role towards the universal abolition of slavery was played by Great Britain in the 19th century[69].

Since the first half of the 800's, Britain stipulated several bilateral treaties with the principal maritime States, establishing reciprocal rights of visit on the high seas against vessels suspected of engaging in the African slave trade[70]. The visit in question included the right of search and seizure. Nevertheless, the lack of treaties with the USA, France, Portugal, and Brazil determined, despite the English efforts, the persistence of slave trade in the Atlantic route. To stop the phenomenon, the United Kingdom continued to visit Brazilian and Portuguese vessels suspected of slave trade, justifying its action in the absence of agreements on his success in uncovering the unlawful practises. This led Brazil and Portugal to stipulate bilateral treaties for the reciprocal recognition of rights of visit[71].

Moreover, Britain tried to equate the slave trade to piracy in the establishment of a universal right of visit, no longer based on bilateral treaties, but both France and USA strongly opposed to this attempt[72]. Consequently, Great Britain proposed to separate the right of visit from the actions of search and seizure: the idea was accepted by the USA and at the end of the American civil war the first *Anglo-American Bilateral Treaty for the Suppression of Slave Trade* was signed by the President Abraham Lincoln on the 7 July 1862: a limited right of visit was successfully recognized and, most importantly, in the 1870's the slave trade was totally abolished in the Atlantic. Instead, with reference to France, the way to the establishment of a reciprocal right of visit for suspected slave trade took longer. It was first provided by two treaties in 1831 and 1833, whose content was abolished in 1845. However, after the Britain's blockade of slave trade in Zanzibar, a mediation between the two countries brought to the stipulation of an agreement establishing a reciprocal right of visit in 1890, which became part of the *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition and Spiritous Liquors,* also known as 1890 *General Act of Brussels*[73].

This latter was considered the most important international agreement on the suppression of slave trade, ratified by seventeen States including both France and the USA. Its principal outcome was the recognition of

[68] Universal Declaration of Human Rights 1948, art. 4
[69] H. Wilson, "Some principal aspects of British efforts to crush the African Slave Trade", American Journal of International Law, 1950, pp. 505-526
[70] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, pp. 107-108
[71] J. Allain, Law and Slavery: Prohibiting Human Exploitation, 2015, pp. 50-55
[72] J. Allain, The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade, British Yearbook of International Law, 2008, pp. 357-358
[73] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 108

a universal right to visit ships whose tonnage is less than 500 tons on the high seas to suppress the slave trade. In fact, although the Act formally referred to the limited maritime area of the Indian Ocean and the Red Sea, it gained a full acceptance under international law. However, the General Act was abrogated by the *1919 Convention of Saint Germain-en-Lay*, providing for the parties of the Treaty no more a reciprocal right of visit but only an obligation to secure the suppression of slavery in all its forms[74].

Afterwards, the *1926 Slavery Convention* and the *1956 Supplementary Convention* were adopted but, differently from the 1890 General Act, they reduced the level of control over slavery since they do not contain a reciprocal right of visit, search, and seizure. In this context, the right of visit was re-established, this time gaining a proper universal nature of customary law, by article 23 of the *Geneva Convention on the High Seas* in 1958 and by article 110 LOSC, providing the right of visit about slave trade[75]. The provision has only an informative content and there is no right of interference going beyond the boarding and the documents' exam. An analysis of the *travaux préparatoires* of these Conventions highlighted that the parties originally did not want expressly to equate the slave trade to piracy and that the right to visit in cases of salve trade was seen by some participants as a breach of the freedom of navigation principle[76]. However, the arguments of the opponents were rejected and article 110 provides today no distinction on the application of the right of visit to piracy and slave trade.

Another important provision concerning slavery in the LOSC is article 99, entitled "Prohibition of the transport of slaves". According to this article, every State has the obligation to take effective measures to prevent and punish the transport of slaves in ships flying its flag and to prevent the unlawful use of its flag for this purpose[77]. Besides, the provision states that any slave taking refuge on board of a ship must be considered "ipso facto" free, regardless of the flag the vessel is flying. This means that the freedom from slavery transcends the principle of the flag-state jurisdiction, also giving a theoretical justification for the right to visit ships suspected of slave trade[78].

About the definition of slave trade, the main piece of legislation is article 1 of the *1926 Slavery Convention*, whose content is considered having the status of customary law. It specifies that all acts consisting in the capture, acquisition, or disposal of an individual with the intent of reducing him to slavery constitutes slave trade[79]. In this sense, there is an important attempt to broaden the concept of slave trade to not merely the transport and trade: it is slave trade also the de facto condition of being subject to severe forms of exploitations. Always article 1 of the *Slavery Convention* points out that slave trade includes "all acts involved in the

[74] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 199
[75] LOSC 1982, art. 110
[76] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 110
[77] LOSC 1982, art. 99
[78] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 112
[79] Slavery Convention, 1926, art. 1

acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves".

In this context, slavery has been defined by the *Slavery Convention 1926* with a jus cogens norm universally accepted as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Around this phrase, several disputes have arisen, and scholars have questioned whether other forms of exploitation can fall in the scope of the provision in an evolutive and contemporary perspective[80]. In fact, the *Supplementary Convention* of 1956 added other four forms of "servile status": the debt bondage; serfdom; forced marriage and the trafficking of woman; the trafficking and exploitation of children under the age of eighteen years. Besides, the *2005 Council of Europe Convention on Acting against Trafficking in Human Beings* has stated "trafficking in human being may result in slavery for victims". In this sense, it is important to assess if these new forms of human trafficking on the high seas fall or not in the scope of the definition of "slavery". In fact, in case of an affirmative answer, the article 110 LOSC can potentially apply the right to visit also towards ships suspected of engaging in human trafficking on the high seas. In order to reach a more comprehensive understanding whether the concept of slavery covers such forms of exploitation, a brief analysis of the extent of their definition is needed. Human trafficking is defined with accuracy in the *2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children* as the exploitation of a person whose movement is controlled by some means[81].

Instead, the forced labour is a term arose in international labour law and disciplined in article 2 of the *ILO Convention* to refer the exploitation of a person's work or service when such work or service is not offered on a voluntary basis but under the menace of a penalty. In other words, the person is not in position to freely leave his/her employment[82].

Finally, the debt bondage is defined by the ILO as a method by which an individual is kept in forced labour: the individual in question, debtor of another person, works under the control of this other person for obtaining the repayment of his debt. In such situation, the length of the work is not defined, and the worker is exploited since deprived of his freedom[83]. These kinds of exploitation have been interpreted in a contemporary evolutionary perspective as falling within the scope of the slavery definition.

3.3 Unauthorized broadcasting

[80] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 200
[81] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 101
[82] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 102
[83] D. MacFarlane, The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, Asian Journal of International Law, 2017, p. 102

One of the most unusual of form of jurisdiction regulated under LOSC is without doubts the one exercised in relation to unauthorised broadcasting, also known as "pirate broadcasting". The practise of broadcasting on the high seas without authorization became a matter of concern in the early 1960's, continuing only sporadically in 1980's[84]. It can give rise to various inconveniences, for instance interfering with emergency frequencies or licensed broadcastings or even with sea and air traffic controls lines[85]. In other words, the main interest behind the regulations prohibiting this practise is the protection of public safety. Moreover, the economic interest mostly involved is the coastal State's one in regulating its space on the radio communications spectrum.

A first step towards a proper legal regime addressing the phenomenon was undertaken in August 1962 by Denmark, Norway, Sweden, and Finland, who implemented a uniform legislation whose core principle was aimed at criminalizing only acts by nationals, based on an objective territorial jurisdiction. This quasi-uniform legislation was considered a logical outcome of the *International Telecommunication Union (ITU) Regulations*, which these four countries have promoted among themselves. In this context, also Belgium enacted a law for combating unauthorized broadcasting for the only prosecution of Belgian nationals or non-nationals operating in Belgian ships[86], while United Kingdom did not pass any specific legislation concerning the topic even if there were at least five station of radio broadcasting from vessels or fixed platforms outside its territorial sea.

The first jurisdictional issues arose with the *Radio Nordzee* case. This radio was a broadcast situated on a fixed platform originally not subject to any flag-state jurisdiction because on the Dutch continental shelf. However, in 1964 the Netherlands extended their national jurisdiction on it and closed the station with a police action, without any protests from the other countries. The main ratio behind the Dutch action was that international law would not tolerate no longer individuals carrying their economic activities beyond the national jurisdiction of the States: the country closer and most contiguous whose legal interests were hunted by such activities could assert its jurisdiction. However, this view never gained a large acceptance[87].

Besides, unauthorised broadcasting was for the first time considered a treaty crime under the *European Agreement for the Prevention of Broadcasting Transmitted form Stations Outside National Territories* in 1965, adopted under the will of the *European Council*. The article 3 of the agreement introduced the obligation of each Party to punish their nationals who have committed or supported unauthorized broadcasting on its territory or in ships or aircrafts even if outside national territories. The Parties were also entitled to punish non-nationals who have committed or assisted unauthorized broadcasting on their territories, ships or others floating or airborne object. This means that such agreement was not overtaken the principle of exclusive

[84] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, pp. 170-171
[85] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 200
[86] Van Panhuys and Van Emde Boas, Legal aspects of pirate broadcasting, American Journal of International Law, 1961, pp. 303-341
[87] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, p 173

jurisdiction and the jurisdiction established is based alternatively on the nationality of the offender or vessel or the territory from which ancillary offences were committed. However, this jurisdiction was still not universal such as the one established with reference to piracy and no reciprocal rights of high seas boarding were created[88].

Despite these limits, the *1965 European Agreement* proved to be very effective in addressing the persecuted practise and the same approach was followed by the United Kingdom in the *1967 UK Statute*. In fact, this piece of legislation criminalized unauthorized broadcasting in territorial waters caused from both nationals and no-nationals and in the high seas caused from British individuals. Thus, also the British legislation on the topic did not provide, as well as the domestic legislation of Nordic countries and the *European Agreement*, high seas enforcement provisions[89]. Considering the measures on the topic from countries outside Europe, also Australia enacted a specific legislation applying to any person on a vessel outside the territorial waters but "adjacent to Australia"[90]. The scope of this phrase was not properly circumscribed, but the interpretation mostly given asserted a broad jurisdiction applying without considerations of nationalities.

After Radio Nordzee, another case in which a high seas enforcement action was performed has been the *Lucky Star* case-law. In 1962, the ship's crew was arrested by the Danish government and the broadcasting equipment of the five persons abroad was seized. Although the boarding took place without the consent of the Flag State, nobody protested because all the members of the crew were Danish. Moreover, there has been always confusion about the nationality of flag the ship was flying, since some authors reported it was Lebanese, while others Guatemalan or even the vessel was stateless. This case is remembered because it was cited in 1981 by the Netherlands for sustaining the lawfulness of its conduct of boarding a Panamanian flagged vessel on the high seas and the arrest of Dutch national suspected of unauthorised broadcasting. However, the argument was rejected by the Supreme Court, which highlighted that a derogation of the principle of exclusive jurisdiction stated in article 6 of the *High Seas Convention* could be implemented only under the Treaty itself, without being prompted by a single act of a state practise[91].

The most important discipline of unauthorised broadcasting is contained in *the United Nations Convention on the Law of the Sea*, which in article 109.2 addresses it with a proper definition: "the transmission of sound or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulation but excluding the transmission of distress calls"[92]. The article imposes also to all States a duty to cooperate in the suppression of the illegal activity in question on the high seas. But more importantly, the LOSC in article 110 includes the unauthorised broadcasting among the grounds for the interdiction of a foreign vessel and further provides an express high-seas enforcement jurisdiction not limited

[88] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, pp. 173-174
[89] N. March Hunnings, Pirate Broadcasting in European Waters, 1965, pp. 410-433
[90] Wireless Telegraphy Act, 1967
[91] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, p. 175
[92] LOSC 1982, art. 109

to the right of visit and inspection[93]. In fact, according to article 109.3, any individual engaged in such activity can be persecuted alternatively before the courts of a) the Flag State of the ship b) the State of registry of the installation c) the State of which the person is a national d) any State where the transmission can be received e) or any State where the authorized radio communication is suffering interference. Moreover, it is specified that the jurisdiction of a State conferred on such basis comprises the capacity to arrest any person or ship engaged in unauthorised broadcasting and to seize all the apparatus of the activity. This means that the LOSC grants to a State the possibility to board a vessel and enforce its jurisdiction on the sole grounds of the nationality of one offender, pursuant to letter c).

In other words, whenever a national of certain State A is engaged in an unauthorised broadcasting from a flagged ship of another State B, the State A does not only have the right to board B's vessel and arrest its nationals A, but it is in the position to also arrest any other persons aboard[94]. Article 109 LOSC has introduced a fundamental innovation in comparison to the *Lucky Star* case-law, in which only the Dutch nationals could be subject to the Netherlands enforcement activities. Always in article 109, letters d) and e) set out instead cases of jurisdiction exercised based on objective territoriality. Overall, it is clear how, differently from the regulation of piracy, the LOSC provision does not create a universal jurisdiction about the suppression of unauthorised broadcasting. In fact, the legally provided cases in which jurisdiction can be enforced witness the will to not create unilateral rights of intervention on the high seas in the absence of at least one jurisdictional nexus with the intervening State.

3.4 Stateless vessels and Vessels with Suspicious Nationality

Stateless vessels, known also as vessels without nationality, constitute a phenomenon not rare in the reality of the oceans. Especially in the recent years, an increasing concern has grown in relation to such vessels navigating in the high seas and contributing to the global issue of illegal, unreported and unregulated (IUU) fishing. A vessel without nationality can be identified in two different situations. The first arises from the description contained in the provision of article 92.2 LOSC about the "status of ships": all the ships sailing under two or more flags of different States, using alternatively one of them for only reasons of convenience, are assimilated to ships without nationality[95]. Such ships cannot claim the nationality of any of the countries whose flags is flying. Moreover, a vessel becomes stateless also once its original Flag State revokes its registration under its legal regime due to the continued violation of its laws. The registration can also be retired of its own by the vessel itself, which becomes stateless whenever it does not contextually acquire the nationality of any other State[96].

[93] LOSC 1982, art. 110
[94] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, p. 176
[95] LOSC 1982, art. 92
[96] T.L Mc Dorman, Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference, Journal of Maritime Law and Commerce, 1994, p. 531 and pp. 533-534

In the field of vessels without nationality, there are numerous uncertainties around the application of international law, also considering that actual legal framework provides few guidelines concerning the treatment of these ships. As we have seen before, the law of the sea requires each vessel a nationality according to the system of the Flag State and each Flag State has some obligations of international law that request the ship flying its flag to comply with. However, the stateless vessel, being without nationality and not the addressee of any regulation imposed by a State, is not subject to any international obligation. In fact, when this vessel violates an international regulation on the high seas, the Flag State mechanism imposing through the concept of exclusive jurisdiction an obligation cannot materially apply since the ship in question is not flagged by any State.

With reference to the right of visit, article 110 LOSC mentions stateless vessels as one of the exceptions to the exclusive jurisdiction of the Flag State, justifying their boarding in the high seas by warships when there are reasonable grounds to suspect that such vessels are operating without nationality. In other words, it is conferred to States the right to visit the vessel to verify the vessel's right to fly its flag. At this aim, the commander of the visiting ship can send a boat to the suspected ship and if the suspicions remain even after the check of the documents, the boarding of the vessel can be performed[97]. However, if the vessel is found to be without nationality the *United Nations Convention on the Law of the Sea* is silent on the legal consequences, since it does not explicitly affirm which actions can be legally taken against the vessel[98].

This lack of legislation not only generates uncertainties around the discipline to apply but also constitutes a consistent lacuna in international law. On one hand, the scholars Churchill and Lowe suggested that a right of all States to take enforcement actions against stateless vessels does not exist due to two different reasons: a rule to exercise such right does not exist; statelessness does not constitute for itself a breach of international law. This absence of enforcement rights clearly contrasts with the discipline of other offences under LOSC, such as piracy and unauthorized broadcasting. On the other hand, other scholars share the view according to which international law, despite not expressly authorizing the exercise of enforcement actions against stateless vessels, does not prohibit it too. In this sense, such enforcement measures should be considered allowed. This view is founded on the *Lotus principle*, a fundamental principle of international public law affirming that sovereign States can act in the way they consider more appropriate if they do not contravene explicit prohibitions[99].

Moreover, another argument used to sustain this view is that in the absence of any regulation, vessels without nationality would operate completely unregulated and would be immune from any act of interference[100]. In

[97] LOSC 1982, art. 110
[98] Z. Scanlon, Taking Action against Fishing Vessels without Nationality: Have recent International developments clarified the Law, The International Journal of Marine and Costal Law, 2017, p. 56
[99] Z. Scanlon, Taking Action against Fishing Vessels without Nationality: Have recent International developments clarified the Law, The International Journal of Marine and Costal Law, 2017, p. 57
[100] M. Nichols, United Nations Convention on the Law of the Sea: A Commentary, 1995, p. 125

this context, some experts in the sector of the law of the sea have suggested some conducts that can be considered permitted towards stateless vessels, including general police powers such as right to identify, approach, board and verify. It is considered included among these conducts even the bringing of the foreign vessel to a port for further investigations based on the conception of the right of visit as aimed at the maintenance of the necessary public order at sea. Besides, several judicial decisions provided by domestic courts have stated that a State can enforce its law against stateless vessels on the high seas. For instance, in the *Molvan* case-law (1948), the British courts affirmed that States are entitled under international law to extend their jurisdiction towards vessels without nationality since the freedom of the high sea must be considered a principle applying only to ships flying the flag of a State: the vessel *"Asya"* in *Molvan* did not fulfil this condition and consequently no breach of international law would take place with reference to its seizure by another ship. A step further has been made by the US Court in the *US v Marino Garcia* case (1982), in which the American judge apostrophised stateless vessels as "floating sanctuaries from authority", stating they do not have a right to navigate on the high seas and that to any nation under international law is granted the possibility to subject these vessels to its jurisdiction. This jurisdiction arises only because of the ship's status[101].

The permission of enforcement actions against vessels without nationality on the high seas is prescribed even by domestic provisions. For instance, in Norway a domestic law permits the arrest and the prosecution of stateless vessels violating the Norwegian Law, treating them such as a national ship. In the USA, a US law allows the US Coast Guard to enforce the domestic legislation extraterritorially on stateless vessels, including actions of boarding, inspections, arrests, detentions, and prosecutions, especially towards ships suspected of drug trafficking or unregulated fishing. Moreover, the *US Department of Navy handbook* provides that stateless vessels, being not entitled to the protection of any nations, are subject to the jurisdiction of all nations and thus can be boarded in mare liberum by a warship or others government ships. Even Canada's law system permits the exercise of jurisdiction over vessels without nationality fishing contrary to the regulations of the *Regional Fisheries Management Organizations* (RFMOs)[102]. However, it is generally accepted that the national State of the individual on the stateless vessel has diplomatic protection and that at any case a certain type of juridical nexus between the visiting state and the intercepted ship must exist[103].

Finally, it must be highlighted how article 110 LOSC grants the right to visit also to ships with suspicious nationality: when there are reasonable grounds for suspecting that a ship flying a foreign flag or refusing to show its flag is actually of the same nationality of a warship, such warship has the right to visit. In other words,

[101] Z. Scanlon, Taking Action against Fishing Vessels without Nationality: Have recent International developments clarified the Law, The International Journal of Marine and Costal Law, 2017, p. 58
[102] Z. Scanlon, Taking Action against Fishing Vessels without Nationality: Have recent International developments clarified the Law, The International Journal of Marine and Costal Law, 2017, pp. 59-60
[103] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, p. 17

the warship is entitled to visit, seize and eventually bring ashore the vessel flying its same flag without being authorized[104].

4. The Right of Hot Pursuit: a temporary extension of the Coastal State jurisdiction on the High Seas

Along with the right of visit, the other exception to the principle of exclusive jurisdiction of the Flag State is the right of hot pursuit, considered traditionally as a product of the Anglo-Saxon jurisprudence and nowadays existing without controversial as a matter of customary international law[105]. According to such right, a State can pursue and seize on the high seas a ship flying the flag of another country when such ship is suspected of having committed a violation of the law of the pursuing state within the state's maritime jurisdictional zones. In this sense, at a first glance, this right seems offensive to the right of ships to navigate freely on the high seas. As we have already seen, ships on the high seas should be subject only to the exercise of jurisdiction of their flag state and exceptions to such principle are admitted only in cases of extreme necessity. The right of hot pursuit consequently is under international law one of these extraordinary measures, considering it is always in accordance with the overarching objective of order on the high seas: this latter is a fundamental principle supporting the general rule forbidding interference with non-national ships.

The right of pursuit ensures the effective enforcement by coastal states of their local laws and regulations against non-national ships fleeing on the high seas, an area where these coastal states would not be allowed to exercise their jurisdiction. Thus, several scholars have denominated the right of hot pursuit a temporary extension of the coastal state's right jurisdiction onto the high seas and specifically William Hall has addressed the hot pursuit as "a continuation of an act of jurisdiction which has begun within the territory itself and that is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercise"[106]. In the words of Hall, hot pursuit is not intended to unduly offend the flag jurisdiction principle, since the vessels exempted from the application of this rule are only the ones escaping after the violation of a domestic provision committed in the territorial waters of another state. It constituted a pragmatic balance between the coastal state's interest in the enforcement of its legislation and the principle of the free use of the oceans by the international community.

The right is provided by both article 23 of the *1958 High Seas Convention* and the article 111 of the *United Nations Convention on the Law of the Sea*. These two treaties highlight that the right of hot pursuit can be legally exercised only by certain types of vessels or aircraft: warships, military aircrafts or other ships or aircrafts on government service specially authorized. Moreover, the specially authorized ships and aircrafts

[104] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 202
[105] D. P. O'Connell, The International Law of the Sea, 1988, p. 1076
[106] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 557-559

must be also clearly marked and identifiable. In other words, the ships or aircrafts must be entitled to exercise the state authority, so that the responsibility of their actions falls on the pursuing State[107].

The main point is that while warships do not need an authorization since their connection with a State is evident *per se*, the eventual connection of other ships is not manifest. Thus, the ships or aircraft in government service require a special authorization ensuring their legal identity with the State. Scholars have debated if such authorization must be specific or if a general one towards special classes of vessels is sufficient to engage in hot pursuit in a particular incident. They agreed on the second interpretation, concluding that a general authorization for certain types of ships like coast-guard ones and fishery protection vessels can secure the policy needs at stake[108].

Moreover, the right of hot pursuit can be exercised only towards certain ships. For instance, warships cannot be pursued vessels, since they are considered immune from the exercise of jurisdiction by any state other than their flag one. Generally, ships of foreign government in a non-commercial service are also vessels towards which the right of hot pursuit cannot be exercised. However, it must be clarified that, although such vessels are considered immune from the enforcement jurisdiction of foreign states, their flag state is without doubts be responsible of its ships' violation of other domestic legislations[109].

In this context, it must be highlighted that not all the offenses give rise to the right of hot pursuit: although article 111 LOSC does not expressly provide a description of the offence needed all the offences are abstractly considered capable of allowing the pursuit, the international comity finds inappropriate the exercise of hot pursuit with reference to trivial offences. There is not an obligation in doing so, but in practice States never disapply the principle of comity because they all do not want their vessels being subject to interdiction without good cause. Moreover, in the territorial sea of State, a vessel flying the flag of another country has the so-called right of innocence passage, which ends when the right ceases to be "innocent". Under international law, the LOSC specifies in article 19 that a passage stops being such when it becomes prejudicial to the peace, good order, or security of the costal State. It has been highlighted that also a trivial offence can potentially be not innocence when it is not related to the passage: in such cases, the right of hot pursuit is legally justified[110].

Besides, according to article 111 LOSC the right of hot pursuit can be exercised only when the pursuing ship has a reasonable suspicion that the pursued ship has committed an infringement. Precisely, the competent authority of the costal state must have "good reason to believe that the ship has violated the laws and regulations of the State"[111]. This means that a mere suggestion the foreign ship has violated the laws is not

[107] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 202
[108] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 561-565
[109] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, p. 565
[110] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 565-568
[111] LOSC 1982, art. 111

sufficient: a suspicion near to the actual knowledge of an infringement is requested. Scholars share the opinion that, despite the lack of such high grade of suspicion, the flight of a foreign ship towards the high seas justifies the hot pursuit. The right is not limited to actual offences, but it arises also with reference to attempted delicts[112].

This approach cannot be evinced neither from the *High Sea Convention*, neither from LOSC but it is clarified by the *travaux préparatoires* of the former piece of legislation. In fact, when Brazil proposed to make an explicit remark to infringements about to be committed, the *International Law Commission* considered such suggestion already implied in the text. Instead, the main doctrine considers that hot pursuit cannot be performed against vessels escaping from the arrest for a prior delict: such exercise of power would give rise to a "resumption" of hot pursuit, prohibited under international law. The only way to eventually consider the conduct of the flight as the legal basis for the exercising of hot pursuit is considering the flight itself as a new delict, which follows the prior delict committed always by the foreign ship.

Another question related to the topic is whether the hot pursuit can be undertaken because of offences committed by the passengers of a ship, delicts whose conducts are not ascribed to the ship. In this sense, it is common knowledge that hot pursuit is available only for violations of laws and regulations of the foreign ship, while the breaches of domestic laws by the passengers or the crew would remain under the jurisdiction of the flag state. These latter in fact constitute offences not committed by individuals representing the authority of the ship. To ascribe an illegal conduct to the ship itself, the delict must be committed by the commanders of the vessel[113].

Geographically, according to article 111 LOSC the commencement of the pursuit must begin when the foreign ship is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing State. Moreover, always article 111.2 extends the application of the right also to violations of laws or regulations of the coastal State in the exclusive economic zone (EEZ) or on the continental shelf, including the areas of the safety zones around the continental shelf installations. The pursuit can be undertaken also with reference to violations perpetrated within the contiguous zone, but only under certain circumstances.

In fact, both the *High Sea Convention* and LOSC underline that hot pursuit in the contiguous zone can be undertaken only for the violation of the rights for the protection of which the zone was established. The rights intended are the ones imposed by the custom, fiscal, sanitary and immigration laws[114]. However, it is common view that it is always possible the establishment of the zone in question for other purposes, among all the protection of fisheries.

[112] D. P. O'Connell, The International Law of the Sea, 1988, pp. 1088-1089
[113] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 571-572
[114] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 203

Generally, the right of hot pursuit terminates once the pursued ship has reached the territorial waters of any state other than the pursuing one. This principle is explicitly mentioned in both the *High Sea Convention* and LOSC. In fact, whenever a vessel may pursue another ship withing the territorial waters of another state, the international order of the sea would be clearly offended. However, it must be noted that the exclusive economic zone and the contiguous zone of another sovereign state are considered high seas for the purposes of hot pursuit, meaning that the pursuit of a non-national vessel into these areas is allowed. The only possible exception allowing the pursuit into the territorial waters of another state is the case of ships suspected of piracy: however, in such hypothesis, the act of pursuit must be undertaken by the State whose territorial waters are entered by the pursued ship and only if such State cannot continue the pursuit begun from the costal state whose laws have been breached the originally pursuing state can take up the pursuit. The outcome of this exception is a rare form of pursuit of a suspected vessel into the territorial waters of a third state[115].

The juridical point arising is if the pursued ship entering the territorial waters of another state would enjoy or not the right of innocence passage, considering its transition not determining a prejudice to the peace, good order, or security of the state. The answer given is negative: international law does not request any specific action or breach of any law for asserting the loss of innocence of a ship's transit and the mere presence of a vessel into the territorial waters of a state is enough for threatening the security and the territorial integrity of the littoral state. Another juridical question debated is what happens when the pursued vessel, after entering the territorial waters of a third state, re-enters again on the high seas. Some scholars have questioned if the right of hot pursuit can resume and started to use the expression "resumption" of the right. However, both the *High Sea Convention* and the LOSC seem to disagree on such theory and several scholars share the opinion that, due to the exceptional nature of the right in question, the hot pursuit must be interpreted in a narrow sense, not allowing the resumption[116].

Moreover, it has been highlighted how both the Conventions expressly use the verb "cease" with reference to the entrance of the pursue ship into the territorial waters of another state. Otherwise, if a resumption would be possible, the term "interruption" would have been used. One more insight deserving to be made is that the pursuit can commence only after a visual or auditory signal to stop has been given to the suspected ship, when this latter ignores it. However, article 111 LOSC specifies that such signal must be launched at a distance enabling the receiving ship to see or heard it. Originally signals given through means of radio or wireless devices were excluded from the application of the norm: only in the *case R. v Mills and Others (1995),* considering the technological advancements in the field, the judges affirmed their inclusion in the scope of the norm[117].

[115] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 577-579
[116] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, p. 580
[117] W.C. Gilmore, Hot Pursuit: The Case of R. v Mills and Others, 1995, p. 957

Moreover, in 2015, the *Annex VII Arbitral Tribunal* in the case *Arctic Sunrise* underlined how the VHF messages fall within the scope of the provision of article 111 LOSC, constituting one of the means of communication granting the function of informing the pursued ship. The ratio behind this statement is that the norm referring to hot pursuit must be interpreted in light of its object purpose. Going in depth with the analysis, the pursuit must be "hot and continuous"[118]: this means that, as we already said, the pursuit cannot be resumed because its interruption would determine its loss. This requirement has been determined always in the case *Arctic Sunrise*, about a vessel flying Holland's flag located in the Russian exclusive economic zone and protesting for an offshore oil platform. Such vessel was pursued by the Russian Coast Guard until an interruption intervened, so that the right of hot pursuit of Russia was judged ceased[119]. However, the interruption must be significant and if the pursued ship is temporary lost in fog the pursuit can successfully recommence.

Finally, although there is no specific provision about this circumstance, it is a customary use to allow the transferral of hot pursuit between ships: the warship of actual capture and the one which initiated the pursuit may not be the same. In any case, whenever the suspect on which the pursuit is based reveals to be unfounded, the flag state of the pursuing ship is responsible for the payment of any damages occurred to the pursued vessel because of the act. However, according to article 111 the compensation is provided only in circumstances which do not justify the right of hot pursuit: if the suspect can at least "justify" the hot pursuit, no compensation is given, even if such suspect results to be unfounded[120]. In the case-law *"The M/V Saiga"*, the ITLOS has underlined that all the conditions related to the right of hot pursuit settled by article 111 are cumulative and consequently they must be satisfied all together to consider the pursuit legitimate[121].

4.1 International Cooperation and the Multilateral Hot Pursuit Missions

Under certain circumstances, the right of hot pursuit has been exercised by the pursuing State also with the help of other countries. When in the operation of pursuit more ships belonging to different States are involved, the scholars have spoken about the so-called "multilateral hot pursuit missions". The main examples are the cases *South Tomi* (2001) and *Viarsa 1* (2003), both concerning the pursuit undertaken by Australia of foreign vessels on the high seas.

The *South Tomi* was a ship flying Togo's flag and pursued by Australian-flagged vessel *Southern Supporter* from the Australian exclusive economic zone. Once on the high seas, the *South Tomi* sailed towards north-west and, considering the difficulties encountered in the pursuit, both France and South Africa were contacted and after fourteen days the Togo's vessel was captured by the *Southern Supporter* with the help and assistance of two South African ships. The case-law *Viarsa 1* deals with a similar situation: *Viarsa 1* was a Uruguayan

[118] LOSC 1982, art. 111
[119] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, pp. 203-204
[120] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, pp. 586-587
[121] The M/V Saiga case, ITLOS Reports 1999, p. 59

fishing vessel engaged in IUU (illegal unreported and unregulated) fishing always in the Australian exclusive economic zone around Heard Island and McDonald Islands in the Southern Ocean. The pursuit by the *Southern Supporter* this time lasted 21 days and ended after 3,9000 nautical miles when the *Viarsa 1* was captured by the Australian-flagged ship with the aid of both United Kingdom and South Africa's vessels. Both the operations have been possible with the involvement of ships belonging to States other than the pursuing one, through the disposal of a multilateral mission. However, these operations of multilateral pursuit were considered fully in accordance with the text of the article 111 LOSC, regulating the right of hot pursuit[122].

Article 111.6 LOSC expressly provides the possibility of a ship to take over from an aircraft when the hot pursuit is performed by this latter[123]. Although it is not mentioned that a ship can take over from another ship, not granting such possibility would be illogical and unreasonable and this view was shared in the *travaux préparatoires* of the *International Law Commission* (ILC) for the draw of article 23 of the *1958 High Seas Convention*. Moreover, the ILC also included an explicit paragraph in article 23, providing expressly that the ship arresting the pursued vessel shall not be necessary the same which gives rise originally to the operation. In other words, it was confirmed the legality of the use of more ships in the hot pursuit. However, it must be pointed out the article 111 does not provide the involvement of vessels or aircrafts with a nationality other than the pursuing state's one but actually it specifically highlights the expression "of the coastal State" when referring to a ship or another aircraft taking over from the aircraft that commenced hot pursuit. Besides, both the two operations of *South Tomi* and *Viarsa 1* do not consist in a "taking over" as mentioned in article 111 because the involvement of the South African and British vessels was in both cases instrumental for enabling the interception of the pursued ship.

Nevertheless, the arguments used to sustain the thesis considering the multilateral hot pursuit missions fully in compliance with the scope of article 111 LOSC are several. Among all, these pursuit operations satisfy all the procedural and substantive requirements for the exercise of the right of hot pursuit, safeguarding the interests of the Flag state. Moreover, the fact that the Australian *Southern Supporter* has always been closely involved in the mission witnesses how the requirement of the "continuity" of hot pursued has been fully met. Thus, there was not any risk of pursuing the wrong vessel during all operation. Another important element for inferring the full accordance of both aforementioned multilateral hot pursuit missions with article 111 is that Australia ensured that one or more of its officials could formally apprehend the vessel: under such circumstances, the coastal state grants that the LOSC's jurisdictional balance remains unaffected. Sometimes, the possible disposal of multilateral hot pursuit missions is the object of a permanent treaty among states, while in other cases the coastal state gives its prior authorization with an ad hoc consent[124].

[122] E. J. Molenaar, Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi, International Journal of Marine and Coastal Law, 2004, pp. 19-23
[123] LOSC 1982, art. 111
[124] E. J. Molenaar, Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi, International Journal of Marine and Coastal Law, 2004, pp. 30-37

As we will see in chapter IV of this work, the scope of multilateral hot pursuit is also coherent with the *International Plan of Action to prevent, deter and eliminate IUU fishing*, since they both call for an integrated approach aimed at enhancing cooperation among States.

4.2 Doctrine of Constructive Presence: pursuing the mothership?

The doctrine of constructive presence allows a State to exercise its jurisdiction over vessels that have not entered its territorial sea. These vessels are considered located inside the jurisdiction of the coastal state even if situated beyond its maritime zones due to their relationship with another ship that is inside the coastal state's jurisdiction[125]. This doctrine has strict interconnections with the right of hot pursuit, enabling the coastal states of the pursing ships to exercise their jurisdiction in a more flexible manner and, more precisely, rendering less harsh the requirement that allows hot pursuit only in respect to vessels situated within the costal state's jurisdiction.

The outcome of the application of the doctrine of constructive presence is the possibility to pursuit vessels violating the law of a coastal state through means of other boats or crafts not belonging directly to them. The scope of the doctrine, today interpreted less narrowly than in the past years, is preventing ships remaining on the high seas but complicit in the breaches from escaping the domestic enforcement[126]. To establish a connection between the ship situated beyond the territorial waters and the one inside is necessary generally an evidence of collective participation in the commitment of the infringement. Constructive presence can be so considered a legal fiction hiding the actual location of the so-called mothership and granting a State the enforcement its jurisdiction even if the pursued ship is situated outside its maritime zone[127].

However, according to article 111 LOSC it is requested the presence in the territorial waters of at least a small crat belonging to the pursued ship or having even an unlawful association with it. The attention must be struck on the existing connection between the craft situated within the territorial waters and the pursued vessel. In fact, depending on the peculiarities of this nexus, two kinds of constructive presence can be defined. On one hand, there is a "simple constructive presence" whenever the doctrine is interpreted narrowly and the boats committing the violation of laws and regulations are seen as a mere accessory of the pursued ship since they belong to this latter[128]. The provisions related to the simple constructive presence are articles 23.1 *High Seas Convention* and 111.1 LOSC, dealing with the pursuit commencing when the foreign ship or one of "its boat" is located inside the coastal state's maritime zone. It is evident how the expression "its boats" highlights that such vessels are parts of the pursued ship, so that they constitute with it a single entity, a proper unit.

[125] R. R. Churchill and A. V. Lowe, Law of the Sea, 1999, p. 215
[126] D. R. Rothwell and T. Stephens, The International Law of the Sea, 2010, p. 448
[127] R. Lewis, The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory", Ocean Development and International Law, 2020, p. 20
[128] N. Poulantzas, The Right of Hot Pursuit in International Law, 1969, p. 244

On the other hand, articles 23.3 *High Seas Convention* and 111.4 LOSC suggest a broader interpretation of the doctrine of constructive presence, using the phrase "the ship pursued or one of its boats or other crafts working as a team and using the ship pursued as a mother ship". This means that in this second case, giving rise to the "extensive constructive doctrine", the relationship is between the pursued ship and "other crafts" not belonging in a strict sense to such pursued vessel[129]. However, these other crafts trigger the operation and share with the pursued ship a teamwork. Thus, the connection in the extensive constructive theory relies on the concept of mothership and it is explicated in the route of boats formally belonging to the pursuing state but coming to and from the mothership located on the high seas, after having committed the illegal act on the shores[130].

With reference to the simple constructive presence applied on hot pursuit, an important case-law is the *Tenyu Maru* (1910). The case is about the Japanese schooner *Tenyu Maru* which stationed on the high seas after having sent its boats to 1.5 miles off the shores of Otter Island, belonging to the archipelago of the American Pribilof Islands. These boats were engaged in hunting seals when on July 1909 a US cutter intercepted and conveyed them to Alaska. Under these circumstances, the District Judge considered the schooner *Tenya Maru* to be "just as much engaged in illegality killing the seals" as its boat, despite its location on the high seas and not in the territorial waters of Alaska. In fact, the *Tenya Maru* constituted the mothership of other boats, forming all together a unit in true sense: when a part of a single unit is subject to the jurisdiction of a State due to its position, all the other parts of the unit enter the same jurisdictional area pursuant to the doctrine of constructive presence[131].

With reference to the extensive constructive presence, a typical act is the contraband smuggling, consisting in boats of the coastal states taking an illegal substance from a mothership located on the high seas with the purpose of smuggling it ashore. At the beginning, the doctrine of extensive constructive presence was not accepted because scholars shared the opinion that a teamwork relationship could not exist between the pursued vessel on the high seas and boats not belonging to the State of such vessel. However, during the preparation of the draft articles of the *1958 High Seas Convention*, Mexico proposed to the other parties of the *International Law Commission* to include the aforementioned expression "its boats or other crafts working as a team and using the ship pursued as a mother ship". The amendment was adopted by 35 votes in favour, 13 against and 16 abstentions and the new wording was officially included in the *High Seas Convention* and afterwards in the LOSC[132].

[129] D. P. O'Connell, The International Law of the Sea, 1988, p. 1093
[130] R. Lewis, The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory", Ocean Development and International Law, 2020, pp. 21-22
[131] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 205
[132] R. Lewis, The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory", Ocean Development and International Law, 2020, pp. 22-24

In jurisprudence, the first decision symbolizing the expansion of the doctrine has been taken by the *Nova Scotia Court of Appeal* in the case *R. v. Sunila and Soleyman* (1987) about the smuggling of cannabis: the Canadian boat *Lady Sharell* was caught in transporting cargos of cannabis to the shore after having received it on the high seas from the Honduran ship *Ernestina*. The Court upheld the validity of the seizure of both the ships since they were engaged in a common venture and acting in teamwork. In fact, in exchange of fifteen 1.000 dollars the *Lady Shell* was taken with the purpose of smuggling 13.4 tons of cannabis. More importantly, in the cases *R. v. Kirchhoff (1995)* and *R. v. Rumbaut (1998)* both about a *rendezvous* relationship between crafts and a mothership on the high seas the *Queen's Bench of New Brunswick* stated that the extensive constructive presence should be considered a doctrine of customary international law.

Scholars have also disputed on the possible existence of a third category of the doctrine analysed: the extended-extensive constructive presence[133]. The cases covered are the ones in which the pursued vessel on the high seas cooperates with a vessel coming from the shores not of the pursuing State but from the ones of a third State. Then, such vessel commits a violation within the territorial waters of the pursuing state. Several national courts have supported the approach that the doctrine of constructive presence applies to these cases as well. The main case usually taken for instance is the *R. v. Mills*, in which the ship *The Poseidon* registered in Saint Vincent and Grenadines was seized on the high seas by the British Coast Guard after being caught in transferring 3.5 tons of cannabis to *The Delvan*, a ship flying the British Flag. *The Delvan* unloaded the cargo on the British coast but it came from the Republic of Ireland before approaching *The Poseidon*. Considering the port of departure of the British boat irrelevant, the Court judged legitimate the pursuit and the arrest of *The Poseidon* on the high seas. The ratio behind the decision was the presence of the element of the "prearrangement", witnessing the relationship of teamwork between the mothership and the other boat, even if the daughter ship initially departed from a different jurisdiction. In fact, it was always clear the presence of a collective involvements between the ships[134].

4.3 Use of force in pursuit of vessels

Despite the lack of a codified provision, under international law the use of force in the exercise of the right of hot pursuit is permitted. In this sense, when a warship arrests on the high seas a ship suspected of having committed violations of its legislation within the territorial waters of the pursuing state, such warship is entitled to exercise its authoritative powers with the auxilia of any force reasonably necessary. The ratio behind is belief is that right of hot pursuit would lose its effectiveness if a prerogative to resort to force would not be admitted. The use of force against a suspected vessel must be always necessary and reasonable, and the liability of the flag state of the pursuing ship for the unjustified use of force remains an asset[135].

[133] W. C. Gilmore, Hot Pursuit, 1995, pp. 950-953
[134] R. Lewis, The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory", Ocean Development and International Law, 2020, pp. 24-25
[135] R. C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, 1993, p. 585

The necessity in the use of force means there must be no other ways by which the arrest of the fleeing vessel can be performed. Moreover, when all these possible means have revealed their unsuccess, the use of force must be proportionate and measured to the vessel's refusal to submit the arrest and to illicit conduct alleged. In other words, the use of force shall be justified in relation to the nature of the offence of which the ship is suspected and the evidence sustaining the suspect in each case. The case-law most suitable for the analysis of this topic is the *"I'm Alone"* case. The controversy deals about a British ship registered in Canada and smuggling liquor in the USA's territorial waters. The vessel, after being seen by the American coastguard *The Wolcott*, refused to stop and, consequently, the United States began the hot pursuit on the high seas. With the help of another American ship, the *Wolcott* finally intercepted the *"I'm Alone"*, which sunk in 1929 in the Gulf of Mexico. The sinking of the vessel was considered unjustified in the *Joint Final Report* of 1935 on the case, considering that no principle of international law neither a provision on the *1924 Convention between United States and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors* provided the legality of the action. However, the *Joint Interim Report of the Commissioners* of 1933 stated that if the sinking takes place incidentally and consequentially to the exercise of a use of force both reasonable and necessary, the pursuing vessel does not respond of any liability and it is considered blameless[136].

The issue of the use of force in relation to hot pursuit has been also deepened by the ITLOS in the case *"The M/V Saiga"*, in which the Guinean officers fired indiscriminately at the oil tanker *Saiga* flying the flag of Saint Vincent and the Grenadines. This action caused not only several damages to the vessel but, more importantly, two of the passengers on board suffered severe injuries. Therefore, the *International Tribunal for the Law of the Sea* condemned Guinea for a disproportioned use of force due to the danger caused to human life[137].

Contextually, it stated whenever a pursued ship does not stop after the reception of the signal sent by the pursuing State, several actions including the firing of shots across the bowls of the ship can be taken and only if these latter fail the pursuing vessel is entitled to use force as extraordinary measure. In other words, the use of force should be the last resort. This concept has been highlighted also in article 9 of the *SUA Convention* (*Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*), which underlines the importance that the use of force shall never overtake the minimum degree of force necessary and reasonable in each circumstance[138].

5. Partial conclusions and observations regarding the high seas

In conclusion, this chapter deals with the fundamental principle of freedom of the high seas and the counter principle of exclusive jurisdiction of the flag state. Both these principles govern the high seas, and their exceptions consist in the right of visit and the right of hot pursuit. These latter are essential for ensuring the

[136] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 206
[137] The M/V Saiga case, ITLOS Reports 1999, p. 62
[138] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, p. 207

prosecution of crimes committed in international waters and they are provided respectively by article 110 and article 111 of the *United Nations Convention of the Law of the Sea* (1982).

The right of visit is the main legal basis for the interception of vessels on the high seas suspected of being engaged in illicit activities, among all piracy. Differently, the right of hot pursuit consists in the temporary extension of the Coastal State jurisdiction on the high seas and its scope is allowing the chase in international waters of vessels which have committed violations of the law of the pursuing state within areas of its jurisdiction.

In the subsequent chapters, the analyses will focus on three different transnational crimes: piracy, drug-trafficking and illegal, unreported and unregulated (IUU) fishing. The aim of this work is examining the main legal issues concerning these crimes with reference to the jurisdictional peculiarities of the high seas.

As we will see, the so-called "flags of convenience" (FOCs) represent an important obstacle towards effective enforcement actions in the repression of these three crimes. Thus, it is fundamental to keep in mind the definition of FOCs already provided in this chapter: practise of shipping under which there is no genuine link between the State and the ships, more specifically when the State does not effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.

Chapter II: **Piracy: a constant threat to the maintenance of the International Security at Sea**

1. Definition of Piracy in International law: Art. 101 UNCLOS

In recent times, piracy has returned to threaten maritime safety once again, although several scholars almost twenty years ago shared the opinion that it had run its course by the early 1800s. Historically, piracy has been a major problem for several societies, including the Roman and Greek ones. However, this phenomenon is considered to have reached its peak in the 17th and 18th centuries: initially under the guise of "privateering", consisting in attacks authorized by states towards the enemy's ship in wartime, piracy has grown in peacetimes by means of unauthorized attacks towards commercial ships for profits[139]. Indeed, piratical attacks were infrequent during the Cold War and the number of incidents raised only in the post-Cold War Era due to political and economic instability of developing countries. Moreover, maritime violence cases increase especially after the withdrawal of American and Russian naval forces in the Indian Ocean[140].

Today piracy is recognized as a major issue for global shipping, since it takes place outside the jurisdiction of any State, affecting nationals of various countries. Geographically, the South-east Asia and the Horn of Africa are the areas in recent years more affected. When in the 18th century it became clear how this phenomenon could be deleterious to trade, the need of a proper definition of piracy arises. This context led to the first antipiracy measures taken by United Kingdom and to the abolition of privateering with the *1856 Paris Declaration Respecting Maritime Law*. However, only a century later piracy was defined as a crime, under the *1958 High Seas Convention*, whose examination of the phenomenon has been deepened by the *1982 United Nations Convention on the Law of the Sea* (LOSC). In fact, nowadays the most internationally recognized definition of piracy is contained in article 101 LOSC, whose content reproduces accurately article 15 of the *1958 High Seas Convention*. Under this provision, piracy is referred as the crime consisting of a) "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in (a) or (b)"[141].

This definition is the only one which has gained over the years a customary status and it has been reproduced even in several regional treaties addressing the phenomenon. The first insight to such definition is that piracy must consist in an act of violence or detention, or in an act of depredation. These two types of acts, which can

[139] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, pp. 863-865
[140] Y. Ishii, International Cooperation on the Repression of Piracy and Armed Robbery at sea under the UNCLOS, Journal of East Asia and International Law, 2014, p. 336
[141] LOSC 1982, art. 101

be committed both towards individuals or properties on board of a ship, seem being in alternative and they must be "actual": no attempt can successfully constitute an act of piracy. In fact, when Great Britain proposed to include attempted acts on the definition of piracy in the travaux préparatoires within the ILO (*International Labour Organization*), such proposal was rejected with twenty-two votes against[142].

Besides, the main expression belonging to the definition of article 101 LOSC which has been debated is the so-called "private ends" clause. Since this requirement has not been properly defined within the LOSC, scholars have found difficulties in its interpretation. Firstly, the aim of the clause is distinguishing between piracy and the privateering: this latter consists, as we have already hinted, in sort of state-sponsored piracy not regarded as a pirate act due to its governmental nature. An example is the Achille Lauro affair (1985): four members of the *Palestine Liberation Front* (PLF), on board of the Italian-fagged cruise ship *Achille Lauro*, seized the vessel on the 7th of November 1985 while sailing from Alexandria to Port Said. The *Palestine Liberation Front* was a faction of the *Palestine Liberation Organization* and its four members had boarded the *Achille Lauro* in Genova as tourists. After hijacking the ship on the high seas, the offenders threatened to kill the passengers held as hostages if Israel would not release in exchange 50 Palestinian prisoners. Moreover, they also threatened to blow up the ship if other vessels would attempt a rescue mission. Not having seen their requests fulfilled, they shot to an American passenger, Leon Klinghoffer, who had Jewish origins[143]. Several states, among all United States of America, considered the seizure an act of piracy. However, the main doctrine shared the opinion the attack towards the *Achille Lauro* did not constitute an act of piracy because it was prompted by a political aim and consequently the "private ends" requirement was not matched[144].

Besides, the offenders in the *Achille Lauro* caselaw were not considered pirates also due to the lack of another requirement settled by the definition provided by article 101 LOSC: the two-ship clause. In fact, an act of piracy necessary involves a pirate and at least a victim, in other words two ships or aircrafts. In this sense, all the acts consisting in the hijacking of a ship on the high seas by its own crew and passengers cannot be considered pirate acts. In the *Achille Lauro* caselaw, the offenders were already on board and thus just an internal hijacking took place. To have piracy, one ship involved must host the pirates, while the other shall contain the victims of the attack. The ratio behind this requirement is also the will that actions such as mutiny would not become incidents with relevance under international law[145].

Going back to the analysis of the "private ends" clause, whenever a ship or aircraft is on military or government service, piracy cannot take place. However, two different views have been sustained by scholars. According

[142] R. Churchill, The Piracy Provisions of the UN Convention on the Law of the Sea: Fit for Purpose, The Law and Practice of Piracy at Sea: European and International Perspective, 2014, p. 21

[143] H. Malvina, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, American Journal of International Law, 1988, pp. 269–310

[144] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, pp. 865-866

[145] R. Satkausakas, Piracy at sea and its limits under international law, Aegean Review of the Law of the Sea and Maritime Law, 2010, pp. 1-9

to the British legal academic Malcom Shaw, all acts of violence committed for political reasons do not configure any pirate attack: the private ends requirement is measured on the motives of the offender[146]. On the other hand, the professor Douglas Guilfoyle supports the thesis that all acts of violence are undertaken for private ends whenever they lack state sanction or authority[147]. This latter encompasses the so-called private/public dichotomy theory, which opposes to the private/political one sustained among others by Malcom Shaw. It is generally accepted that the private ends requirement must be interpreted considering multiple factors not limited to the motives and ends of the offender but broadened to the relationship of the offender with the victims and the reactions of third states[148].

Moreover, the private ship requirement, strictly connected with the "private ends" clause, is another element characterizing the identification of piracy: the act of piracy must be committed by the passengers or the crew of a private ship and be directed against the property or the individuals on board of another ship. In this sense, important specifications making this requirement more flexible have been introduced by articles 102 and 103 LOSC: the acts of piracy committed by a warship or a ship on government service whose crew has taken control of the ship after a mutiny are assimilated to acts committed by a private ship and a ship is considered a pirate if it used by the persons in dominant control of it as a mean for committing pirate acts[149].

The most important limitation to the definition of piracy provided by the LOSC is the geographic extent of its scope. In fact, article 101 LOSC specifies that the act of piracy must be committed in the restricted area of the high seas or outside the jurisdiction of any state, for instance in Antarctica. Therefore, to configure a pirate act, the attack must take place in the area beyond the 12 nautical miles dividing the high seas from the territorial waters. This geographic restriction for the application of the LOSC provision is further complicated by the presence of the exclusive economic zone (EEZ), covering the waters from 12 to 200 nautical miles from the baseline of the territorial sea. According to article 56 LOSC, the coastal state can exercise sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, both living or non-living, contained in these waters and the related sovereign rights for the production of energy from water, currents and winds within the area[150]. In this sense, the sovereign rights of the coastal state over the EEZ are less comprehensive than the ones attributed with reference to territorial waters since they are essentially limited ratione materiae to the economic exploration and exploitation. However, in the EEZ States have without doubts more sovereignty than over the high seas and thus it has been debated if the EEZ fall or not within the areas "outside the jurisdiction of any state", as reported by article 101 LOSC. In other words, scholars have questioned if an illegal act of violence, detention or depredation committed in the exclusive economic zone can be considered an expression of piracy. The main doctrine has responded affirmatively, considering that

[146] M. Shaw, International Law, 2017, p. 458
[147] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, 2009, p. 37
[148] Y. Tanaka, The International Law of the Sea, 2017, p. 454
[149] LOSC 1982, artt. 102-103
[150] LOSC 1982, art. 56

article 58 LOSC, indexed "Rights and duties of other States in the exclusive economic zone", seems to imply that piracy provision should apply also within the EEZ waters. In fact, it states that the provisions contained in articles 88 to 115 (and consequently also article 101 dealing with piracy) and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with its regulation[151]. However, several states and among them particularly China have claimed sovereignty rights more extended over the EEZ and the expansion of these rights it would make harder to consider the exclusive economic zone belonging to the areas outside the jurisdiction of any state[152].

Another important topic related to the definition of piracy even if not covered by article 101 LOSC is the so-called reverse hot pursuit, which we have already partially analysed in chapter I paragraph 4 of this work. In fact, we have seen how according to article 111 LOSC a coastal state is entitled to pursue a pirate ship from its territorial waters into the high seas. However, such provision does not grant the possibility to pursuit a pirate from the international waters into the territorial waters of another state, in what is called "reverse hot pursuit mission". In this sense, the outcome of a strict interpretation of article 111 LOSC is ensuring pirates the possibility to escape the pursuing ships of their victims by simply entering the waters falling into the jurisdiction of another coastal state. Thus, the main doctrine shares the opinion that, despite not permitted under the LOSC, the reverse hot pursuit constitutes a legal practice under international customary law. The ratio behind this convincement is that several coastal states in whose waters pirate may retire are unable to fulfil their duties for the capture, punishment and repression of pirates. Consequently, the UN Security Council in 2008 has for instance taken apposite measures with its *Resolution 1816*, authorizing the reverse hot pursuit into Somali waters for one year, in order to face the Somali pirates in the Gulf of Aden[153].

All in all, the LOSC definition of piracy contained in article 101 is not considered totally adequate to circumscribe this complex crime and many scholars have called for a better one, highlighting that in the *travaux préparatoires* the parties approached to piracy as an historical offence and not as a modern issue as it would have been necessary[154].

1.1 Eco-activists and "private ends": are they pirates?

As we have already seen in the previous paragraph, a fundamental element identifying piracy is the so-called private ends requirement, which plays an important role in the correct legal qualification of "eco-protesters", term used for identifying those who oppose research or exploitation activities to protect the marine environment. In fact, the often-violent conducts of these environmental groups have been classified as piracy under the article 101 LOSC. However, not all scholars agree with this legal qualification and there is an

[151] R. Churchill, The Piracy Provisions, Virginia Commentary, 2014, p.20
[152] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, pp. 866-867
[153] L. Azubuike, International Law regime against piracy, Annual Survey of International Law and Comparative Law, 2009, pp. 43-59
[154] M. Madden, Trading the shield of sovereignty for the scales of justice: a proposal for reform of International Sea Piracy Laws, USF Maritime Law Journal, 2009, pp. 165-166

evolutionary tendency under international law for a new classification of the eco-activism no more related to the concept of maritime piracy. The main argument is that the qualification of eco-protesters as pirates leads to an infringement of their human rights[155].

An important affair regarding the topic is the *Castle John v NV Mabeco* case of 1986. In this latter, two Dutch vessels have been found by *Greenpeace* on the high seas while discharging noxious waste. The members of the environmental group boarded, occupied and damaged the two ships and the Belgian Court of Cassation ruled that this conduct was committed for "private ends", "even though activists may be motivated by public policy". Consequently, the action of *Greenpeace* was considered a proper act of piracy, falling into the application of article 15.1 of the *Geneve Convention*[156].

Another leading case which deserves to be mentioned is the *Institute of Cetacean Research (Japan) v Sea Shepherd Conservation Society*: the ship of the Sea Shepherd Conservation Society, a non-profit marine protection organization based in Washington, attacked on the high seas the Japanese whaling vessel, engaged in carrying out scientific research programmes on whales in the Southern Ocean. Consequently, the Japanese whaler brought an action against the non-profit organization under the *US Alien Tort Statute* for the violation of their right to navigate freely on the high seas and requesting to the identification of the *Sea Shepherd*'s conduct as piracy. In fact, the *Sea Shepherd* took direct action against the Japanese vessel, throwing butyric acid in glass containers, smoke bombs, and flares with hooks at the whaling ships and attempting to foul the rudders with reinforced towing lines. In this sense, the *Alien Tort Statute* provides a specific cause of action for "a tort committed in violation of the law of nations or a treaty of the United States". However, the piracy claim was dismissed by the United States District Court for the Western District of Washington, highlighting that there was no evidence about a harm to the crew of the Japanese whaler and consequently the conduct cannot be considered violent. Moreover, interpreting the "private ends" requirement as the element aimed at "financial enrichment", the action of the *Sea Shepherd* did not constitute in the Court's reasoning an expression of pirate acts due to its lack of pecuniary interest. However, the *Institute of Cetacean Research* appealed the decision, and the US Court of Appeals for the Ninth Circuit reversed the lower judge's statement. In fact, the scope of the term "private ends" in the definition of piracy was considered not limited to private financial gain. Differently, the Court of Appeal held that "private ends" includes "those pursued on personal, moral or philosophical grounds such as *Sea Shepherd's* professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public."[157]

[155] S. Dominelli, Evolutionary Tendency in Maritime Piracy: a Possible Assessment of Eco-Activists' Conduct, Australian International Law Journal, 2014, pp. 41-43

[156] C. Esposito, J. Kraska and N. Harry, Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime, 2016, pp. 181-182

[157] B. Dubner and C. Pastorius, On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd - Who Are the Real Pirates, Journal of Maritime Law and Commerce, 2014, pp. 415-444

It is clear by this wording that the Court in the broadening of the concept of "private ends" has been influenced by the ruling of the Belgian Court of Cassation on the case *Castle John v NV Mabeco* of 1986: acts are considered to be undertaken by private ends whenever they are not taken on behalf of a State. This view reflects the historic distinction between pirates and privateers and the private/ public dichotomy theory, as we have seen in the previous paragraph. The Court also gave a different interpretation on the presence of "violence": the acts have been qualified "violent" even if directed only to inanimate objects[158]. Indeed, the two cases strongly differ from each other and in *Castle John* the Belgian Court of Cassation also held that eco-activists would not commit an act for "private ends" when such act is committed "in the interest of or to the detriment of a State or State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective". In this sense, if this aforementioned reasoning followed in *Castle John v NV Mabeco* would have been followed also by the Ninth Circuit, the *Sea Shepherd's* acts would likely be considered not committed for "private ends" and the piracy claims would be dismissed. In fact, the acts were clearly "committed to the detriment of a State", Japan, which relies both economically and religiously on the whale-hunting.

Moreover, several criticisms to the decision held by the American Court of Appeal have been brought with reference to the interpretation given to the word "private". Generally, in the public opinion and in the majority of dictionaries, interpreting the adjective "public" as the antonym of "private", a purpose is public when related to a common interest even of business content if it opposes to a private affair. The eco-activism of the *Sea Shepherd* seems to fall into such definition, but it has been considered by the Court of Appeal as having "private ends".

Another insight which deserves to be discussed is if a politically motivated attack does fall or not into the piracy definition. Historically, the *travaux préparatoires* of the principal international conventions on the law of the sea have excluded the qualification of "pirate" to political acts. For instance, in the drafts of the *1958 Convention on the High Seas* Czechoslovakia's proposal for including political aims into the definition of piracy was rejected and the *Harvard Commentary on the Draft Convention on Piracy,* which had a relevant impact on the *International Law Commission* for the draft of the LOSC, shared the opinion that it would have been better to exclude from the definition of piracy the acts committed for political reasons[159]. Before, the same approach has been shared also by the Report of the expert committee for the progressive codification of international law of the *League of Nations* in 1926. However, in spite of the state's practice, the treaty-based provisions related to piracy of both the *1958 High Seas Convention* and the LOSC did not evolve, and the

[158] C. Esposito, J. Kraska and N. Harry, Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime, 2016, p. 183
[159] L. Bento, The 'Piratisation' of Environmental Activism, Lloyd's Maritime and Commercial Law Quarterly, 2014, p. 154

main cause has been the will of national states to address with piracy all violent acts on the high seas, without reference if having been committed for economic or non-economic personal gain[160].

In this context, eco-activists argue that their actions have political nature and are driven not for "private ends" but for a common good interest such as the protection of the environment. They sustain their argumentations on the private/political dichotomy theory, opposing the private/public one followed also by the Ninth Circuit in the *Institute of Cetacean Research (Japan) v Sea Shepherd Conservation Society* case and according to which all acts lacking state sanction are committed for "private ends". The private/political dichotomy theory is sustained not only by the researcher Malcom Shaw but also the Australian professor James Crawford writes that "harassing operations by organised groups deploying forces on the high seas [such as the Sea Shepherds in relation to Japanese whaling] may have political objectives . . . and [thus] the aggressors [are] not [to] be regarded as pirates"[161]. More importantly, even the judge José Luis Jesus of the ITLOS has stated that "the 'private ends' criterion seems to exclude acts of violence and depredation exerted by environmentally friendly groups or persons, in connection with their quest for marine environment protection. This seems to be clearly a case in which the 'private ends' criterion seems to be excluded."[162] Besides, even Vladimir Putin, in relation to the case *Arctic Sunrise* about a vessel flying Holland's flag located in the Russian exclusive economic zone and protesting for an offshore oil platform, highlighted that the activists have broken the law, but they were not pirates[163].

One more reason for considering environmental activists not belonging to the category of "piracy" is that traditionally pirates have always operated for an economic profit, element which does not characterize the eco-activist's conduct. The "piratisation" of the eco-activists has been also considered in contrast to their freedom of expression and consequently hunting their human rights and generally the public opinion shares the view that the classification of environmental activism as piracy must be discouraged especially in this period, in which there is more than one evidence of how the human action is damaging the planet.

Another argument related to the definition of charitable organization is used to justify the non-application of the piracy qualification to eco-activists: the private benefit incidentally conferred on some members of the organization is inevitable. In other words, a charitable organization, which must operate for a "public purpose", does not cease to follow this collective benefit if a private interest is incidentally conferred upon some of its members. This ratio animates all the laws of charity in common law jurisdiction, and it is present also in the USA, where the *Sea Shepherd* is registered. Applying this principle to a non-profit organization for the protection of the environment, when such entity operates for this public purpose, its alleged piratical act should

[160] S. Dominelli, Evolutionary Tendency in Maritime Piracy: a Possible Assessment of Eco-Activists' Conduct, Australian International Law Journal, 2014, p. 47
[161] J. Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 2013, p. 306
[162] J. L. Jesus, Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspect, 2003, International Journal Marine & Coastal Law, p. 363
[163] A. Anishchuk, "Putin says Greenpeace activists not pirates, but did break law", Reuters, 25 September 2013

be presumed not committed for "private ends": even if the protesters enjoy of the protection of the ecosystem as well, their private interest is only concurrent and adminicular to the collective one[164].

In light of all these arguments, even assuming that eco-activism shall not be classified as piracy under article 101 LOSC, violent conducts promoted by environmental protesters should not be considered legitimate and lawful. In this sense, scholars have discussed about the legal framework which more fit for these actions. Under international law, the set of norms which can better regulate this phenomenon is the *1988 Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation* (SUA Convention)[165]. This Convention, born in response to the *Achille Lauro* incident, is applicable to all acts of violence on the high seas which are not regulated by the international law of piracy and, after the terrorist attack of the Twin Towers in New York on 11 September 2001, it has been revised by a specific protocol in 2005. The SUA imposes to the states parties an obligation to criminalize in their legal systems all the conducts considered by the convention a threat to the security at sea. Indeed, the SUA Convention does not fit perfectly with unlawful acts committed by eco-protesters. In fact, differently from article 101 LOSC dealing with piracy, it does not attribute to states fighting these acts the same special rights granted by the LOSC for combating piracy. For instance, it is not conferred to states a right of visit the ship, neither universal jurisdiction is established: a State can exercise and enforce its jurisdiction towards the offenders who have committed unlawful acts only at the presence of a nexus between such act and the State's flag.

All in all, we must conclude that today it still does not exist an ad hoc legal framework to deal with eco-activism, ensuring the safety of navigation and at the same time the respect of the fundamental rights of the protesters[166].

1.2 Armed robbery, a different *locus commissi delicti*

As we already seen in paragraph 1 of this chapter, article 101 LOSC specifies that the act is qualified as piratical only when committed in the restricted area of the high seas or outside the jurisdiction of any state. Differently, the acts of violence committed in the territorial sea or in the internal waters of a coastal state fall within the definition of "armed robbery". Indeed, scholars have discussed whether illegal acts of violence, detention or depredation occurring within areas of special or limited state jurisdiction such as the EEZ or the contiguous zone fall or not into the definition of piracy under article 101 LOSC[167]. In fact, formally such areas are not "outside the jurisdiction of any state": it is attributed to the coastal state limited jurisdiction.

During the *Third UN Conference on the Law of the Sea* ended in 1982, Peru proposed to emend the definition of piracy including acts committed within the exclusive economic zone (EEZ). The proposal was rejected, and

[164] L. Bento, The 'Piratisation' of Environmental Activism, Lloyd's Maritime and Commercial Law Quarterly, 2014, pp. 156-158
[165] S. Dominelli, Evolutionary Tendency in Maritime Piracy: a Possible Assessment of Eco-Activists' Conduct, Australian International Law Journal, 2014, p. 52
[166] S. Dominelli, Evolutionary Tendency in Maritime Piracy: a Possible Assessment of Eco-Activists' Conduct, Australian International Law Journal, 2014, p. 53
[167] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, 2009, p. 42

this view has been successfully embodied in article 86 LOSC, stating the provisions of part VII LOSC, including the piracy ones "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State"[168]. However, while some scholars on the basis of a letteral interpretation of this article have deduced the exclusion of the application of the high sea's regime (and consequently the piracy framework) in the EEZ, others have assumed the opposite: the provision would simply witness the unified character of the oceans both in the high seas and in the exclusive economic zone, with the only exception of the sovereignty rights of the coastal state over the natural resources. As we have already seen in paragraph 1 of this chapter, this view is reinforced also by the text of article 58.2 LOSC, providing that the Part VII LOSC indexed "High Seas", whenever compatible, shall apply to the EEZ regime. In this sense, the residual application of the high sea's enforcement provisions contained in LOSC to the economic exclusive and contiguous zones should not be controversial. Analysing sources other than the LOSC, as we will see in Chapter III paragraph 1 of this work, the *1988 UN Narcotics Convention* seems to follow the same approach. In fact, despite the Brazil's proposal during the negotiation of the Convention highlighting the need of an authorization by the coastal state for exercising enforcing powers in its EEZ, the majority of the parties shared the view it would be legitimate to grant a priori jurisdiction to interdict suspect vessels "exercising freedom of navigation" in accordance with international law. In this context, even the 2005 SUA Protocol, using the expression "any vessel located seaward of any State's territorial sea" with reference to the right of board, seems to allow the law enforcement by a foreign state within the EEZ of the coastal state to the extent it does not interfere with the subject matters reserved to this latter state's jurisdiction. The same approach must be followed also with reference to the contiguous zone[169].

In this sense, all acts of violence, detention or depredation having place in the EEZ or in the contiguous zone should fall into the scope of the definition of piracy in article 101 LOSC and consequently they shall not be regarded as "armed robbery". More precisely, the geographic extent of the armed robbery has been specified by the *IMO Code of Practise for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*, adopted on the 2 December 2009. In this latter, the "armed robbery against ships" is any act of violence or detention or any act of depredation other than an act of piracy and committed within a State's internal waters, archipelagic waters and territorial sea. Moreover, such act shall be always committed for private ends and directed against a ship or against persons or property on board such a ship, including the acts merely inciting or facilitating intentionally such conduct[170].

Thus, it is clear the main difference between piracy and "armed robbery against ship" is the *locus commissi delicti*. This definition reflects the traditional legal distinction between acts committed in ports and territorial waters (armed robberies against ships) and those committed on the high seas (piratical acts). The first category,

[168] LOSC 1982, art. 86
[169] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, 2009, pp. 43-45
[170] IMO Resolution A. 1025 (26), 18 January 2010

regarding domestic offences, shall fall into the jurisdiction of the coastal state; the second category, being piracy under LOSC, shall be treated in compliance with the principle of universal jurisdiction. In the analysis of armed robbery, a fundamental contribution is given by non-governmental organizations and shipping company, since they are generally the entities giving the largest amount of information about this phenomenon[171]. In fact, Coastal States usually tend to not provide accurate reports and descriptions about these incidents taking place within the areas under their jurisdiction. In other words, there is evidence of coastal states under-reporting: these latter most of the times are not willing to give information about the armed robbery attacks because they do not want their commercial traffics being damaged by the concerns on the low safety of their coasts. Improvements in reporting have been reached in the period 1984-2004, when all the incidents indicated rose from less than 50 to more than 400 annually.

The major effort towards such improvements belongs to the IMO *(International Maritime Organization)*, whose secretariat in 1995 began to issue monthly circulars, special analysis each four months and even an annual report on the attacks towards ships. Only this systemic and wide action of reporting prompts the coastal states to cooperate and make available their information on armed robbery having place on their coasts[172]. However, the shipowners are generally still not incline to report the incidents involving their vessels: most of the times they are worried about the possibility to lose their clients or simply they want to avoid the physiological delays of any criminal investigation on their activities. Moreover, shipowners also fear the possible increase of the cost of their insurance contracts due to the reported incidents.

Another element contributing to the unreported attacks is the number of offences which, further than becoming actual, are only "attempted". In fact, all these attempted attacks usually go unreported. According to the IMO, attacks in the form of armed robbery constitutes the large majority of the crimes committed at sea. For instance, the *Reports on Acts of Piracy and Armed Robbery against Ships* of the *IMO Annual Report 2011* have confirmed that more than half of all threats to maritime security have taken place within the territorial, internal and archipelagic waters of states[173]. On the basis of this data and considering the quite-often incapability of coastal states to effectively prevent and suppress such acts, several scholars have discussed about the adequacy of the LOSC definition of piracy. Proposals of updating the text of article 101 LOSC with an ad hoc protocol, additional to the *1982 Montego Bay Convention* and including illicit activities committed in territorial waters in the piracy qualification, are currently subject to evaluation: the aim of these proposals is modifying the Convention, granting the right of interdiction by state parties' ships into the territorial waters of other parties in order to combat piracy. It must be noticed that the IMO acts proposing the gradual substantial assimilation between piracy and armed robbery are moving towards the same direction[174]. In particular, as we have already seen, the *IMO Code of Practise for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*

[171] R. Balkin, The International Maritime Organization and maritime security, 2006, p. 3
[172] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, 2009, p. 51
[173] IMO Annual Report 2011, MSC.4/Circ.180, 23rd April 2012
[174] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 9-14

promotes the convergence between the IMO's definition of armed robbery and the LOSC's one of piracy: this tendency is even more evident with the modification of the Code of Practise's text of December 2009, which has updated the 2001 version adding the requirement of the "private ends"[175].

2. Piracy as universal jurisdiction crime: similarities and differences with *crimina iuris gentium*

Under international law, States are entitled to claim their jurisdiction over a crime on the basis of five different principles: territoriality, nationality, protective, passive personality and universal. The principle of territoriality attributes jurisdiction to a State over events having place in its territory; the nationality principle over events committed by nationals; the protective one over events which have damaged the interest of the State; the passive personality principle over events which have harmed individuals who are nationals of that State; the universal one attributes jurisdiction to all States over events which are considered crimes against all nations[176].

In this context, piracy is considered since 1980s the "paradigmatic" case of universal jurisdiction in international customary law. This means that all nations are entitled to exercise jurisdiction in cases of piracy and that all states can consequently try pirates for their crimes[177]. This concept has been underlined even by the United Nations Security Council in the *1976 Resolution* of 11 April 2011, in which piracy has been regarded as a "crime subject to universal jurisdiction"[178]. The importance of such recognition is understood considering that several states, which would potentially have jurisdiction based on one of the other four aforementioned principles, may not be in position to effectively exercise it due to the lack of well-functioning naval forces for the prosecution of pirates. Even the LOSC definition of piracy in article 101 embraces this approach by providing as geographic restriction to the scope of the norm "the high seas" or the expression "outside the jurisdiction of any state". These areas are the only ones where piracy could be successfully constructed in theory as a universal crime, without challenging the rights of sovereignty of any state.

An important point to be highlighted is that there is not an obligation upon States to prosecute pirates: they have a mere faculty in eventually doing so. This concept is clearly expressed by article 105 LOSC, indexed "Seizure of a pirate ship or aircraft", highlighting that in the high seas or outside the jurisdiction of any state, every state "may" and not "must" seize a pirate ship or aircraft and proceed to the arrest of the individuals and to the confiscation of the property on board. In other words, states are completely free to exercise their jurisdiction on pirates in the absence of a specific LOSC provision establishing a duty in such sense[179].

States often decide to not prosecute pirates also due to the high costs which they have to bear for bringing them to court. This is the downside of the law of piracy conceived as "law of *dédoublement fonctionnel*": in the prosecution of piracy, each state assumes the role of protectionist of the entire international community

[175] IMO Resolution A. 1025 (2), 18 January 2010
[176] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, p. 867
[177] M. Garrod, The Emergence of "Universal Jurisdiction" in Response to Somali Piracy: An Empirically Informed Critique of International Law's "Paradigmatic" Universal Jurisdiction Crime, Oxford University Press, 2019, pp. 551-552
[178] UN Security Council Resolution 1976 (2011), S/RES/1976 (2011), 11 April 2011, para. 4
[179] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, p. 868

with regard to the common interest of the maritime security of the oceans. The State acts as an organ of the international community for a common good from which all nations benefit. Performing its action within the international legal order, a state becomes a proper international organ, not operating under these circumstances at a municipal level[180]. However, if on one hand all states are entitled to contribute to the common good of maritime safety, on the other only few of them actually take part in the process due to the high costs. These latter, together with the often lack of domestic legislation addressing piracy and the complexities of criminal legal proceedings, prompt States to release pirates despite the duty to cooperate "to the fullest extent"[181] in the repression of piracy, contained in article 100 LOSC. In fact, not all states have implemented in their legal systems pieces of legislation concerning anti-piracy measures, considering that LOSC does not establish an explicit mandate to take action against pirates for their crimes. In any case, the State which captures and punishes pirates may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith[182].

Moreover, according to article 106 LOSC, whenever the seizure of a ship or aircraft has been carried out without adequate grounds of suspicion, the State which took action against the alleged pirates is considered liable for any loss or damages occurred to the State to which the ship or aircraft interdicted belongs[183]. In this context, it must be noticed the universal jurisdiction attributed to States with reference to piracy differs from the principle of universal criminal jurisdiction applied to *crimina iuris gentium*, also known as core crimes. According to the *1945 London Agreement* establishing the International Military Tribunal (IMT) at Nuremberg for the trial of Nazi war criminals, these latter encompassed the crimes against peace, war crimes and crimes against humanity. This breakdown has inspired the list contained in the *1998 Rome Statute of the International Criminal Court* (ICC), which it includes four different types of crimes: genocide, the crime of aggression, crimes against humanity and war crimes[184]. These four categories are considered the mean through which international law regulates the so-called "crimes concerning individuals". Indeed, piracy has constituted over time the first and only crime concerning individuals to which the principle of universal jurisdiction was applied[185].

In fact, despite during 19th century other conducts concerning individuals arose (salve trade and war crimes above all), piracy was the only crime which all States could face exercising their full enforcement jurisdiction. For instance, as we have already seen in chapter I paragraph 3.2, whenever a ship is suspected of slave trade, a warship of another state can exercise its right to visit only for ascertaining if the suspected vessel is flying its same flag. Instead, with reference to war crimes, at the beginning of the 20th century their correct legal

[180] Y. Tanaka, The International Law of the Sea 3rd edition, 2019, pp. 355-356 and 457
[180] LOSC 1982, art. 86
[181] LOSC 1982, art. 100
[182] LOSC 1982, art. 105
[183] LOSC 1982, art. 106
[184] Rome Statute of the International Criminal Court 1998, artt. 5-8bis
[185] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 55

qualification was still debated and the punishment of individuals who have committed these crimes was reserved only to the belligerent states: when the conflict ended it was common practise to also end the repression of war crimes in compliance with the amnesty clause[186].

Having been the first crime concerning individuals and having contributed to the birth of such legal category, it could seem at a first sight bizarre today piracy is not even mentioned in any convention regulating the *crimina iuris gentium*. For instance, piracy is not regulated in the *Rome Statute of the International Criminal Court* signed in 1998 and entered in force in 2002, despite the attempt by the drafters to broad the category of *crimina iuris gentium* with the inclusion of offences which had never gained until then recognition at a customary level. Nevertheless, piracy must always be considered the *ante litteram* crime concerning individuals and its exclusion from the main pieces of legislation regarding crimina iuris gentium must be read in light of different considerations. Above all, between the 40s and the 80s of the 20th century piracy had been assumed as a phenomenon which had run its course: this timeframe coincides perfectly with the period during which the International Community understood the importance of the repression of *crimina iuris gentium*. Consequently, several differences emerged between these latter and piracy.

The first element of distinction regards the nature of the ends pursued. As we have seen in paragraph 1 of this chapter, article 101 LOSC requires piracy to be committed for "private ends". Differently, *crimina juris gentium* are committed by supreme State's organs, such heads of States or prime ministers. Thus, *crimina iuris gentium* are the result of the action of the State because their conducts are planned, controlled and sustained by state organs, which are completely liable for their effects. In other words, we are in front of a proper "organic relationship", which is evident especially in war crimes and genocide. A second element of distinction regards the nature of the authority invested of the power to exercise jurisdiction: while the LOSC Convention prescribes pirates must be brought before the national court of the state which has proceeded to their arrest on the high seas, *crimina juris gentium* are persecuted by international tribunals. Consequently, with reference to such crimes several *ad hoc* international tribunals have been set up, among others: International Criminal Tribunal for the Former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); International Criminal Court (ICC). The third difference between piracy and *crimina juris gentium* consists in the general scope pursued with their criminalization: the repression of crimes concerning individuals mentioned in the 1998 Rome Statute aims at ensuring international security, peace and the protection of human rights, whereas the anti-piracy provisions contained in LOSC are intended to safeguard maritime security on the high seas and to preserve the economic and commercial interests of coastal states[187].

Once having defined the conceptual differences between piracy and *crimina juris gentium*, it is fundamental to understand why the universal jurisdiction attributed to States with reference to the former differs from the

[186] M. Starita, Amnesty for Crimes against Humanity: Coordinating the State and Individual Responsibility for Gross Violation of Human Rights, Italian Yearbook of International Law, 1999, pp. 86-93
[187] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 57-60

principle of universal criminal jurisdiction applied to the latter. The principle of universal criminal jurisdiction allows each State to proceed to the punishment of *a crimen iuris gentium* regardless of the place where the crime has been committed and of the nationality of the author or the victim[188]. However, such principle in its application towards *crimina iuris gentium* has always been qualified as a threat to state sovereignty. In fact, differently from the piracy universal jurisdiction, it does not apply with reference to illegal acts performed by private individuals in places outside the jurisdiction of any state: it applies instead towards crimes committed by state organs, touching the heart of sovereignty[189]. Thus, the principle of universal criminal jurisdiction has encountered several obstacles before having been recognized at a customary level. The same cannot be said with reference to universal jurisdiction in the field piracy *iuris gentium*, which has been established even before a shared definition of the piratical phenomenon was internationally agreed in the *1982 United Nations Convention on the Law of the Sea*[190].

3. Anti-piracy international cooperation in South-East Asia, Horn of Africa and Guinean Gulf

Over the years, international cooperation has played a fundamental role in countering piracy and a duty to cooperate is explicitly moored in the *United Nations Convention on the Law of the Sea* (LOSC), specifically in its article 100. As we have already seen, this latter calls States "to cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State"[191]. In this sense, the honourable justice of the International Tribunal for the Law of the Sea Mr. Helmut has highlighted how "practice of piracy has been widespread over the centuries and continues to be a menace. As a result, every State not only has a right, but also a duty, to take action to curb piratical activities"[192].

Article 100 LOSC constitutes the first provision of the Convention's section about piracy, providing an accurate benchmark for all the following articles and using a strong expression, "to the fullest extent", in the description of the duty to cooperate. The provision has perfectly transposed the wording of article 14 of the *1958 High Seas Convention*, which in turn has adopted the corresponding article introduced by the International Law Commission (ILC). The ILC drafted its article consulting the scholarly work *Harvard Research Draft,* which used to impose upon States only a discretionary obligation to discourage piracy by means of their rights of prevention and punishment. Thus, the LOSC, establishing a proper duty to cooperate, made a significant step further in addressing the phenomenon. However, article 100 LOSC does not specify which obligations do fall within its scope, leaving its provision open to interpretation with reference to which approaches States can embrace in developing cooperation[193].

[188] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 61
[189] F. Graziani, Il contrasto alla pirateria marittima nel diritto internazionale, 2011, p. 182
[190] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 64-65
[191] LOSC 1982, art. 100
[192] T. Helmut, Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, University of Miami International Law and Comparative Review, 2008, p. 342
[193] Y. Gottlieb, Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, Case Western Reserve Journal of International Law, 2013, pp. 306-308

In this context, scholars questioned about the consequences of failure to cooperate by a State when the circumstances require take action: according to Mr. Jack Lang, the Special Adviser appointed by the U.N. Secretary General to address the legal issues related to piracy off the coast of Somalia, the flexible wording of article 100 LOSC "should not be used as a pretext for failure to prosecute." Other scholars even suggested that States permitting under their inaction piratical acts may be subject to the intervention of the UN Security Council. Among them, Professor Wolfrum asserted the provocative thesis that "turning a blind eye to the activities of pirates is in itself an act of piracy"[194].

The main doctrine shares the view the duty to cooperate embodied in article 100 LOSC shall be interpreted broadly but always in compliance with the principle of due diligence. Consequently, the counter-piracy operations should be carried out with the "best efforts" standards, higher than minimum or reasonable ones. In other words, article 100 LOSC requests States sincere, concerted, and proactive efforts to cooperate internationally in the repression of maritime piracy[195]. Nevertheless, the due diligence depicts only an obligation of conduct, not of results, so that different states may comply with the duty to cooperate in different manners, based on the different tools and resources each one has available. The obligation to cooperate is referred by scholars as a guiding principle through which identifying the specific obligations imposed upon states and a particular attention must be focused to the duty to share relevant information. The role of such duty in preventing piracy attacks and in facilitating the prosecution of pirates has be stressed by both the UN Security Council and the UN General Assembly. The former in its *Resolution 1816/2008* urged "all States to cooperate with each other...and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia"[196], whereas the latter in its *Resolution 63/111* "recognizes the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea…through…the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats"[197].

Moreover, as we will deeply analysed afterwards always in this paragraph, the duty to share information has been included also at a regional level by important bilateral and multilateral agreement such as the 2004 *ReCAAP*, the *2009 Djibouti Code of Conduct* and the *2013 Yaoundé Code of Conduct*. The outcome of the duty to share information is that States must warn other countries about potential piratical attacks and communicate relevant info through means of international police databases. This systemic approach underling the so-called "responsibility to forewarn" has been introduced in LOSC by article 24.2, embodying the

[194] R. Wolfrum, Fighting Terrorism at Sea: Options and Limitations under International Law, Negotiating for Peace, 2003, pp. 649-668
[195] Y. Gottlieb, Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, Case Western Reserve Journal of International Law, 2013, pp. 311-312
[196] UN Security Council Resolution 1816 (2008), S/RES/1816(2008)
[197] UN General Assembly Resolution 63/111 (2009), A/RES/63/311

principle stated by the International Court of Justice (ICJ) in the 1949 Corfu Channel case[198]. According to article 24.2, "the coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea"[199]. This principle does not directly apply to piracy since the *locus commissi delicti* of the danger to navigation shall be within the territorial sea. However, it is considered a corollary of article 100 LOSC, applying to cases of armed robbery against ships.

An exception to the obligation to cooperate under article 100 LOSC is the "national security clause", provided by article 302 LOSC. This article contains a general provision stating that "nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security"[200]. It applies also to the duty to share information, implying a restriction of its scope whenever, in the disposal of information, concerns regarding the national security or sovereignty of the State arise. Nevertheless, it is important to highlight that only "essential" state interests can justify this exception to the general rule[201].

States are prompted to take part in international cooperation for both economic and political reasons: the costs of maritime security are less expensive when shared with other international actors and several countries aim at obtaining by the international community a political recognition of their front-line role in countering piracy[202]. Moreover, from a juridical point of view, international cooperation constitutes a concrete chance for harmonizing national legislations on this field, introducing ad hoc provisions covering eventual legal vacuum[203]. In this context, it must be notice that international cooperation in counter-piracy operations has been developed following two different approaches: on a regional level and through international institutions. In this paragraph we analyse the first approach considering the interested areas of South-East Asia, Horn of Africa and Guinean Gulf and the bilateral and multilateral agreement introduced for combating the phenomenon.

In the South-East Asia, the area which deserves a focus is the Malacca Strait, a very narrow waterway whose geographical location has been the cause of several attacks hindering maritime security. The States more vulnerable to the offences started to cooperate in patrolling the area: Indonesia and Singapore established a direct operation code between their navies, introducing a specific provision for a coordinated pursuit across their territorial boundaries. Besides, Indonesia created with Malaysia a Joint Maritime Operation Planning Team in the same year. In July 2004, these two bilateral agreements were unified in a trilateral one, the MALSINDO agreement. This latter, as well as the two previous ones, prohibited enforcement operations of

[198] Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9)
[199] LOSC 1982, art. 24
[200] LOSC 1982, art. 302
[201] Y. Gottlieb, Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, Case Western Reserve Journal of International Law, 2013, pp. 320-323
[202] F. Munari, La "nuova" pirateria e il diritto internazionale: Spunti per una riflessione, Rivista di Diritto Internazionale, 2009, p. 347
[203] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 90

ships within a foreign State's territorial waters, not introducing derogations to the zonal approach. However, it allowed for the first-time warships from the three countries to enter the reciprocal waters for pursuing vessels suspected of piracy, under the consent of the interested Coastal State. In September 2008, also Thailand joined the agreement. In the meanwhile, users States of the strait such as Japan and USA tried to introduce co-patrol systems involving their government officials, but all their attempts failed due to the vehement opposition especially of Indonesia and Malaysia: the presence of foreign forces in the area was considered unacceptable[204].

In this context, the ASEAN (*Association of South-East Asian Nations*), founded with the Bangkok Declaration in 1967, has promoted several initiatives aiming at the adoption of ad hoc international agreements. For instance, under the auspices of such association, in Phnom Penh the *2003 Statement on Cooperation against Piracy and Other Threats to Security* was adopted. Its peculiarity is the focus on the relationship between piracy, terrorist attacks and transnational organized crimes, with a specific section dedicated to the armed robbery at sea. However, the most important outcome of the ASEAN is the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ship in Asia (ReCAAP),* signed in Tokyo the 11th of November 2004. This latter provides technical and financial assistance to States Parties and it has also established an information-sharing centre, located in Singapore. This organ does not only provide "appropriate alerts" in cases of piratical or armed robbery acts but also adopts periodical reports on the phenomena's development[205]. Despite the improvements in comparison to the previous bilateral agreements, even the ReCAAP expressly excludes the States Parties' possibility to intervene within the territorial waters of other contracting States: article 5.2 states "nothing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law"[206]. Moreover, it must be notice that both Indonesia and Malaysia, the countries involved in the piratical offences on going in the Malacca Strait, decided to not ratify the agreement, despite their participation in the negotiation process and their cooperation with the ReCAAP parties at an operational level. Their choice witnesses how states are reluctant to comply with multilateral regulations in territories of their sovereignty[207]. All in all, the results obtained from the ReCAAP are considered below the expectations and the reduction of piracy attacks in the South-East Asia shall be reconducted mainly to other two factors: the success of Indonesian governments in combating the separatist "Free Aceh Movement", which has reasonably several implications with Indonesian pirates; the 2004 tsunami, which has weakened the piratical groups[208].

[204] Y. Ishii, International Cooperation on the Repression of Piracy and Armed Robbery at sea under the UNCLOS, Journal of East Asia and International Law, 2014, pp. 338-339 and 344-345
[205] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 92-93
[206] ReCAAP 2004, art. 5
[207] Y. Ishii, International Cooperation on the Repression of Piracy and Armed Robbery at sea under the UNCLOS, Journal of East Asia and International Law, 2014, p. 345
[208] R.C. Zara, Piracy and Armed Robbery in Malacca Strait, A Problem Solved, Naval War College Review, 2009, p. 67

Moving our analysis to the geographical area of the Guinean Gulf in the West Coast of Africa, the *Code of Conduct concerning the repression of piracy, armed robbery against ships and illicit activity in West and Central Africa* was signed in Yaoundé on the 25th of June 2013, also known as *Yaoundé Code of Conduct*. Its adoption has been stimulated by the UN Security Council Resolution 2039 of the 29th of February 2012, through which the organ expressed its concerns about the piratical and armed robbery attacks on going in the Guinean Gulf and encouraged the coastal states, the ECOWAS (Economic Community of West Africa States), the ECCAS (Economic Community of Central Africa States) and the GGC (Gulf of Guinea Commission) to develop coordination centres for maritime security[209]. The *Yaoundé Code of Conduct* is peculiar due to its emphasis on the convergence between piracy, armed robbery and transnational organized crimes and for its particular attention to the repression of IUU (Illegal, Unreported and Unregulated) fishing. Such code, as well as the ReCAAP, does not allow states parties to intervene into the territorial waters of other States for the repression of piracy and armed robbery without a specific authorization[210].

Always in the area of the Guinean Gulf, it deserves to be mentioned also the *Resolution on Prevention and Suppression of Piracy, Armed Robbery against ships and Illicit Maritime Activities*, adopted in 2013 by the IMO and applied *inter alia* among all states in the region[211]. Finally, another important area where international cooperation for the suppression of piracy has played a fundamental role is the Horn of Africa. Since the late 2000s, there has been a constant escalation of maritime offences in the Gulf of Aden, as a result of the political instability in Somalia. In 2009, the States in the region adopted the *Code of Conduct concerning the Repression of Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden*, also known as *Djibouti Code of Conduct*, during a Sub-Regional Meeting undertaken under the IMO's initiative. This code provides a regulation for the common use of information-sharing centres in Kenya, Tanzania and Yemen, aimed at facilitating reciprocal assistance operations[212]. Moreover, it also states that States Parties are not entitled to pursue a ship suspected of piracy in or over the territory or territorial seas of any coastal state, without the consent of the interested state[213]. This clause acquires a particular significance especially in light of the Security Council resolutions authorizing the use of force by foreign States into Somalia's territory, country which has participated and signed the *Djibouti Code of Conduct*. This latter theme will be deeply analysed in the following paragraph of this work.

3.1 Somali Piracy: UN Security Council resolutions and the EU Atalanta Operation

The UN Secretary General in his 466/2008 report has used the expression "one of the most dangerous places in the world for maritime vessels"[214] with reference to Somalian coasts. Somalia's nightmare began in 1991 with a violent civil war after the collapse of the national government and it is still on going. This context has

[209] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 459
[210] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 96-98
[211] IMO, Resolution A.1069 (28), A 28/RES. 1069
[212] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 459
[213] Djibouti Code of Conduct 2009, art. 4
[214] UN Doc. S/2008/466

been over the years further compounded by the military intervention of foreign states and the separatist revindications of certain areas, above all the northern region of Somaliland. Moreover, within the country's territory it has been clearly reported the presence of terrorist organizations such as Al *Shabab*, which has imposed itself after the defeat of the *Islamic Courts Union* during the civil war. Due to the humanitarian emergency, the International Community has taken measures of different nature aimed at improving the living and political conditions in the country. In this sense, humanitarian aids were sent under the *World Food Programme*, a military mission of the African Union was organized, and several international conferences were held for the determination of the most accurate measures to combat the causes of the political instability. Among these latter, it deserves a mention the *London Conference on Somalia*, which took place in February 2012. In the meantime, the 10th of October 2004 the Transitional National Government was formed to guide Somalia out of the crisis, but it did not prove to be up to the expectations and in August 2012 the Federal Government of Somalia was finally established. In recent times, the political situation and living conditions in the country are progressively improving, although in certain areas the civil war is still on going and despite the presence of armed forces of the neighbouring States Kenya and Ethiopia[215].

In this scenario, piracy along the Horn of Africa is only one of the outcomes of the country's political instability and armed groups are nowadays attacking vessels not only in the territorial waters but even on the high seas, beyond the 200 nautical miles from shore. This situation led in 2007 the IMO to ask the Transitional National Government to enforce measures aimed at the repression of piracy and, more importantly, to "advise the Security Council that… it consents to foreign warships or military aircraft… entering its territorial sea when engaging in operations against pirates or suspected pirates and armed robbers endangering the safety of life at sea… specifying any conditions attached to the consent given"[216].

In 2008, the Transitional National Government, aware of its incapability in facing the phenomenon, finally requested international assistance to the UN Security Council for combating acts of armed robbery against ships. Thus, on 2nd June 2008, the UN Security Council adopted, on the basis of Chapter VII of the UN Charter which is indexed "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", the *Resolution 1816*, whose second preambular paragraph stated that the Council was "gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation". Moreover, in its text, the UN Security Council affirmed that "the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region"[217].

[215] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 98-99
[216] IMO Doc. A 25/Res.1002 (6 December 2007)
[217] UN Doc S/RES/1816 (2008), Preamble, 2 June 2008

More significantly, after having underlined the need to respect the sovereignty and the political independence of Somalia, the Security Council fixed a period of six months beginning from the date of the *Resolution 1816* in which foreign States, under the prior consent of the Transitional Federal Government, may: "(a) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; (b) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery"[218]. However, the Resolution also specified that the authorization provided in its text shall be intended to apply only with reference to "the situation in Somalia" and, more importantly, it should not be regarded as "establishing customary international law"[219]. Besides, it is also requested to the cooperating states to ensure their activities undertaken on the basis of the authorization do not have the practical effect of denying or impairing the right of innocence passage of ships of any third state[220].

Afterwards, the UN Security Council has adopted the *Resolution 1851/2008* on the 16th of December 2008, always on the basis of Chapter VII of the UN Charter. This resolution had a very innovative content, since it extended the mandate of States Parties, allowing them to undertake all the necessary measures for combating piracy and armed directly into the land of Somalia[221]. In other words, the geographical scope of the "necessary measures" was broadened and pirates started to be pursued also in the place of operation on land. The main aim was facilitating the capture of pirates and the release of the hostages by annihilating their logistic basis. Pursuant to *Resolution 1851/2008*, the Contact Group on Piracy off the coast of Somalia located in New York was established under the initiative of USA between 28 states and 6 regional or international organizations. The agenda of this group was the military and operational coordination, capacity building and information sharing for combating piracy and armed robbery in Somalia's waters and on high seas[222].

Subsequently to *Resolution 1851/2008*, the UN Security Council decided to renew the plan of operation through a sequence of one-year authorisations contained in several other acts: *Resolution 2246* (2015), *Resolution 2316* (2016), *Resolution 2383* (2017) and others. The latter having this clear intent in order of time is *Resolution 2500* (2019), which has renewed the counter-piracy measures off the coast of Somalia for other 12 months[223].

In this context, the difficulties in safeguarding vast maritime areas from piratical offences have led international organizations and States to support the United Nations through military operations in the Horn of Africa. For instance, the USA launched the *Combined Task Force 151* in January 2009 with the scope of

[218] UN Doc S/RES/1816 (2008), para. 7
[219] UN Doc S/RES/1816 (2008), para. 9
[220] UN Doc S/RES/1816 (2008), para. 8
[221] UN Doc. S/RES/1851 (2008), para. 6
[222] Y. Ishii, International Cooperation on the Repression of Piracy and Armed Robbery at sea under the UNCLOS, Journal of East Asia and International Law, 2014, pp. 346-347
[223] UN Doc. S/RES/2500 (2019), para. 12

contrasting piracy and armed robbery in Somalian waters, whereas the NATO organized in 2009 the anti-piracy initiative denominated *Ocean Shield*, whose participants were not only States Parties but also third States. Moreover, it deserves a particular analysis the *Operation Atalanta*, which is the first EU military maritime operation launched through the adoption by the Council of the European Union of the *Joint Action 2008/851/CFSP*, based on various UN resolutions. This operation, also known as *European Union Naval Force Somalia-EU Navfor*, has a double scope: contributing to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast; in the meanwhile, protecting vessels of the World Food Programme and the other vulnerable vessels carrying humanitarian aids. Indeed, the *Operation Atalanta* gives an important contribution also to the achievement of secondary tasks, such as the monitoring of fishing activities in the Horn Africa and the repression of weapons and drug trafficking, illicit charcoal trade and illegal, unreported and unregulated fishing. Furthermore, it also contributes to the enforcement of the weapons embargo on Somalia[224]. A part of all these secondary tasks have fallen within the mandate of the *Operation Atalanta* when this latter in late 2020 was prolonged for other two years until December 2022 and its mission was adjusted to reflect its new responsibilities. In this context, it is fundamental to highlight that for the achievement of its scope the States Parties can adopt all the necessary measures, including "the use of force"[225].

Geographically, the *Operation Atalanta* covers the zones of the Southern Red Sea, the Gulf of Aden and a large part of the Indian Ocean, including the Seychelles, Mauritius and Comoros. Overall, the area is extended for 4,700,000 square nautical miles and States participating to the EU Navfor are not only EU Member States but also third countries. Specifically, Norway was the first non-EU country joining the operation, followed by Montenegro, Serbia, Ukraine and New Zealand. The operation is financed by the contributing States and the personnel costs are sustained on a national basis. Moreover, there is also a common extra budget agreed on an annual basis for covering the incidental extra costs of the operation. This latter has been fixed at 4.4 million euros for 2021. Practically, under its mandate, all ships of the Eu Navfor can arrest, detain and suspected pirates, who once captured can be prosecuted by an EU Member State, by Regional States, or by any other third States with which the EU has agreements, and which wishes to exercise its jurisdiction over the suspected pirates[226].

Under this operation, it has been also established the "*Maritime Security Centre for Horn of Africa*", giving ships updated information about maritime zones where there are higher risks of piratical attacks. This centre is part, together with the *Operation Atalanta*, to the so-called "EU's Integrated Approach" for facing organically the Somalian piracy by acting on the causes of the problem[227]. Finally, it must be said that the effectiveness of the EU operation has been disputable by scholars: it seems that while on one hand Atalanta

[224] P. Dombrowski and S. Reich, The EU's maritime operations and the future of European Security: learning from operations Atalanta and Sophia, Comparative European Politics, 2018, pp. 868-870
[225] Joint Action 2008/851/CFSP, art. 2 letter d)
[226] E. Papastavridis, EUNAVFOR Operation Atlanta off Somalia: The EU in Uncharted Legal Waters, International and Comparative Law Quarterly, 2015, pp. 548-550
[227] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 104

has contributed to the reduction of successful piratical attacks, on the other hand the attempted offences did not decrease. In fact, the pirates in the Guinean Gulf have remained substantially the same in number due to the stagnant economy and insufficient local governance of Somalia. Moreover, the action of EU Atalanta has been criticized also considering the costs of its military operations, which amounted between 2009 and 2014 to 40 million euros[228].

4. Piracy Prosecution: "Catch and release" and Human Rights

As we have already seen in paragraph 2 of this chapter, article 105 LOSC clearly states piracy prosecution by States is facultative, not existing a duty to enforce jurisdiction on pirates. Moreover, not all countries have a domestic legal provision regulating piracy and the only few states effectively exercise their jurisdictions over captured pirates. This practise, known as "catch and release", consists in the release of persons suspected of piracy without before having faced justice and it has become over the years a rule: the paradox is how judicial proceedings have become the exception[229].

The causes of "catch and release" are several, above all the fact LOSC does not oblige States to prosecute pirates neither to introduce in their domestic legislation a provision criminalizing piracy. Moreover, when the suspected pirates are caught before the expected attack, it is complex to collect evidence about their guiltiness, considering pirates often claim to be innocent fishermen. Another difficulty is the need to preserve all the evidence within the ship and reproducing them to court once having landed: even the witness evidence requires the track of the crew of the attacked vessel. Besides, if the benefits of the prosecution of pirates are enjoyed by the whole international community, on the other hand the costs are borne entirely on the country enforcing jurisdiction. From an economic point of view, bringing a pirate before court can be even more expensive than undertaking anti-piracy measures such as military action on the high seas. States also fear pirates once having reached their territory may claim political asylum[230].

One more deterrence to the prosecution of piracy is the practical need of the warship which has eventually captured pirates to interrupt its military operation, changing its route towards land[231]. Finally, another incentive to the catch and release practice is the difficulty of the correct application of the principle *pirata non mutant dominium*, according to which the navies and the cargos seized from pirates should return to the original owner. In this context, the issues related to "catch and release" are not limited to rendering ineffective maritime operations on the high seas: this outcome of this practice consists in the reiteration of piratical activities from always the same individuals, who progressively refine their criminal expertise[232].

[228] P. Dombrowski and S. Reich, The EU's maritime operations and the future of European Security: learning from operations Atalanta and Sophia, Comparative European Politics, 2018, pp. 872-874
[229] E. Kontorovich, The Piracy Prosecution Paradox: Political and Procedural Problems with Enforcing Order on the High Seas, Georgetown Journal of International Affairs, 2012, pp. 108-109
[230] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, p. 868
[231] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 144
[232] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 105

This led the UN Security Council to affirm in *Resolution 2383/2017* its concern about the release of pirates having been captured, calling all States to "criminalize piracy under their domestic law"[233]. Considering the practice of catch and release is particularly widespread in Somalia, the Security Council also invited all states and regional organizations operating in the Horn of Africa to conclude special agreements for embarking "shipriders" in vessels performing anti-piracy operations[234]. The "shipriders" are law enforcement officials of countries willing to exercise their jurisdiction over pirates, facilitating the collect of evidence and the preliminary investigations. The stipulation of shipriders agreements is also suggested by the *Djibouti Code of Conduct*[235].

In this context, several agreements have been concluded between European States and international organizations on one hand and African Eastern States and countries of the Indian Ocean on the other. Through such agreements, the countries belonging to the second category have assumed the obligation to prosecute before their courts pirates captured by maritime operations conducted in the Horn of Africa. With reference to this practise, Kenya has concluded agreements with United Kingdom, the EU, Canada, USA, China and Denmark in 2009[236]. Specifically, the 2009 agreement between Kenya and the European Union Operation Atalanta has fixed the conditions and modalities for the transferral of suspected pirates captured by the EU Navfor ships in Kenyan prisons, granting to the African State the faculty to reject such transferral on the basis of a preliminary evaluation of the legal evidence. However, once the transferral has been authorized, the suspected pirates cannot be any longer moved to another State without the consent of the EU Navfor. A similar agreement allowing the transfer of captured pirates to a neighbouring state without depending on an extradition procedure has been stipulated always in 2009 between the Republic of Seychelles and the European Union. The main innovation consists in the distinction between two categories: individuals who have committed acts of violence on the high seas against Seychelles-flagged vessels or who have committed piratical acts in the exclusive economic zone (EEZ) of Seychelles; other individuals having committed acts of piracy. In relation to the first category Seychelles cannot refuse the transfer, while for persons belonging to the second case the transfer is subordinated to the explicit authorization of the Indian Ocean country[237]. Other agreements with similar content have been stipulated between by EU Navfor with the Mauritius in 2011 and the Republic of Tanzania in 2014: these latter States have in both cases the faculty to authorize or reject the transfer of suspected pirates at their own discretion on a case-by-case basis[238].

In order to face all complexities with regard to the prosecution of pirates, scholars have thought about new international solutions to be undertaken. For instance, Dutton has suggested the inclusion of piracy in the jurisdiction of the International Criminal Court (ICC), with the advantage that differently from today no state

[233] UN Doc. S/RES/2382 (2017), para. 19
[234] UN Doc. S/RES/1897 (2009), para. 6
[235] Djibouti Code of Conduct 2009, art. 7
[236] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 457
[237] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 146-148
[238] T. Treves and C. Pitea, Piracy International Law and Human Rights, The Frontiers of Human Rights, 2016, p. 120

would bear alone all the costs of the trials. Moreover, the scholar has pointed out that no other court would be more capable and experienced in hosting piracy trials than the ICC, which would also be able to guarantee the human rights of the defendants[239]. However, it must be noticed the art. 5 of the Rome Statute of the ICC expressly states that the jurisdiction of the court is limited "to the most serious crimes of concern to the international community as a whole": piracy, defined as a crime endangering maritime security of trade routes, seems to not belong to this category. Other possible solutions whose viability deserves an analysis are the establishment of: a new tribunal for piracy at an international or even regional level; a criminal mixed tribunal in Somalia with both national and foreign judges; a Somalian tribunal in the territory of a neighbouring state[240].

One more fundamental concern in dealing with the piracy prosecution is the respect of pirates' human rights: the transferral of pirates in other States for their trial shall not have as outcome the violation of their fundamental rights. For instance, although the Kenyan criminal code sanctions piracy with life sentence, the eventual allegation of additional crimes such as kidnapping and murder may condemn the pirate to the capital punishment. To avoid such cases, the 2009 agreement between European Union and Kenya contains a clause for the reprieve of death penalty in detention[241]. The main human rights obligations upon States are imposed by the *European Convention on Human Rights* (ECHR), the *Convention against Torture and the International Covenant on Civil and Political Rights* and can be resumed in four principles: the right to be brought promptly before a judge; the non-refoulment; the fair trial principle; the right to an effective remedy[242]. The application of these obligations at sea has been recognized by the jurisprudence of the ECHR and by several UN Security Council resolutions dealing with piracy. In particular, according to the principle of non-refoulment, States capturing pirates cannot return these latter to their home countries for prosecution when there are reasonable grounds to believe they would face "a prohibited treatment"[243]. Such risk limits the States' capacity in transferring persons within their jurisdiction to third states. More precisely, article 3 of the ECHR provides a legal basis for state's liability when the removal of an individual exposes that person to a real risk of torture or inhumane treatment in the destination country. Besides, responsibility of the State can arise under article 2 of the ECHR when the person faces the risk of being subject to death penalty, and under article 6 when exposed to a possible flagrant denial of justice[244].

In this context, it deserves a mention article 12 of the Joint Action regulating the EU Operation Atalanta, which states: "no persons . . . may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to

[239] Y. M. Dutton, Bringing pirates to justice: a case for including piracy within the jurisdiction of the International Criminal Court, Chicago Journal of International Law, 2010, pp. 201-245
[240] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 151
[241] M. C. Noto, La repressione della pirateria in Somalia: le misure coercitive del Consiglio di Sicurezza e la competenza giurisdizionale degli Stati, 2009, p. 454
[242] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 458
[243] E. Nyman, Modern Piracy and International Law: Definitional Issues with the Law of the Sea, Geography Compass, 2011, p. 868
[244] T. Treves and C. Pitea, Piracy International Law and Human Rights, The Frontiers of Human Rights, 2016, p. 122

torture or to any cruel, inhuman or degrading treatment"[245]. In this sense, provisions dealing with the respect of human rights are included in all the transfer agreements stipulated by the EU Navfor with Kenya, Mauritius, Tanzania and Seychelles. Their aim is underlining the European Union is not exempted from its obligation on the protection of human rights in transfer proceedings regarding piracy[246].

5. Maritime Security Services: The Privately Contracted Armed Security Personnel

The protection of vulnerable vessels at sea from piratical attacks can be granted following two different options. The first consists in the employment of military and enforcement agents being selected among state officials, while the second concerns the presence on board of the so-called "contractors", more precisely privately contracted armed security personnel. In both cases, such officials and contractors do not actively perform anti-piracy measures, but they simply defend on board the commercial vessel from the piratical offences which have eluded the self-defence strategies implemented by the crew[247]. In particular, the privately contracted armed security personnel implies a "privatization" of military and security services which has been over the years discouraged by several international actors. In fact, international organizations and intergovernmental institutions used to not recommend the employment of contractors, on the belief they could boost the risk of use of force cases[248]. In this sense, it is indicative the recommendation contained in the *Circular 1337/2010* of the *International Maritime Organization* (IMO), whose section 6 explicitly states: "the use of armed guards is not recommended"[249].

However, in recent times, the privatization of military and security services has become prevalent also with regard to shipping: in the past, it was common practise only on land. This situation prompted the IMO to adopt in 2011 guidelines and recommendations for States making use of privately contracted security personnel on board of vessels navigating routes of high piratical risks[250]. Nevertheless, it must be highlighted the IMO expressly remarks that the faculty to employ armed contractors "does not constitute a recommendation or an endorsement of the general rule" and that this practise shall be intended only as "an additional layer of protection and not as an alternative"[251] to the *Best Management Practices* (BMP) adopted in 2009. These latter are a list of good practice periodically updated and aimed at reinforcing the defensive capacities of ships. Their application requires the preliminary registration in the IMO Maritime Security Centre. Besides, the vessels shall also send a daily report on their position, the so-called "Vessel Position Reporting Form", to the United Kingdom Maritime Trade Operations (UKMTO). From the IMO's endorsement to such BMP, it is evident the intent of the organization to recommend the adoption of all the necessary means to avoid the use of force by

[245] Joint Action 2008/851/CFSP, art. 12.2
[246] T. Treves and C. Pitea, Piracy International Law and Human Rights, The Frontiers of Human Rights, 2016, p. 123
[247] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 461
[248] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 110
[249] IMO, MSC.1/Circ. 1337 (2010)
[250] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 110
[251] IMO, MSC.1/Circ. 1339 (2011), para. 15

private guards, which shall be exercised only when strictly necessary and under reasonable circumstances. The ratio behind is minimizing eventual injuries and protecting human life[252].

Always in 2011, the number of ships employing armed guards rose approximately from 10 to 50 % after the first endorsement towards their use by the International Chamber of Shipping (ICS)[253]. Subsequently, IMO issued in March 2012 a note entitled "Piracy and armed robbery against ships" calling States to discuss about the eventual introduction in their national legislation of a special provision authorizing the handle of firearms by privately contracted armed security personnel. However, the international community also expressed its concern about the risk of an escalation of violence determined by contractors using unlawfully their arms. The fear, expressed especially by the ICC International Maritime Bureau, is that the use of privately contracted security personnel may threaten pirates, inducing them to open fire. Moreover, another issue regarding the topic is the one dealing with sovereignty. In fact, some scholars share the opinion the security at sea, being a governmental function, shall be exercised only by public authorities. Consequently, private guards could only give information to the competent entities[254]. Differently, other scholars shared the view the monopoly of public authorities with regard to the use of force shall be subject to another interpretation: government officials can apply force, but they are also entitled to abdicate from such prerogative, pointing out who will exercise it on their behalf[255].

In this context, it is fundamental to highlight the several legal implications arising from the use of privately contracted security personnel. In 2008 the majority of flag states did not allow arms to be carried on their trade vessels, but it must be noted today all open registries countries do not prohibit their use by private guards. The only European countries not allowing the on-board transport of arms on commercial ships are Lithuania, Poland, Portugal and the Netherlands. Instead, it is commonly agreed the use of force by privately contracted security personnel is legitimate only when performed in self-defence, as also the *Enrica Lexie* case-law (2012) has witnessed. Only in the USA some scholars share the view an immunity shall be granted to those who kill pirates in the middle of an attack to the ship they are protecting[256].

One more issue arising regards the relationship between the master of the ship and armed guards in relation to the fundamental decision that must be taken in the field of security. This concept has been clearly expressed by the words of Captain Philips in the *Maersk Alabama case*, regarding hijacking of an American cargo ship in 2009: “I am not comfortable giving command authority to others. In the heat of the attack, there can be only

[252] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, pp. 107-109
[253] I. Van Hespen, Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements, Journal of Maritime Law and Commerce, 2014, p. 361
[254] L. Azubuike, International law Regime Against Piracy, Annual Survey of International and Comparative Law, 2009, p. 53
[255] T. Ginkel, F. Van der Putten and W. Molcnaar, State or Private Protection against Maritime Piracy? A Dutch Perspective, 2013, p. 14.
[256] I. Van Hespen, Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements, Journal of Maritime Law and Commerce, 2014, pp. 373-374

one decision maker". Moreover, the topic of private guards renders necessary also the analysis of the legality and security of arms transport at sea: this matter has been addressed by the introduction of specific "floating armouries". The floating armouries are vessels carrying and supplying weapons on the high seas to the private maritime security companies, who receive them in guise of their clients. Such ships operate only in international waters, never entering the territorial sea of coastal states[257].

Another legal issue is whether a ship with on board privately contracted security armed personnel entering the territorial waters complies or not with "innocent passage". Trade vessels have usually granted the right of innocent passage within 12 nautical miles from shore. However, this practise is based on the assumption they are unarmed: only in such case they do not pose a threat to the sovereignty, territorial integrity or political independence of the coastal State[258]. In this context, the private armed security guards are considered civilians of the flag state but, although they are not part of the military base of any State, they are subject to the international human right framework. More importantly, the flag state is liable for any violation of human rights law resulted from their conduct: its responsibility arises because all states shall protect individuals from offences to fundamental freedoms, even the ones brought by third parties such as private maritime security companies[259].

Finally, in a dissertation on the use of private armed guards, it deserves a mention the 2012 *Enrica Lexie* incident between Italy and India. The *Enrica Lexie* was an Italian-flagged oil tanker navigating 20.5 nautical miles from the Indian shore with on board six Italian marines. Meanwhile, a vessel not identified was seen 2.8 miles away and heading towards the Italian ship in manner deemed consistent with a piratical attack. Consequently, two marines opened fired killing two fishermen: the targeted craft was a mere Indian fishing boat. Disputes of jurisdiction arises between the two countries[260]. However, without entering the political and diplomatic dimension of such case-law, the incident witnesses one more time the relevance of private military contractors for the protection of ships from piratical attacks.

6. Repression of piracy in Italian Law

The Italian fleet is very consistent, ranking sixth in Europe with a dimension of 21 million deadweight tonnages and Italian vessels on the high seas have often suffered from piratical attacks. These offences could potentially lead to a shift of maritime routes away from the Mediterranean Sea and the Suez Canal, with the marginalization of Italian ports as outcome. Thus, Italian authorities have always addressed piracy as a threat to the national interest, considering the maritime sector contributes to the country's growth with around 2.5 %

[257]United Nations Office on Drugs and Crimes, Summary of Laws Regulating Floating Armouries and their Operations, Annex A to Maritime Crime: A Manual for Criminal Justice Practitioners, 2020, pp. 1-5

[258] S. Polepalli, Floating Armouries and Privately Contracted Armed Security Personnel on Board Ships: Balancing coastal state security concerns against navigational freedom, Journal of territorial and maritime studies, 2019, pp. 80-82

[259] I. Van Hespen, Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements, Journal of Maritime Law and Commerce, 2014, pp. 377-378

[260] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, pp. 462-463

of the GDP. The data provided by the International Maritime Bureau between 2009 and 2013 reveal 35 Italian vessels were attacked and, in some cases, among all the *Montecristo* one in October 2011, crew and passengers were released only after the payment of a high ransoms and the military intervention of the Navy. All these events and circumstances led Italian government to assume a forefront position in combating piracy. In 2005, Italy was the first country to launch an antipiracy mission, called *Mare Sicuro,* off the Somalian coasts. Moreover, Italy took part to several military operations aimed at the repression of piracy such as NATO's "Ocean Shield," EU Navfor's "Atalanta," EUCAP's "Nestor," and the Combined Task Force (CTF) 151[261].

In this context, it must be noticed before 2011 only few methods could be adopted by Italian shipowners for combating piracy: the compliance with the *IMO Best Management Practise* (BMP) was highly recommended, while on the contrary the use of privately armed security personnel was mostly discouraged. In fact, as already said in the previous paragraph, the involvement of armed guards was seen as a possible cause of escalation of violence, since pirates could potentially open their fire, being threatened by their presence. In this sense, before 2011 the maritime private company were employed only with consultancy functions, as in the *Montecristo* case-law, in which the attacked ship had a group of unarmed private guards on board. A new approach in combating piracy was adopted in Italy only under the *Law 130/2011*: vessels were allowed to embark armed guards, belonging without distinction from both the public and private sector[262].

In other words, it has been developed a hybrid and dual approach involving not only the Vessel Protection Detachments (VPDs) provided by the Navy, but also the Private Contracted Armed Security Personnel (PCASPs), expression of the private sector. In fact, the private guards are contacted by the shipowners whenever the public military forces are not available. In this case, the shipping industry has to cover the costs instead of the State. A similar system can be found also in other European countries, such as France and Belgium. There are two conditions which have to be met for obtaining the assistance of VPDs or PCASPs: vessels must have adopted at least one of the shipping industry *Best Management Practices*; in addition, they shall sail an area of "high risk" identified by the Ministry of Defence. Furthermore, other restrictions are settled for the demand of private contractors. For instance, the shipowners must produce a written proof of the rejection of their request for vessel protection detachments. Besides, armed guards on board cannot be more than four in number. Under the Italian legislation, it is nowadays granted a possibility prohibited in the past: the employment of foreign private guards. These latter need in any case the authorization of the Italian Ministry of the Interior and they must be established in another EU country[263].

7. Partial conclusions and observations regarding piracy

[261] E. Cusumano and S. Ruzza, Contractors as a Second-Best Option: The Italian Hybrid Approach to Maritime Security, Ocean Development & International Law, 2015, pp. 111-113
[262] L. Marini, Pirateria Marittima e Diritto Internazionale, 2016, p. 113
[263] E. Cusumano and S. Ruzza, Contractors as a Second-Best Option: The Italian Hybrid Approach to Maritime Security, Ocean Development & International Law, 2015, pp. 115-118

In conclusion, piracy represents the paradigmatic "universal jurisdiction crime" since all nations are entitled to exercise their jurisdiction on pirates and all states can consequently try pirates for their crimes. In this sense, the laws regulating the prosecution of pirates do not only restrict the scope of the principle of freedom of the high seas, but they also constitute a limit to the principle of exclusive jurisdiction of the flag state. Nowadays, its most internationally recognized definition is contained in article 101 LOSC, which has gained over the years customary status.

The concept of piracy is strongly related to the high seas: international waters constitute the geographical extent of its scope, in other words its *locus commissi delicti*. Differently, acts of violence and depredation committed within the 12 nautical miles from the shore, and thus in the territorial waters of the Coastal State, do not fall into the definition of piracy. Instead, they are classified as "acts of armed robbery", falling into the jurisdiction of the Coastal State.

Moreover, piracy is expressly mentioned by article 110 LOSC among the crimes falling within the scope of the right of visit: when there are reasonable grounds to suspect that a ship on the high seas is engaged in piracy, a warship is entitled to board and visit such vessel.

Furthermore, another general tendency observed in this chapter regards the right of hot pursuit. As we have seen in chapter I of this work, a coastal state is entitled under article 111 LOSC to pursue a pirate ship from its territorial waters into the high seas. However, the provision does not clarify if it is possible the so-called "reverse hot pursuit": the pursuit of a pirate ship from the high seas into the territorial waters of another state. After having fully examined this legal issue in this chapter, we can conclude today the reverse hot pursuit constitutes a legal practice fully recognized under international customary law.

The next chapter of this work will focus on drug-trafficking at high seas and its main legal implications.

Chapter III: **Drug Trafficking at High Seas: a worldwide phenomenon**

1. The LOSC and the 1988 UN Narcotics Convention

The illicit traffic in narcotic drugs and psychotropic substances, also known simply as "drug trafficking", has traditionally constituted a major issue for the international community. In fact, it represents a threat to international and national security worldwide and it is estimated its effects negatively affect almost 250 million users each year, of which more than 80 million are suffering from forms of addiction. Moreover, the studies of the *United Nations Office on Drugs and Crimes* (UNODC) have assessed how the repercussions of drug trafficking have determined 28 million deaths in 2017[264]. In addition, the illicit traffic in narcotic drugs must be associated also with increasing cases of violence, which have a strong impact on the lives of many people. As we will see in this chapter, the involvement of individuals in drug trafficking is often determined by the high economic incentives it offers and it constitutes sometimes a way out of poverty[265]. Thus, drug smugglers should not be identified always with carters but rather with single individuals facing economic difficulties and poor living conditions[266]. This situation has led States to promote a system of international cooperation to combat the illicit traffic in drugs through the adoption of several legal instruments.

The main definition of "drug trafficking" is provided by the *1988 UN Narcotics Convention*, which encompasses in the illicit traffic the "production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention"[267]. These two conventions mentioned have constituted until 1988 the most important instruments against drug trafficking: the *Single Convention on Narcotic Drugs* of 1961, which was amended by the *1972 Protocol*; the *Convention on Psychotropic Substances* of 1971. Afterwards, it was adopted in 1988 the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, which has a more comprehensive content addressing the illicit traffic of both narcotic drugs and psychotropic substances[268]. Furthermore, the *1988 UN Narcotics Convention* includes in the definition of drug trafficking other three conducts: the cultivation of plants for the purpose of drug production; the possession or purchase of illicitly trafficked narcotic drugs or psychotropic substances for the purpose of illicit traffic; the involvement in laundering of proceeds through property purchases[269].

[264] United Nations Office on Drugs and Crimes (UNODC), World drug report, 2017
[265] L. M. Saavedra-Díaz and S. Jentoft, The role of the small-scale fisheries guidelines in reclaiming human rights for small-scale fishing people in Colombia, The small-scale fisheries guidelines, 2017, pp. 573–594
[266] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 995
[267] UN Narcotics Convention 1988, art. 3
[268] United Nations Office on Drugs and Crimes (UNODC), Transnational Organized Crimes in the fishing industry, 2011, pp. 74-75
[269] UN Narcotics Convention 1988, art. 3

In this context, the international regulation of drug trafficking on the high seas represents a field where it is possible to depart from the principle of exclusive jurisdiction of the flag state: several multilateral and bilateral treaties addressing the phenomenon provide exceptional measures for the interception in international waters of foreign vessels suspected of illicit traffic in narcotics[270]. Indeed, the *United Nations Convention on the Law of the Sea* (LOSC) addresses drug trafficking with few provisions, among which article 27 constitutes the legal basis for the exercise of the coastal State's criminal jurisdiction on board of foreign ships passing through its territorial waters for the suppression of illicit traffic in narcotic drugs or psychotropic substances. In other words, the coastal State is entitled to arrest any individual or to conduct any investigations on board of a foreign-flagged ship in its territorial sea when such measures are necessary to counter drug trafficking activities[271]. However, it has been observed how drug-running "mother ships" located beyond the 12 nautical miles often distribute their forbidden cargo to smaller boats which head fast towards the shore evading interdiction. In this sense, it is evident the need to take action on the high seas before smugglers enter territorial waters[272].

Nevertheless, the LOSC explicitly refers to drug trafficking in international waters only with article 108, which prescribes a general obligation upon States to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances when this latter is "contrary to international conventions". Besides, the same provision also provides that any state with "reasonable grounds for believing" that a ship flying its flag is engaged in illicit traffic can request other states' cooperation to suppress such traffic[273]. A careful reader can hardly help noticing that the more common situation where a State is willing to interdict on the high seas a ship suspected of drug trafficking flying the flag of another foreign state is not mentioned. Considering article 110 LOSC does not include drug trafficking among the exceptions permitting the exercise of the right of visit, scholars have pointed out how the UN convention does not provide an explicit legal basis for boarding drug smuggling vessels in international waters. Actually, during the 1975 third session for the drafting of article 110 LOSC, the informative consultative group on the high seas included drug trafficking among the grounds for exercising the right of visit but at last the provision was changed and the illicit traffic in narcotics was substituted by unauthorised broadcasting[274].

However, as we will see in this chapter during the examination of three concrete cases regarding the statement of the Italian jurisdiction in international waters, article 110 can potentially apply to drug trafficking when the illicit traffic involves "stateless vessels". In fact, drug smugglers often use vessels without nationality for their activities. Notwithstanding such possibility, it must be noted the right of visit the ship does nor encompass the

[270] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 207
[271] LOSC 1982, art. 27
[272] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, p. 79
[273] LOSC 1982, art. 108
[274] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 206-208

right to seize its cargo and to arrest the members of the crew. Differently, the intervening State should rely on other legal basis for the exercise of jurisdiction over the properties and persons on board. Despite this general rule, it is interesting to highlight the American *Drug Trafficking Vessel Interdiction Act* (DTVIA), which was adopted by the US Congress in 2008. In fact, this law permits not only the boarding but also the exercise of enforcement jurisdiction over individuals on board of stateless submersibles or semi-submersibles: the ratio must be found in the peculiarities of these fishing vessels, which are very difficult to detect as we will examine in paragraph 5 of this chapter[275].

In this context, the shortcomings of LOSC in addressing drug trafficking have been successfully covered by the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, also known as *UN Narcotics Convention* or *1988 Vienna Convention*. This latter, which was signed in Vienna after several negotiations between both States and UN bodies, contains the so-called "boarding provision": article 17. The importance of such provision is witnessed by its revolutionary content since it provides the right to board the vessels of other states parties engaged in drug trafficking. Precisely, as article 108 LOSC, also article 17 firstly remarks the general obligation upon the States to cooperate in suppressing illicit traffic at sea, adding the efforts towards such cooperation shall be "at the fullest extent". Besides, a State party which has reasonable grounds to suspect a vessel flying "its flag" or "not displaying a flag or mark of registry" is engaged in drug trafficking, can call other States parties for assistance in suppressing the illicit traffic. In this sense, differently from article 108 LOSC, the 1988 *UN Narcotics Convention* seems to include into the scope of the provision the stateless vessels. However, the legislative innovation is brought by article 17 when it provides that a State with reasonable grounds to suspect that a vessel "flying the flag or displaying marks of registry of another Party" is engaged in drug trafficking while "exercising freedom of navigation", may in this order: a) notify the Flag state; b) request confirmation of registry; c) if confirmed, request to the flag state authorization to take appropriate measures[276].

It is evident article 17 provides a framework for interdiction based on the flag-state consent with reference to drug trafficking. Moreover, it must be noted there is no obligation to authorize the interdiction: the flag state can legitimately deny at its own discretion the boarding of its vessel. However, the main doctrine has underlined how the denial of a request must be always fully justified. In fact, as we have already said before, a State party is always bound by the general obligation to cooperate in the suppression of the illicit traffics in narcotics[277]. In addition, the expression "exercising freedom of navigation" suggests the scope of the provision

[275] A. Bennett, The Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel interdiction Act, Yale Journal of International Law, 2012, pp. 433-434
[276] UN Narcotics Convention 1988, art. 17
[277] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 208-211

shall include all the vessels navigating beyond the territorial sea and thus even the ones within the exclusive economic zone (EEZ) and the contiguous zone[278].

Furthermore, article 17 of the *1988 UN Narcotics Convention* also highlights that the flag State can alternatively authorize the requesting State to "a) board the vessel; b) search the vessel; c) if evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board"[279]. As for the right to visit provided in article 110 LOSC, also the authorization to board under article 17 does not necessarily include the permission to search and seize the ship or to exercise enforcement jurisdiction upon persons and properties on board. In other words, the provision provides three different layers of authorization having a disjunctive nature: the consent of the Flag State must be given for each one individually[280]. Besides, article 17 also underlines that a State party must answer "expeditiously" to the requests for authorization coming from other countries and it also stressed the importance of stipulating bilateral and regional agreement to reinforce the effectiveness of the *1988 UN Narcotics Convention*. More importantly, the provision also asks States parties to designate a competent authority entitled to receive and respond to the requests for authorization and in any case the intervening State must always inform the Flag state of the results of the actions undertaken. Finally, it must be noted the right to board under article 17 can be exercised only by warships, military aircrafts and other determined governmental ships[281].

Another essential provision contained in the *1988 UN Narcotics Convention* is article 4. This latter, differently from article 17 which is intended to allow States parties to exercise their enforcement jurisdiction on the basis of the flag state consent, deals with national prescriptive jurisdiction. Its scope is limited to the most serious drug trafficking offences listed in article 3 of the *UN Narcotics Convention*: it provides that the States parties "may" establish their jurisdiction over such offences committed in their territories or on board of their vessel upon which they have been authorized to take appropriate measures under the already examined article 17. In addition, the provision specifies that "such jurisdiction shall be exercised only on the basis of agreements referred to in article 17"[282]. In other words, the boarding State is entitled to bring the offenders to its courts only when such faculty is provided by the bilateral or regional agreements recognized under article 17. The outcome is that States are not obliged to exercise their legislative jurisdiction since its assertion is made only an option. Thus, it has been reported that only few States have established their prescriptive jurisdiction pursuant to article 4[283].

[278] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, pp. 83-84
[279] UN Narcotics Convention 1988, art. 17
[280] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, p. 84
[281] UN Narcotics Convention 1988, art. 17
[282] UN Narcotics Convention 1988, art. 4
[283] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 213-214

2. The 1995 Council of Europe Agreement and other Multilateral/Bilateral Treaties

The *1988 UN Narcotics Convention* has been strengthened and supplemented by the Council of Europe with its *1995 Agreement on Illicit Traffic by Sea*, which expressly aims at implementing its article 17. Thus, the so-called *"1995 Council of Europe Agreement"* deals with the interdiction of vessels engaged in drug trafficking in international waters and it can be considered the most effective multilateral response to the call for the establishment of bilateral and regional arrangements to enhance the effectiveness of article 17. Thus, its content is intimately related with the *1988 UN Narcotics Convention* and such close connection is the result of the drafters' mindset: they wrote the agreement including only solutions in accordance to the letter of the *Vienna Convention*, excluding those contrary with its spirit. Moreover, the close link between the two instrument is also witnessed by the practise to grant the membership to the 1995 Agreement only to States which are or have become parties to the *1988 Vienna Convention*. However, being formally an "open agreement", the States parties to the Vienna Convention which are not Council of Europe members can participate only through means of an invitation by the Committee of Ministers[284]. The Agreement entered in force in 2000 after three ratifications and today it has fifteen parties. Moreover, it has been signed by other 8 countries which however decided to not officially ratify it[285].

Similarity to the *UN Narcotics Convention*, also the *1995 Council of Europe Agreement* promotes a case-by-case flag-state authorization system and it must be noted that the Flag state does not have an obligation to respond positively to a request for authorization, being also in position to eventually deny it[286]. In its framework, article 6 has gained a particular importance: when there are reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorisation of the Flag State to stop the vessel in waters beyond the territorial sea[287]. In this sense, the Convention fixes upon the Flag State a timeline of four hour from the receipt of the request to answer back to the intervening State[288]. During the *travaux préparatoires*, it was discussed whether the failure to respond in time could be considered a tacit consent to the authorization. However, the drafters opted for a more conservative approach and today article 8, which deals with the conditions for promoting the interdiction of the vessel, underlines that a prior express authorization shall be obtained by the intervening State before taking any action. Besides, it must be noted the use in article 6 of the expression "vessels engaged in or being used for" the commission illicit traffic in

[284] W. C. Gilmore, Narcotics interdiction at sea: the 1995 Council of Europe Agreement, Marine Policy, 1996, pp. 3-4
[285] As of 23 May 2021, see www.coe.int
[286] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 218
[287] Council of Europe Agreement 1995, art. 6
[288] Council of Europe Agreement 1995, art. 7

narcotics, which perfectly addresses the common "mother-ship" relationship between a ship and other smaller boats engaged together in drug trafficking[289].

An important element which deserves to be pointed out is how the *1995 Agreement of the Council of Europe*, differently from the *1988 UN Narcotics Convention*, does not permit but it rather requests the States parties to extend their prescriptive criminal jurisdiction to the offences committed on board vessels flying their flags or merely vessels without nationality. In fact, article 3 contains a mandatory rule calling each Party "to establish its jurisdiction over the relevant offences"[290]. In this sense, it is significative the inclusion of stateless vessels into the scope of the provision, especially considering the UN Narcotics makes them a reference only when providing the norms regarding the request of assistance in suppressing the illicit traffic[291]. Furthermore, another aspect of the Agreement deserving an insight is the use of the concept of "preferential jurisdiction" always in its article 3. In other words, the intervening and boarding State shares with the Flag State a concurrent jurisdiction over the relevant offences committed on board but the Flag State has a sort of "priority" in the exercise of its jurisdiction. The concept is fully clarified by article 1 of the 1995 Agreement, which expressly states that "preferential jurisdiction" means that the Flag State has the right to exercise its jurisdiction "on a priority basis", consequently excluding the exercise of the boarding State's jurisdiction over the relevant offence[292].

In this context, it must be noted the 1995 Agreement applies also when the vessel engaged in drug trafficking is at the same time involved in the commission of another crime: the exclusiveness of the illicit traffic in narcotics operation is not a requirement[293]. Besides, differently from the *1988 UN Narcotics Convention*, the 1995 Agreement requires that the request of authorization to board shall be made from the intervening State to the Flag State in written form. However, article 19 underlines how "modern means of telecommunications, such as telefax, may be used"[294]. In any case, similarly to the LOSC and *1988 UN Narcotics Convention*, the maritime interception operations (MIOs) justified under the Agreement must be always carried out by warships or military aircrafts.

Generally, an aspect of the Agreement which may be difficult to be implemented is the so-called "surrender of vessels, cargoes, persons and evidence" on board of the interdicted ship[295]. According to article 15, the surrender takes place when the Flag State has asserted its preferential jurisdiction upon the vessel's seizure. In such cases, the enforcement jurisdiction exercised by the boarding State is "continued" by the Flag state, which undertakes the prosecution of the offences. Thus, the individuals arrested, and the cargoes seized on board are

[289] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 219
[290] Council of Europe Agreement 1995, art. 3
[291] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 219
[292] Council of Europe Agreement 1995, art. 1
[293] W. C. Gilmore, Narcotics interdiction at sea: the 1995 Council of Europe Agreement, Marine Policy, 1996, p. 8
[294] Council of Europe Agreement 1995, art. 19
[295] Council of Europe Agreement 1995, art. 15

surrendered without extradition to the Flag State, having place a sort of *restitutio in integrum*[296]. This approach is consistent with the text of article 14, which expressly provides that, when the Flag State exercises its preferential jurisdiction, the measures taken by the boarding State towards the persons on board of the vessel are "deemed to have been taken as part of the procedure of the Flag State"[297]. It is evident we are in front of a proper "legal fiction" which can operate only under the on the assumption the intervening State's enforcement jurisdiction is on loan from the Flag State. However, the 1995 Agreement also contains a clause within its article 15 providing that in exceptional circumstances the Flag State can request the immediate release of the persons and cargoes on board of its vessel instead of activating the surrender procedure. Under these circumstances, the boarding State shall release them forthwith[298].

The only exception to the duty to surrender individuals deals with the issue of capital punishment and it is regulated by article 16 of the 1995 Agreement. In fact, although in Europe the death penalty is no more included in the criminal codes of the EU Member States, the same cannot be said with regard to countries belonging to other areas of the world. In fact, the capital punishment for drug trafficking offences is often prescribed by the legal systems of several African and Asian countries. Thus, considering that article 28 enables the Committee of Ministers of the Council of Europe to invite to accede the agreement also non-member States, the capital punishment clause assumes a particular importance[299]. Precisely, article 16 provides "the surrender of any person may be refused unless the flag State gives such assurances as the intervening State considers sufficient that the death penalty will not be carried out"[300].

In this context, the Caribbean Agreement (*2003 Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area***)** is another multilateral treaty at a regional level deserving an examination. Concluded in 2003, its main aim is the suppression of the illicit maritime and air trafficking in narcotic drugs and psychotropic substances taking place in the Caribbean Area. In fact, this region has been historically hit by drug trafficking also due to the presence of several navigational "choke points" rendering extremely difficult enforcement operations[301]. As the *1995 Council of Europe Agreement*, also the scope of the Caribbean Agreement is enhancing the effectiveness of article 17 of the *1988 UN Narcotics Convention*. In this sense, it is introduced a peculiar innovation with article 16 of the Agreement, which explicitly provides "when law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party located seaward of any State's territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search

[296] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, pp. 86-87
[297] Council of Europe Agreement 1995, art. 14
[298] Council of Europe Agreement 1995, art. 15
[299] W. C. Gilmore, Narcotics interdiction at sea: the 1995 Council of Europe Agreement, Marine Policy, 1996, pp. 11-12
[300] Council of Europe Agreement 1995, art. 16
[301] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 220

the suspect vessel, its cargo and question the persons found on board"[302]. In other words, differently from the *1988 UN Narcotics Convention* and the *1995 Council of Europe Agreement*, the boarding State shall not wait the answer of the Flag State to its request of authorization before taking any action. In fact, the ratification of the Caribbean Agreement constitutes itself an *a priori* authorization for interdicting all the foreign vessels suspected of drug trafficking in international waters. This flexible approach benefits also to the expediency and efficiency of the whole procedure since the intervening State shall not contact the Flag State for obtaining the authorization to board[303].

An a priori authorization for boarding vessels suspected of illicit traffic in narcotics on the high seas is conferred also by several bilateral treaties, for instance the *1981 UK-US Exchange of Notes* and the *1990 Treaty between Spain and Italy to combat illicit drug trafficking at sea*. The main peculiarity of the former is being non-reciprocal, meaning the US authorities are entitled under the Agreement to board the UK vessels but the UK ships do not have a respective right to interdict the US ones. Moreover, as we have already said, the US ships shall not obtain an express British authorization to board in each particular case because the exchange of notes itself constitutes a general consent in advance. However, once the boarding has taken place, the United Kingdom has the right to be notified of all the interdictions and prosecutions regarding the ships flying its flag. Besides, it must be taken into account that the scope of the Agreement covers the areas of the Caribbean Sea, the Gulf of Mexico and the waters within 150 miles of the US Atlantic Coast[304]. Furthermore, according to the wording used by paragraph 1 of the Agreement, the United Kingdom is committed to not object to an American interdiction of its own vessels when the US authorities have reasonable grounds to believe that a UK ship is engaged in drug trafficking with the purpose of importation of the illicit substances into the United States[305].

In this context, the *1990 Spain-Italy Treaty* is another important bilateral instrument for the suppression of the illicit traffic in drugs at sea. Differently from the *1981 UK-US Exchange of Notes*, it has a mutual nature since it recognizes the right to intervene to both Spain and Italy when there are reasonable grounds to suspect that a ship flying the flag of one party is engaged in drug smuggling on the high seas. However, when a party proceeds to the boarding without reasonable suspicion, it will be considered responsible for any eventual loss and damage occurred to the interdicted ship[306]. In any case, similarly to the *1981 UK-US Exchange of Notes*, there is no need of an ad hoc prior authorization to board from the Flag state because the *1990 Spain-Italy*

[302] Caribbean Agreement 2003, art. 16
[303] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 220-224
[304] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, pp. 82-83
[305] UK-US Exchange of Notes 1981, para. 1
[306] D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge studies in International and Comparative Law, 2009, pp. 85-86

Treaty constitutes itself the legal basis for the right to visit in international waters of vessels suspected of being engaged in drug trafficking[307].

In conclusions, there are several multilateral and bilateral agreements providing the legal basis for the interception of foreign vessels suspected of illicit traffic in narcotics on the high seas. However, the boarding measures shall be performed always under the authorization of the Flag state. Thus, we must notice that these multilateral and bilateral treaties do not constitute a breach to the fundamental principle of exclusive jurisdiction of the Flag State. On the contrary, they only provide exceptional measures in the regulation of the illicit traffic in narcotic drugs and psychotropic substances[308].

3. Statements of Italian jurisdiction in international waters: three concrete cases between 2015 and 2017

Drug trafficking at sea is an important source of revenue for several Italian criminal organizations, which are traditionally engaged in activities of importation and retailing of illicit and psychotropic substances. Such activities are carried out in cooperation with others foreign partners, above all Latin American drug smugglers for cocaine, Spanish criminal organizations for hashish and Albanian criminal groups for marijuana[309]. Thus, although Italy is not a main country producer, it plays a fundamental role in countering maritime drug trafficking due to two factors: its strategic geographic position in the Mediterranean Sea and its vast internal market whose functioning is often hit by criminal infiltrations[310]. Drug trafficking at sea has gained over the years a transnational nature and in this paragraph we will examine the main legal issues arising when the maritime interdiction operations (MIOs) aimed at suppressing the phenomenon take place outside the Italian territorial waters.

In November 2017 two Italian naval units of the financial police were exercising in international waters the right of visit on the basis of article 110 LOSC upon a flag-less vessel suspected of drug trafficking. The vessel did not have any fishing gear and it was devoid of identifying elements. Furthermore, there were aboard only 9 individuals of Egyptian nationality. After the survey, the Italian officials found few documents regarding the ship's enrolment in the registries of Delaware (USA) and, in addition, large quantities of hashish. However, during the maritime interception operation, the vessel sunk due to unknown causes and the Italian financial police managed to recover only 1.6 tons of the illicit substances carried. Thus, the nine Egyptian were brought to the port of Cagliari and they got arrested. Afterwards, their defence attorneys appealed the judgement of the Court of First Instance[311].

[307] E. Papastavridis, Interception on the High Seas to Counter Drug Trafficking, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 236
[308] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 209
[309] V. Delicato, Maritime Security and the fight against drug trafficking in the Mediterranean and Atlantic approaches, The German Marshall Fund of the United States, Istituto Affari Internazionali, 2010, pp. 1-2
[310] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, p. 83
[311] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, pp. 86-89

According to the defence, Italian courts should not have jurisdiction upon the case due to several elements. Firstly, the alleged illicit conduct took place in international waters upon an American ship. In this sense, there was not a significative link with Italy, also due to the absence of evidence of any attempt of introduction of drugs in the country. Moreover, the crew was entirely composed of foreign individuals. On the contrary, the Italian court based its jurisdiction on the assumption the case regarded a crime committed upon a stateless vessel against the peace, good order, and security of the coastal state. Thus, all the interested states could potentially enforce their jurisdiction on such type of conduct. Furthermore, the defence argued article 111 LOSC, which as we have already seen in chapter I of this work provides the so-called right of hot pursuit, should not apply: the ship did not enter the Italian territorial waters. In addition, the attorneys shared the view article 17 of the *1988 UN Narcotics Convention* should not apply too. In fact, such provision permits the detention, visit, inspection and pursuit of a foreign vessel only with the consent of the flag state and in the caselaw examined no request to the USA was sent[312]. All in all, the defence sustained there were not international provisions upon which basing the Italian jurisdiction.

Nevertheless, the adjudicative body followed a different reasoning, stating the enforcement of the Italian jurisdiction by the financial police was in compliance with article 110 LOSC: at the beginning of the maritime interception operation, the vessel was flag-less and there was not any identification mark apart from some Arabic wordings. Consequently, the right of visit should be granted, considering article 110 LOSC allows the boarding of a ship when there is a reasonable ground for suspecting the vessel is actually without nationality[313]. Moreover, the Italian court also classified as superficial and contradictory the answers of the American judge to the request of mutual assistance made by the Court of Appeal itself. Besides, the explanations given by the official Delaware were not considered sufficient to prove the existence of an effective genuine link between the USA and the illicit conduct. Thus, the ship's enrolment in the Delaware's registers was judged worthless. In other words, the ship fully fell in the category of "vessel without nationality" or "stateless vessel" and the American jurisdiction upon the caselaw was denied[314].

In this context, there were other several elements reinforcing the legitimacy of the Italian jurisdiction upon the case. For instance, it should not be considered relevant the circumstance that the presence of the defendants in Italy was not dependent on their will. In fact, their transhipment from the fishing boat to the Italian navy occurred due to a real state of necessity, which was determined by the situation of danger arising when the vessel began to sink. Moreover, three members of the crew declared they entered the vessel with the aim of illegally reaching Italy and the maritime route of the ship was heading towards the Calabrian coast of Tropea crossing the area between Sardinia and Sicily. One more time, these three considerations led to affirm the Italian jurisdiction upon the case[315].

[312] UN Narcotics Convention 1988, art. 17
[313] LOSC 1982, art. 110
[314] Corte d'Appello di Cagliari, sentenza 11 gennaio 2017 n. 1
[315] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, p. 89

Another important leading caselaw which deserves to be mentioned regards the authorization request to intervene on the basis of article 17 of the *1988 UN Narcotics Convention*. The case deals with the interception of the ship *Meryem*. This latter was flying the Turkish flag in international waters within the Sardinian Channel when a maritime interception operation of the Italian financial police stopped its route. In fact, the vessel was reported by the Central Directorate for Anti-Drug Services of the Italian Ministry of the Interior to the General Command of the financial police. The reason of the alert was based on suspects of illicit transport of drugs and psychotropic substances. Thus, the Central Directorate asked to the Turkish competent authorities the authorization request for boarding the ship, which was constantly monitored also through aircrafts of the Italian financial police. Furthermore, it was evident the vessel was moving from the high seas towards the Sicilian coasts.

Once having obtained the Turkish authorization to board the vessel, the Italian financial police ordered the ship suspected of drug trafficking to stop. However, this latter didn't comply immediately with the command and the Italian naval units proceeded to board it in international waters. The outcome was the detection of almost 10 tons of hashish and the consequent arrest of the nine members of the crew having Turkish nationality for the alleged conduct of illicit transport of drugs and psychotropic substances. Moreover, the offence was aggravated by the large quantities of hashish carried and also by the crime of association with the scope of illicit international drug trafficking[316].

The arrest was validated on the 7th of June 2015 by the Palermo preliminary investigation judge[317]. In this context, it must be noted how the defence argued the arrest should be considered illegitimate due to the fact the ship flying the Turkish flag was on the high seas during the boarding promoted by the Italian financial police. Moreover, the defence also highlighted the authorization released by Turkey to Italy should be limited only to the search of the ship, without encompassing the right to arrest the members of the crew. However, the adjudicative body has considered such argumentations in contrast with a significative Italian provision on the matter: article 99 d. P. R. n. 309/90. According to this latter, the Italian competent authorities are entitled to search and capture in international waters foreign ships suspected of drug trafficking: the only condition is the "full compliance with the rules of the international legal order"[318]. In this sense, such requirement was considered fulfilled in the examined caselaw by the authorization released from Turkey to Italy on the basis of article 17 of the *1988 UN Narcotics Convention.*

Besides, another caselaw regarding the statement of the Italian jurisdiction in international waters dates back to 2017. Precisely, in May 2017 an aircraft belonging to the European Border and Coast Guard Agency "Frontex" spotted on the high seas a flag-less raft heading towards the Apulian coasts. The vessel, which was suspected of drug trafficking, was reached by several naval units of the Italian financial police but it didn't

[316] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, pp. 92-93
[317] Giudice per le Indagini Preliminari di Palermo, Ordinanza di convalida di arresto e custodia cautelare in carcere, 7 giugno 2015
[318] Decreto del Presidente della Repubblica n. 309/90, art. 99

comply with their order to stop. Thus, in the attempt to escape the members of the crew started to throw away a large number of wraps containing drugs. However, the Italian ships succeeded in stopping the vessel in international waters and they seized almost 2 tons of marijuana. Moreover, the two smugglers on board of the raft were arrested[319].

In the report of the Italian financial police, the main focus was on the absence of any distinguishing markets which could lead to the identification of the ship's nationality. In fact, the vessel was flagless, and it could be properly defined as a "stateless vessel" or "vessel without nationality". Thus, in accordance with an important customary principle of international law embodied also in the *UN Convention on the Law of the Sea*, a vessel without nationality can be subjected to the so-called "flag enquiry": in other words, it can be captured and conducted to the national port of the capturing State for the adoption of appropriate measures. In fact, as we have already seen in the first caselaw examined under this paragraph, 110 LOSC allows the boarding of a ship when there is a reasonable ground for suspecting the vessel is actually without nationality[320]. In this sense, the vessel without nationality which is captured cannot invoke the protection of any State and thus, the adopted measures are justified by the absence of enforcement jurisdiction of any other State. Moreover, during the search and seizure of the vessel identified by the aircraft of the European Border and Coast Guard Agency, it was found a paper note indicating two nautical points corresponding to the Apulian coastal zone where the smuggling of marijuana should take place. Consequently, the Italian preliminary investigation judge stated the full legitimacy of the maritime interception operation promoted in international waters by the Italian financial police against the stateless vessel: the legal basis could be found on the article 110 LOSC regarding the so-called right of visit[321].

In this context, it must be examined also a recent caselaw concerning drug trafficking in which the Italian jurisdiction on the high seas has been denied. The matter, which dates back to 2019, regards a vessel flying the Dutch flag and engaged in the illicit smuggling of drugs and psychotropic substances in international waters. Indeed, the Italian jurisdiction upon the case was at first instance confirmed by the Court of Catania. However, one defendant proposed an appeal in cassation against such decision, arguing Italy should not exercise any jurisdiction since the alleged illicit conduct was committed entirely in international waters upon a vessel flying the Netherlands' flag. This view was shared also by the Italian Court of Cassation, which underlined how a State cannot intervene on the high seas against a vessel without the consent of the flag state and, in any case, within the limits of the prior authorization released. In this sense, it must be excluded the legitimacy of any unilateral intervention in international waters, even if the action is aimed at the repression of drug trafficking as prescribed by the *1988 UN Narcotics Convention*. In fact, this latter promotes a system of international voluntary cooperation among States in countering the phenomenon: the key for its functioning

[319] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, pp. 89-90
[320] LOSC 1982, art. 110
[321] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, p. 90

consists in the consent of the acceding countries[322]. However, in the case examined, the Dutch authorities asked the aid of the Italian financial police only with reference to the boarding of the ship, excluding the Italian competence at enforcing any act of deprivation of liberty. In other words, Holland did not waive its jurisdiction upon the case, but it merely authorized Italy to promote a monitoring activity on the vessel. Thus, the Italian Court of Cassation granted the defendant's appeal, and it denied the Italian jurisdiction with its judgement n. 13596 of the 28th of March 2019[323].

All in all, the examination of these recent concrete cases can lead us to conclude there are two main international provisions which often apply to maritime drug trafficking: article 110 LOSC and article 17 of the *1988 UN Narcotics Convention*. Specifically, article 110 LOSC applies when a stateless vessel is suspected of drug trafficking on the high seas and it allows the exercise of the right of visit: if the ship turns out actually to be without nationality, it can be brought to a national port of the capturing state and other measures such as arrests and seizures can be eventually undertaken. Differently, article 17 of the *1988 UN Narcotics Convention* applies when the vessel suspected of drug trafficking is flying the flag of another foreign State: under such circumstances, the competent authorities of the flag state shall be informed so that they can confirm the vessel's nationality. Afterwards, the interdicting state can expressly request the authorization to stop and monitor the vessel and, where appropriate, take measures against the member of the crew[324].

4. Narco-Fish: the relationship between drug trafficking and fishing vessels

Drug trafficking is a phenomenon strictly interrelated with global fisheries: several recent studies have highlighted how the trade of narcotics strongly relies on fishing vessels. However, the widespread lack of data and information about such practise has always made difficult any further analysis. Generally, drug trafficking is considered one of the most profitable illicit activities, whose global retail market amounted to 500 billion dollars in 2015[325]. Moreover, several manifestations of the illicit trade of narcotics fall under the scope of the definition "crimes at sea". In fact, maritime routes often constitute the main path of such trade. As we have already seen in the previous paragraph, maritime piracy is historically considered the first "crime at sea", even if other illicit activities such as IUU (illegal, unreported and unregulated) fishing, human trafficking, smuggling of weapons, several forms of environmental pollution and the discharge of noxious and toxic waste fully belong to the same legal category[326].

In this context, the use of fishing vessels with regard to drug trafficking has been largely reported in the past years, especially within the traditional areas where the phenomenon takes place. For instance, scholars share the opinion almost 90 % of the total amount of cocaine produced in South America is transported by sea.

[322] M. Castellaneta, La Cassazione sulla giurisdizione nel mare internazionale – Italian Court of Cassation on the jurisdiction on the high seas, Notizie e commenti sul diritto internazionale e dell'unione europea, 2019
[323] Corte di Cassazione, IV sezione penale, sentenza 28 marzo 2019 n. 13596
[324] A. Leandro, Mare e Sicurezza: il contrasto ai traffici marittimi illeciti, Cacucci Editore, 2018, pp. 93-96
[325] M. Channing, Transnational crime and the developing world, Global Financial Integrity, 2017, p. 3
[326] E. H. Allison, I. Kelling, Fishy crimes: The societal costs of poorly governed marine fisheries, Third Annual Convention of the Consortium of Non-Traditional Security Studies in Asia, 2009, pp. 3–4

Similarly, drugs and psychotropic substances coming from the West and the North African regions reach Europe crossing the Mediterranean Sea. Thus, monitoring, control and surveillance (MCS) measures aimed at countering drug trafficking have begun to address the phenomenon by detecting suspected ships. This situation has led drug smugglers to engage in their illicit activities through means of smaller and faster boats, in order to make their interception more complex[327].

The importance of fishing vessels in the promotion of drug trafficking has been witnessed also by the data collected from the European *Maritime Analysis and Operations Centre* (MAOC): according to this latter, the interdiction of cargo from maritime interception operations on fishing vessels represent almost the 44.5 % of all the volume of drug seizures[328]. Generally, quite all the reports concerning the European region highlight a strong contribution of fishing vessels in enhancing the illicit traffic of drugs and psychotropic substances. However, not always studies on the relationship between drug trafficking and global fisheries around the world has led to the same conclusions. For instance, officially only 1 % of all produced cocaine in South America is considered being trafficked through fisheries. This data seems to be clearly in contrast with global trends in other regions, so that several European scholars have begun to share the opinion reports coming from areas other than Europe tend to underestimate the contribution of fishing vessels in driving the growth of drug trafficking[329].

An important research published in 2020 by the enterprise "Fish and Fisheries" has brought relevant data on the topic. The study has been focused on 292 reported cases of fishing vessels interdiction in the period between 2010 and 2017, covering a total drug cargo of 522.1 tonnes of a value of almost 16.5 billion American dollars. Such research has underlined how the number of fishing vessels used for drug transhipment during the aforementioned timeline has tripled in comparison to the past standards, while the total retail value of seized drug even quadruped[330]. This common trend regarding all the categories of illicit drugs taken into account is confirmed singularly by cocaine and heroin. Besides, the 58 % of the intercepted vessels carrying illicit substances were small ships, mainly pangas, pirogues and artisanal boats. Thus, these vessels, being smaller in size, were found to carry smaller quantities of drugs but of a higher market value. In this context, we must notice how these collected data generally also confirm another important fact: although the seizures of illicit drugs occurring on land are higher in number in respect to those performed at sea, these latter are generally larger in value than the former[331].

In addition, predictably, the drug cargo carried upon artisanal vessels was found lower in weight than the average seizure aboard industrial fishing vessels. On the contrary, the value of drug cargo contained in artisanal

[327] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 994
[328] JOCC summary 2007-2010, Maritime Analysis and Operations Centre
[329] M. P. Atkinson, M. Kress, R. Szechtman, Maritime transportation of illegal drugs from South America, International Journal of Drug Policy, 2017, pp. 43–51
[330] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 998
[331] UNODC, World drug report 2015, New York, United Nations Office on Drugs and Crime

vessels was higher than the one of the illicit substances transported in industrial ships. The study highlighted that cocaine was the substance most traded since it appeared in 51 % of cases. Differently, cannabis was the substance with the highest weight carried, immediately followed by heroin. Furthermore, as already said before, it was noticed the tendency of smugglers to engage in drug trafficking by means of smaller boats, which consequently carry less tonnes of substances. In other words, it was observed a general decrease in weight per shipment. This decline of the ships 'size has involved transversely all drugs, from cocaine to marijuana and the geographic regions mostly interested were the Western Indian Ocean and both Central and South America[332]. This data can be better understood considering that small vessels constitute the most common mean of maritime transportation in Africa as well as in the Caribbean and in Latin America, representing respectively the 75 % and the 89 % of the whole fleet according to the Food and Agriculture Organization (FAO)[333].

Moreover, the research published in 2020 by the enterprise "Fish and Fisheries" has also brought attention on another important stat: in the period between 2010 and 2017, almost 5,700-7,760 tonnes of drug have been smuggled only in fishing vessels. Considering the drug value as parameter, the 16 % of the total market value of drugs, which could be ranged in 2017 between 426 and 652 billion dollars, was trafficked annually through means of such shipping category. Besides, only few cases (5 %) of overlap between drug trafficking and other crimes were reported. Actually, these last data were considered surprising by scholars, who used to believe the illicit trade of drugs and psychotropic substances in fishing vessels was an activity often carried out together with other types of crimes. Instead, the study highlighted how drug smugglers tend to avoid their engagement in other criminal activities in order to lower the risk of inspections of their vessels. The only crime which was found to sometimes overlap with drug-trafficking is the illicit arms shipment. On the contrary, drug smugglers very rarely engage in illegal fishing practices or in attempts to escape while transporting drugs[334]. Thus, it is evident how the registration as "fishing vessel" by the shipowners is only a mean to dissimulate the true illegal activity carried out. In this sense, the possession of the "correct papers" regarding the inscriptions in the registries is a mere instrument for reducing the risks of eventual more accurate inspections: once such papers are shown, the competent authorities usually do not engage in further legal assessments concerning other possible infractions[335].

The main category of substances which has been found to be carried in fishing vessel is cocaine and the reason is its low range of production. In fact, differently from other drugs such as cannabis which are produced in almost all countries, coca grows only in the American region, precisely only in 8 countries, above all Brazil, Colombia, Ecuador and Peru[336]. Precisely, in Colombia the cultivation of coca bush increased of one third in

[332] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 999
[333] FAO, The state of world fisheries and aquaculture 2018 – Meeting the sustainable development goals, 2018
[334] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, pp. 999-1000
[335] Stop Illegal Fishing. (2017). Illegal fishing? Evidence and analysis. Gaborone, Botswana: Fish-i Africa
[336] Il Post, Il più grande produttore di coca al mondo, 23 settembre 2013

the period between 2013 and 2015 due to an agreement between the national government and the Revolutionary Armed Forces of Colombia (FARC) which permitted its cultivation in large territories[337]. Similarly, also heroin has a low range of production. However, despite such peculiarity, this substance is not often traded in fishing vessels and instead it is mainly trafficked on land or transported at sea on other kinds of vessels such as cargo ships. According to the aforementioned study, cases of illicit drug trafficking in fishing vessels have been reported in almost all regions. However, the main maritime routes involved by the phenomenon are the ones situated in the Caribbean, in the Mediterranean, in West Africa, in the Western Indian Ocean and in Oceania[338].

In this context, the main outcome of the strict relationship between drug trafficking and global fisheries is the enrolment of fishermen in criminal organizations responsible for the constant growth of the phenomenon. Their involvement in drug-trafficking depends on several factors, above all social and economic ones: their poor living conditions, together with difficulties in access to resources, prompt them to engage in the illicit drug trade. Furthermore, another driver towards the enrolment of fishermen in drug trafficking is the adoption of conservative management measures to safeguard the marine environment and specific fish's species from excessive exploitation. In fact, such measures often do not plan employment alternatives for the individuals working in the fisheries sector[339]. The main "alternative programmes" addressing drug smugglers have been developed in relation not to fishing communities but to farming ones. In this context, fishermen may also have access to boats but not to fish due to the restrictive fishing seasons. On the contrary, it has also been highlighted how the access by drug smugglers to coastal zones and marine protected areas (MPAs) is a danger to the effectiveness of conservative measures since it increases the risk of harmful fishing practices[340]. Besides, other factors contributing to the enrolment of fishermen into drug trafficking are the low level of monitoring and surveillance activities upon drug cartels and the low incomes granted in the small-scale fisheries sector. Finally, also the corruption of local authorities plays an important role in the flourishment of the illicit trade of drugs[341].

In the analyses of maritime drug trafficking, it deserves a brief mention also the risk of violence which may occur on fishermen from drug cartels, especially in Central and South American States. Moreover, fishermen acting as drug smugglers when captured are exposed to strict law enforcements and jail times. In this sense, the international community has raised concerns on the actions of the US Coast Guard. In fact, it has been reported how this latter often holds captured drug smugglers abroad its vessels for weeks, behaving as a sort

[337] UNODC, World drug report 2017, United Nations Publication
[338] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 1001
[339] L. M. Saavedra-Díaz and S. Jentoft, The role of the small-scale fisheries guidelines in reclaiming human rights for small-scale fishing people in Colombia, The small-scale fisheries guidelines, 2017, pp. 573–594
[340] D. Wrathall, J. Devine, B. Aguilar-Gonzalez, K. Benessaiah, E. Tellman, S. Sesnie, The impacts of cocaine trafficking on conservation governance in Central America, Global Environmental Change, 2020, pp. 1-12
[341] N. Magliocca, K. McSweeney, S. E. Sesnie, E. Tellman, J. Devine, E. A. Nielsen, D. Wrathall, Modelling cocaine traffickers and counterdrug interdiction forces as a complex adaptive system, Proceedings of the National Academy of Sciences of the United States of America, 2019, pp. 7784–7792

of "floating Guantanamo". This practise has been criticized because smugglers should not be considered under arrest before they reach land[342].

As we have already seen, only in few cases drug smugglers engage in other activities such as IUU fishing while trafficking illicit substances. However, it must also be noted how drug trafficking organizations (DTOs) finance their business reinvesting their earnings not in a legitimate manner in multiple criminal enterprises in the fishing, shipment and agriculture sectors. In this sense, drug trafficking gives rise to consistent money laundry processes. Consequently, profits coming from drug trafficking often accelerate the collapse of fish stocks when they are reinvested in illegal, unreported and unregulated (IUU) fishing activities[343]. Evidence of money being laundered in harmful fishing practices have been collected in recent times in Colombia, Mexico and Panama[344]. Especially in Colombia, high levels of authorities' complicity have been reported in dealing with this phenomenon. All in all, reinvesting profits earned from drug trafficking in the fisheries sector is very common among criminal organizations.

Finally, scholars share the opinion the current COVID-19 global pandemic may intensify the phenomenon of drug trafficking through means of small fishing vessels. In fact, as well as other individuals working in other sectors, also fishermen have lost income due to the imposed confinement. Moreover, the restaurant closures have determined a low demand for fish and seafood. Thus, especially artisanal fishers may be more inclined in engaging in drug trafficking for facing their economic weaknesses. Besides, the pandemic has rendered maritime routes more accessible than land ones and smugglers may choose to transport the illicit substances at sea also due to the weak policing levels in the water[345].

5. Colombian Narcosubmarines: outlaw innovation for evading interdiction

The techniques of maritime drug trafficking have been developed over the years, becoming not limited to transportation at sea through means of fishing vessels. Narcotraffickers have implemented several technical innovations for lowering to the fullest extent the risks of interdictions. In this context, Colombia is one of the countries which traditionally has been mostly involved with the illicit trade at sea of drugs and psychotropic substances, especially cocaine. In fact, several individuals of Colombian nationality have taken part to drug cartels starting from the mid-1980s and early 1990s[346].

The Colombian Government has made significant efforts for countering the activities of cocaine smugglers. Precisely, under the influence of the United States of America, it established the Antinarcotics Police, which manly focuses on the development of an Air Force aimed at facing drug trafficking using air methods and at the promotion of Maritime Interdiction Operations (MIOs) to combat the illicit trade of cocaine at sea.

[342] T. Tong, The US Coast Guard is operating floating prisons in the Pacific Ocean, The World, BBC, 2017
[343] D. Belhabib, P. Le Billon and D. Wrathall, Narco-Fish: Global fisheries and drug trafficking, Fish and Fisheries, 2020, p. 992
[344] F. De Sanctis, International money laundering through real estate and agribusiness, Springer International Publishing, 2017, pp. 113-122
[345] E. C. Alberts, Drug trafficking could be putting "fragile fisheries" at risk study says, Mongabay, 2020
[346] P. Gootenberg, Andean Cocaine: The Making of a Global Drug, University of North Carolina Press, 2008

Moreover, the US Government signed in 2000 with Colombia an important agreement, also known as the *Plan Colombia*, whose main objective was providing the necessary resources for the development of military forces against narcoterrorism. Focusing on drug trafficking at sea, a significant step has been made by the Colombian Navy in 1994 with the creation of the Coast Guard Unit which contributed to the strengthening of maritime control through means of updated technologies. The Coast Guard Unit was created in response to many alarming reports about the increasing amount of cocaine transported using maritime routes after being departed from the Pacific Coast. In this sense, the aforementioned maritime interdiction operations (MIOs) became a fundamental tool for responding to smugglers and the criminal groups to which they belong[347].

In this context, the main outlaw innovation developed with success by drug smugglers is the so-called "narcosubmarine", which started to be fully utilized by Colombian traffickers only in 2000s for the smuggling of illicit substances into the US market. In fact, before such period drug smugglers used to experiment other forms and methods of transportation such as camouflage strategies, which however turned out to be more detectible and less effective than narcosubmarines. For instance, fishing satellites buoys are tools which have often been used by smugglers: their function consists in the localization of drugs which are transported and left in the open sea. In this way, the illicit substances can be easily tracked and recovered in the same manner of fishing nets. Practically, cocaine or drugs are tied to the buoy and left in a determined point on the high seas. Due to the signal emitted by the buoy, the illicit substances are geo-localized and picked up by the ship entitled to trade them in land.

Nevertheless, the Colombian Navy has proved over the years its capability in the interdiction and seizure also of narcosubmarines, as it is witnessed by the so-called "Narcosubmarines Graveyard'. This latter is a place situated only forty miles far from the Colombian town Buenaventura, where a proper cemetery of intercepted narcosubmarines is found. Indeed, it is located inside the main Colombian Navy base, the Bahia Malaga base in the Colombian Pacific, which was built in the late 1980s and whose main objective was at first the interception of drug traffickers in the open sea of the maritime routes between Ecuador and Panama[348].

At that time, drug trafficking was still considered a problem with limited relevance in comparison to other crimes and mainly confined in the Caribbean region. In fact, cocaine traffickers used to perform their transhipment mainly in that area. Furthermore, rather than narcosubmarines, camouflage methods were implemented to engage in drug trafficking. The illicit substances were often embodied through artisanal works in all sorts of objects having access on the market and the means of transportation were not limited to fishing vessels since also small airplanes were used for carrying drugs. In other words, the so-called "narcoplanes" were employed for trafficking illicit substances and substantial innovations were applied to their structure for improving their fuel reserve. Most of the times the gas containers of such narcoplanes were modified in order to allow them to fly from Colombia to Mexico and all the way back without refuelling: the risks of interception

[347] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, pp. 1-4
[348] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, pp. 5-7

by national authorities were significantly lowered and the illicit substances could be easily dropped from the plane after having been properly packed[349].

Over the years, these methods became always more sophisticated and criminal organizations in the field of drug trafficking progressively enhanced their coordination and expertise capacities. The set path was the development of always faster transport methods[350].

Actually, maritime radars detected for the first-time narcosubs in the early 1990s, when three pieces of this new technology were captured along the Caribbean Coast. In this context, only in the 2000s it could be noted a shift in smuggling forms from aircrafts delivery to maritime transportation and alternative means such as fishing ships, cargo ships, go-fast boats began to be used more frequently[351]. As with narcoplanes, smugglers have provided advanced modifications to go-fast boats and the other types of vessels, aiming at enhancing their fuel capacity and at better protect their cargo. Furthermore, they also created proper gas stations at the open sea so that the vessels could easily recharge their reserve with new petrol. Besides, the individuals entitled to drive these go-fast boats were instructed and trained for performing rapid evasive movements in cases of pursuit by national authorities. In this sense, the placement of a hull on top of the vessel was not only a method used to obtain more aerodynamic but also to better protect the cocaine carried from the water[352].

As already said before, among the new innovations in the maritime transportation sector, the narcosubmarine was the tool which was considered the less detectable and thus the most secure for carrying illicit substances.

Thus, narcosubs, also known as drug subs, narco semisubmersibles, self-propelled semisubmersibles, have played a fundamental role in the flourishment of drug trafficking, especially in Colombia. As we will examine, there are different categories of narcosubmarines built with different artefacts and techniques. The common element which is present in all the types is a valve. This latter is used to fill the vessel with water in cases of interdictions operations and capture, in order to sink the narcosubmarine. One more feature of narcosub is their disposable nature since drug smugglers often abandon them on the seabed after they have completed their task and the illicit substances have been traded on land. Rarely the narcosubmarine is reused for further journeys and, when this happens, evidence of multiple use can be found in the corrosion of the vessel's materials. It must be noted how these narcosubmarines are usually built combining wood with steel and glass fibre or, alternatively, they are made of kevlar, which is a strong synthetic fibre very resistant to heat and commercialized from the early 1970s.

Although narcosubmarines are considered slower in comparison to other means of transportation at sea, they became common over the years due to their capacity to cross long marine paths with very weighted illicit

[349] S. H. Decker and M. Townsend Chapman, Drug Smugglers on Drug Smuggling Lessons from the Inside, Temple University Press, 2008
[350] A. López Restrepo, A. Camacho Guizado, From smugglers to drug lords to traquetos: Changes in the Colombian illicit drug organizations, Democracy, human rights, and peace in Colombia, 2007, pp. 60–89
[351] UNODC, The Threat of Narco-Trafficking in the Americas, 2008
[352] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, p. 39

cargos. Besides, drug smugglers have made large use of these vessels because they do not generate any emissions after their departure, making difficult for radars to detect them on the high sea's seabed. Considering maritime drug trafficking in Colombia, the narcosubmarines usually depart from the northern coasts of the country, specifically from the Gulf of Urabá. Another area where police surveillance is traditionally low and thus from which smugglers often begin their routes upon narcosubs is the south Colombian Pacific coast. The capacity of narcosubmarines to carry cocaine depends on their structure: however, they can generally transport from 1 to 10 tons of cocaine each journey[353].

In this context, some scholars have calculated that only the 14 % of narcosubmarines engaged in drug trafficking are successfully interdicted[354], while according to the US Drug Enforcement Administration (DEA) these data are estimated around the 20 %[355]. Moreover, another statistic which deserves to be mentioned regards the number of narcosubs being stopped: by 2013, the Colombian Navy estimates 83 vessels confiscated under its maritime interdiction operations, with almost 98.2 tons of cocaine seized. Besides, the 78 % of them were found in the Pacific Ocean, while only the 20 % in the Caribbean area[356].

Indeed, the first narcosubmarine was seized on the 22nd of May 1993 in the waters adjacent to the Island of Providence, situated in the Archipelago of San Andrés belonging to the Colombian Department. It was actually a semisubmersible vessel carrying almost 2 tons of cocaine with a crew made of only two individuals. Afterwards, narcosubs have been built with always more specific materials and in accordance with the technological advancements in the maritime sector. Thus, these kinds of vessels evolved over times and they constitute a radical innovation replacing other forms of transport for drug trafficking. Today, narcosubmarines can be classified in four different categories: the self-propelled semi-submersibles; the submarines; the torpedo; the low-profile vessels (LPVs). Indeed, the self-propelled semi-submersibles (SPSS) and the low-profile vessels (LPVs), considering their immersion capacity, belong to the same group since they both do not completely submerge. In other words, they can be regarded generally as "semisubmersibles". Differently, the torpedo and the submarines are both "submersibles" due to their full capacity in reaching the seabed and immerging completely their hull[357].

Going in depth with the examination of narcosubmarines, in the category of "self-propelled semisubmersibles" only vessels which cannot totally submerge are included. However, they are in any case able to accurately control their running depth and direction and to lower their surface profile. Furthermore, they usually between 6 and 10 tons of cocaine and their construction costs are estimated around 1 million dollars[358]. Most of the

[353] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, pp. 42-43
[354] R. Mackey, Advances in "Narco-Submarine" Technology, 2010
[355] Diálogo, Semisubmersibles: The New Undersea Threat, 2009, pp. 66–71
[356] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, p. 43
[357] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, p. 49
[358] B. Ramirez and R. J. Bunker, Narco-Submarines: Specially Fabricated Vessels Used for Drug Smuggling Purposes, Claremont Graduate University Faculty Scholarship, 2015, p. 17

times they are made of wood or aluminium covered with fiberglass. Similarly, low profile vessels (LPVs) are also capable of controlling their depth and direction meanwhile lowering their surface but on the contrary they can usually carry only between 2 and 8 tons of narcotics. Indeed, the low-profile vessels resemble the shape of the go-fast boat which is used to build them, and they have an estimated cost of approximately 750, 000 to 1 million dollars. In recent times the design of low-profile vessels has substantially improved and today such vessels are often equipped with anti-radar features and other advanced systems such as modern electronics and water-cooled mufflers. Furthermore, their structure is covered of fiberglass to enhance their navigation capacity[359]. All these improvements render more complex their detection by the national authorities of Colombia and United States.

Finally, the analyses of narcosubs must consider the so-called "submersibles", category which includes both the submarines and the torpedo. The submarines are able to fully submerge under water due to the peculiarities of their structure. They are vessel with self-propulsion, and among all the narcosubmarines they are the most expensive, considering the high costs which must be sustained for their design, built and development. In fact, their cost is estimated between the 2 and 4 million dollars and they can carry narcotics up to 10 tons. Furthermore, they are almost undetectable since they potentially dive 30 feet under the surface and travel at a speed of 11 mph for a distance of 2,000 miles. In this sense, when they reach the seabed they became almost invisible also to the most advanced radars[360]. In this context, the last type of narcosubmarines belonging to the "submersibles" category is the torpedo. This latter is a vessel usually made of steel and it is characterized by its cylindrical structure, which is towed by a fishing boat. Being a submersible, it fully submerges under water as the submarines, and it can carry almost 2 tons of cocaine each journey. Of course, being towed to another vessel navigating upon the surface, the torpedo does not have the capacity to control its direction on its own. However, drug smugglers using a torpedo have an advantage: when they are approached by national authorities they can easily release the "narco torpedo" and recover it with a back-up boat once the maritime interdiction operation ends. Moreover, it is also a type of narcosubmarine relatively cheap, with a cost estimated between 250, 000 and 500, 000 dollars[361].

6. Partial conclusions and observations regarding drug trafficking

In conclusion, the illicit traffic in narcotic drugs and psychotropic substances, also known simply as "drug trafficking", constitutes a major threat to the international and national security worldwide. Generally, the *United Nations Convention on the Law of the Sea* refers to drug trafficking in international waters only with its article 108, which imposes upon States a general duty to cooperate in the repression of the illicit traffic in narcotics. Moreover, the same provision also provides that any state with "reasonable grounds for believing"

[359] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, p. 49
[360] B. Ramirez and R. J. Bunker, Narco-Submarines: Specially Fabricated Vessels Used for Drug Smuggling Purposes, Claremont Graduate University Faculty Scholarship, 2015, p. 17
[361] J. Guerrero, Narcosubmarines: Outlaw Innovation and Maritime Interdiction in the War on Drugs, Palgrave Pivot, 2019, pp. 49-53

that a ship flying its flag is engaged in illicit traffic can request other states' cooperation to suppress such traffic. In this sense, the LOSC does not address the more common situation where a State is willing to interdict on the high seas a ship suspected of drug trafficking flying the flag of another foreign state.

Furthermore, the LOSC does not include drug trafficking among the exceptions listed in article 110 and providing the legal basis for the exercise of the right of visit. In other words, there is not any customary rule permitting the right to visit of drug smuggling vessels on the high seas. However, article 110 can potentially apply to drug trafficking when the illicit traffic involves "stateless vessels": it is not uncommon the use by drug smugglers of vessels without nationality for their activities.

In this context, it must be noted there are several multilateral and bilateral treaties providing exceptional measures for the interception in international waters of foreign vessels suspected of illicit traffic in narcotics. Among all, the *1988 UN Narcotics Convention* with its article 17, the so-called "boarding provision". The importance of such provision is witnessed by its revolutionary content since it provides for the first time the right to board the vessels of other states parties engaged in drug trafficking. Precisely, it promotes a system of ad-hoc flag state consent based on a request of authorization that the intervening State must send for approval to the Flag State.

The mechanics of the *1988 UN Narcotics Convention* have been strengthened by the *1995 Agreement of the Council of Europe*. Moreover, afterwards other regional and bilateral treaties have addressed the issue of drug trafficking on the high seas with even more expediency, exempting the boarding State from requesting an ad hoc authorization to the Flag State in each drug smuggling case. In fact, such treaties often constitute themselves an *a priori* authorization for interdicting all the foreign vessels suspected of drug trafficking in the concerned area.

Finally, this chapter also examined the close relationship between drug trafficking and fishing vessels, especially considering the innovative techniques used by drug smugglers for evading interdiction: the narcosubmarines.

The next chapter of this work will focus on illegal, unreported and unregulated (IUU) fishing and its main legal implications.

Chapter IV: **Illegal, Unreported and Unregulated (IUU) Fishing: a threat to long-term biological capital and sustainable fisheries**

1. FAO's IPOA-IUU: a definition of Illegal Unreported and Unregulated Fishing

The term "illegal, unreported and unregulated fishing" (IUU) was used for the first time in 1997 during the sixth session of the *Commission for the Conservation of Antarctic Marine Living Resources* (CCAMLR) and only in 2001 the phenomenon was addressed with a proper definition by the *United Nations Food and Agriculture Organization* (FAO). Therefore, when in 1982 the *United Nations Convention on the Law of the Sea* (LOSC) was ratified, the concept of IUU fishing still did not exist and even the 1995 LOSC's additional instrument *Straddling Fish Stocks Agreement* did not regulate it[362].

However, IUU Fishing on the high seas must be analysed considering the original practise of Distant Water Fishing (DWF), which has always existed, although only in the second half of the 20th century hit the headlines due to the fast technological advancement. In fact, the fishing vessels started to develop accurate techniques for tracking fish stocks located far from the shore and the increase of distant water fishing became a threat to the marine species around the globe. In this context, the American President Truman launched in 1945 his *Truman Fisheries Proclamation*, claiming the right to establish conservation zones in areas of the high seas contiguous to the coasts of the United States without any prejudice to the other high sea's freedoms. This declaration influenced several Latin American States to extend their territorial waters up to 200 nautical miles with the aim of establishing fisheries conservation zones to safeguard the marine resources from distant water fishing. However, several fishing disputes arise between states, all regarding the difficult balance between the interests of distant water fishers and the coastal states' will to expand their jurisdiction for preventing the DWF from hunting the marine environment.

The *1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas* tried to address the problem with the promotion of several duties of cooperation, among all the obligation of States, whose nationals are fishing on waters adjacent to coastal states, to enter into negotiation with these latter for conservation measures[363]. Moreover, the Convention contains a provision, which also binds third states, allowing coastal states to enforce unilateral urgent conservation measures in the high seas. The non-discriminatory and scientifically founded character of these measures is the only condition for the exercise of such prerogative[364]. However, the 1958 Convention did not establish a limit to the territorial sovereignty of the coastal states and consequently, despite the duties of cooperation provided in its text, revealed its inadequacy in countering the DWF practise.

[362] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 534
[363] N. Oral, Reflections on the Past, Present and Future of IUU Fishing under International Law, International Community Law Review, 2020, pp. 368-371
[364] Convention on Fishing and Conservation of the Living Resources of the High Seas 1958, art. 7

A step further in addressing the phenomenon was made by the *1982 UN Convention on the Law of the Sea* (LOSC), which expanded the coastal states' sovereign rights for the management of natural resources up to 200 nautical miles, establishing the Exclusive Economic Zone (EEZ) and confining the territorial waters to 12 nautical miles. Moreover, the 1982 Convention provides a specific dispute settlement mechanism applicable also to DWF cases. As already said at the beginning of this paragraph, only in 1997 the Distant Water Fishing was recharacterized as IUU Fishing under the *Commission for the Conservation of Antarctic Marine Living Resources* (CCAMLR). However, such Commission did not contribute to the creation of a legal definition of the phenomenon, which was instead offered almost three years later by non-binding instrument *International Plan of Action (IPOA) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* adopted by FAO in 2001[365].

The main threat of IUU Fishing is the depletion of fish stocks, which occurs without letting species reproduce among each other and consequently harming the marine environment. In fact, as the International Tribunal for the Law of the Sea (ITLOS) stated in its advisory opinion on the 2nd of April 2015, the conservation measures of living resources of the sea "constitute an integral element in the protection and preservation of the marine environment"[366]. In this sense, it is clear an appropriate regulation of fishing is necessary for ensuring the protection of marine living resources and generally of marine biological diversity. This regulation shall prohibit the fishing activities which constitute environmentally harmful practices. However, it must be notice that formally the concepts of "environmentally harmful fishing" and "IUU fishing", in spite of being interrelated, must be distinguished. Formally, IUU Fishing is only a rule-based concept, which must be read in light of fishing activities violating international, regional or domestic laws. It focuses on the compliance and on the contravention of fishing regulations, while the "environmentally harmful fishing" is an ecology-based concept: the impacts of fishing on the marine environment, species and biological diversity constitute its object of analysis. Moreover, the environmentally harmful fishing is considered a broader concept in comparison to IUU fishing, encompassing the protection not only of marine species but of the marine ecosystems as a whole[367].

Another difference between environmentally harmful fishing and IUU fishing lies in the analysis of article 192 LOSC, indexed "General Obligation" under Part XII of the Convention. Such article underlines the states' duty to protect and preserve the marine environment[368]. The term "preservation" is intended for the conservation of the "present" ecosystem, while "protection" means safeguarding the marine environment from "future" damages. The provision, with its double content, reveals the flexible approach behind the concept of "environmentally harmful fishing". In other words, a fishing activity is considered harmful on the basis of the

[365] N. Oral, Reflections on the Past, Present and Future of IUU Fishing under International Law, International Community Law Review, 2020, p. 370
[366] ITLOS Reports 2015, Advisory Opinion, 2 April 2015, p. 37, para. 120
[367] Y. Tanaka, Reflections on the Implications of Environmental Norms for Fishing: the Link between the Regulation of Fishing and the Protection of Marine Biological Diversity, International Community Law Review, 2020, pp. 391-394
[368] LOSC 1982, art. 192

current environmental knowledges. When these latter change in the future, the fishing activities not classified as harmful in the past may be considered endangering the marine environment today. Differently, IUU fishing is a static concept, which does not evolve over time depending on the renewed environmental standards. It focuses on the breach of existing laws and regulations and only a change of these latter can bring an update to the concept[369].

In this context, the IUU fishing is considered by the International Community a serious threat to the food security of countries depending on the fish stocks that it contributes to endanger, and it is not a coincidence FAO is the only organization providing its definition. Indeed, although the 2001 FAO's IPOA-IUU seems to give more an explanation of the phenomenon rather than an accurate definition, its wording has been transposed by the Council of European Union in its *Regulation 1005/2008*, establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing[370]. Besides, several measures contained in the IPOA-IUU have been implemented in another international instrument, the *2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*[371].

The definition provided by IPOA-IUU clearly divides the fishing activities in three different categories, although in the subsequent parts of the international plan of action the phenomenon is addressed and analysed as IUU Fishing as a whole. Fishing is considered "illegal" whenever activities are carried out "in violation of national laws or international obligations"[372]. In this sense, the illegality is assumed on the breach of a protective law enacted by a State combating overfishing. Of course, the State claiming the violation of its law must have jurisdiction to validly apply it. As we have already seen in the previous two chapters of this work, States may enforce their jurisdiction on the basis of different criteria, such as territoriality, nationality of the crew or more commonly applying the flag state principle. However, there are several cases of ships committing overfishing whose flag has been easily reflagged into one of a State not having a legal framework addressing fishing activities causing an excessive depletion of fish stocks. In these cases, the flag state principle can be easily circumvented, and the vessel is intended to fly a "flag of non-compliance". In order to contrast this practice, it has been developed the "active personality" principle, according to which jurisdiction over IUU fishing cases can be asserted not only with reference to the ship's flag but also considering the nationality of the crew members[373]. Furthermore, States often claim their jurisdiction for violations of their IUU norms on the basis of their territoriality: in fact, coastal states can declare certain fishing activities "illegal" if performed within their territorial waters (up to 12 nautical miles) but also within their exclusive economic zone (up to 200 nautical miles). The waters of the EEZ fully fall in the scope of the IPOA-IUU subsection 3.1.1, which

[369] Y. Tanaka, Reflections on the Implications of Environmental Norms for Fishing: the Link between the Regulation of Fishing and the Protection of Marine Biological Diversity, International Community Law Review, 2020, pp. 393-394
[370] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 534
[371] A. M. Song, J. Scholtens, K. Barclay, S. Bush, M. Fabinyi, D. Adhuri and M. Haughton, Collateral damage? Small-scale fisheries in the global fight against IUU fishing, Fish and Fisheries, 2020, p. 832
[372] 2001 IPOA-IUU, para. 3.1.3
[373] D. Erceg, Deterring IUU fishing through state control over nationals, Marine Policy, 2006, pp. 173-174

speaks about "waters under the jurisdiction of a State". Indeed, almost the 90 % of fish stocks targeted by IUU fishing activities are usually located in the exclusive economic zone[374].

Alternatively, fishing activities can be considered "illegal" pursuant to IPOA-IUU also "in violations of international obligations". At a first glance, this wording seems to be vague and ineffective since international law imposes duties not towards individuals but towards States. However, an activity can be regarded "illegal" under international law if a State, having an obligation to prevent it, does not comply with its duty. In other words, the State which does not exercise its jurisdiction to prosecute IUU fishing performers pursuant to an international obligation is breaching the law. This approach is confirmed by the IPOA-IUU in its subsection 3.1.2, where it addresses "illegal" fishing activities carried out by vessels, whenever they constitute a breach of "conservation or management measures by which the States are bound"[375]. Generally, these international obligations are imposed upon States by the so-called regional fisheries management organizations (RFMOs). These latter are international organizations whose parties are countries having fishing interests in a specific regional area. RFMOs usually have a full authority to impose restrictions to fishing activities upon their members. However, States not joining such organizations are not directly bound by their prescriptions. In this sense, the IPOA-IUU has also mentioned "cooperating states to a relevant RFMO" in its subsection 3.1.3, trying to involve such states in the respect of international obligations imposed at a regional level[376].

Going forwards in our analysis of IUU Fishing, fishing activities are considered "unreported" whenever they fail to report, or they misreport their catches in contravention of national or regional rules[377]. The non-reporting or misreporting must have as object relevant information, such as the volume and composition of catch and landings. It can also consist in the lack of information about the vessel registration, its movement or simply the location of its fishing activities. The main outcome of unreported fishing is the difficulty in tracing the endangered fish stocks, which causes the implementation of inadequate harvest strategies. Consequently, the lack of transparency brought by unreported fishing determines a general incapability in facing fraudulent practices on high seas[378]. The main difference with illegal fishing is the lack of the expression "cooperating states to relevant RFMO", which instead is used in the description of the previous illicit conduct. This means the subsection 3.2.2 regarding "unreported fishing" implies that the State violating regional rules must be a full member of the regional fisheries management organization in question. Nevertheless, illegal and unreported fishing consists in the breach of rules by behaviours not in compliance with national or international

[374] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 538
[375] 2001 IPOA-IUU, para. 3.1.2
[376] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 538-541
[377] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 293, Oxford: Hart Publishing
[378] A. M. Song, J. Scholtens, K. Barclay, S. Bush, M. Fabinyi, D. Adhuri and M. Haughton, Collateral damage? Small-scale fisheries in the global fight against IUU fishing, Fish and Fisheries, 2020, pp. 833-834

obligations. Thus, they actually have the same legal nature and unreported fishing can be considered a subcategory of illegal fishing[379].

Differently, "unregulated" fishing deserves a unique examination in light of its more complex nature. Generally, activities are considered "unregulated" when there are not national laws or international obligations regulating them. In this sense, the adjective "unregulated" seems to be the contrary of "illegal", attribution which instead requires the breach of certain legal provisions. Specifically, the IPOA-IUU plan of action regulates the phenomenon distinguishing two types of activities: fishing that is inconsistent with a State's responsibility in respect of the conservation of marine living resources; fishing not in compliance with an RFMO's conservative marine measure by non-members countries[380]. Moreover, the IPOA-IUU also underlines in its subsection 3.4 how certain activities can be regarded as "unregulated" even if they are not in violation of the applicable international law. It also adds certain activities belonging to this category "may not require the application of measures envisaged under the International Plan of Action"[381]. The double content of this subsection 3.4 highlights that certain unregulated fishing activities may not be illegal. This view is confirmed also by the *FAO Technical Guidelines on the Implementation of the IPOA-IUU*, which explicitly states that IUU fishing is a broad legal category encompassing numerous fishing activities "most of which is illicit"[382]. Thus, from this wording it is evident IUU fishing comprises both legal and illegal activities.

However, in light of the subsection 3.4 of IPOA-IUU plan of action, scholars have debated whether these legal unreported fishing activities do fall or not into the scope of the illegal, unreported and unregulated (IUU) fishing definition. The main doctrine has answered that technically they do but their inclusion is intended to be only a formality since the measures contained in the IPOA-IUU do not apply to such activities. Indeed, the subsection 3.4 of the IPOA-IUU constitutes a peculiarity among the IUU fishing regulations: it is the only part of the FAO's plan of action which has not been transposed by the EU Council in its *Regulation 1005/2008*. Therefore, it seems at a first sight under EU law that all unreported fishing activities shall be considered illegal. However, some scholars share the opinion the omitted implementation of section 3.4 into the European legal framework should be intended as a mere oversight[383].

Going back to the analysis of the other two types of unregulated fishing, the IPOA in its subsection 3.3.1 deals with activities carried out by stateless vessels and ships flying the flag of a non-member country of a specific RFMO. Such activities are considered "unregulated" if they are not in compliance with the RFMO's conservative management measures[384]. These measures are aimed at preventing overfishing through the

[379] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 541
[380] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 293-297, Oxford: Hart Publishing
[381] 2001 IPOA-IUU, para. 3.4
[382] 2002 FAO Technical Guidelines on the Implementation of the IPOA-IUU, note 15 at 5
[383] J. Theilen, What's in a Name? The Illegality of illegal, unreported and unregulated fishing, The International Journal of Marine and Coastal Law, 2013, p. 543
[384] 2001 IPOA-IUU, para. 3.3.1

imposition of quotas, which are often exceeded and not respected in fishing activities. The last type of unregulated fishing refers to activities which are generally inconsistent with state responsibilities for the conservation of marine living resources under international law[385]. The main provision on the topic is the IPOA-IUU subsection 3.3.2, whose geographical scope consists in areas where conservation and management measures of a RFMO do not apply. In other words, the areas addressed belong to the high seas and they do not fall into the national jurisdiction of coastal states which have failed to adopt the required conservative measures. In fact, state responsibilities concerning the conservation of marine living resources on the high seas is regulated by various international norms. Above all, article 119 LOSC states fishing in international waters shall be respect specific amounts of total allowable catch (TAC): in other words, conservative measures must be based on scientific evidence granting the maximum sustainable yield and at the same time the restoration of populations of the harvested marine species[386].

Moreover, as we have already seen at the beginning of this paragraph, article 192 LOSC establishes the general duty to protect and preserve the marine environment. As it has been highlighted by both the ITLOS in its *Advisory Opinion to the SRFC*[387] and the Arbitral Tribunal in the *South China Sea*[388] case-law, this duty applies to all maritime zones including the high seas and must be interpreted widely due to its belonging to the corpus of norms regarding the environment. Consequently, the outcome is the State's international responsibility for its behaviours in violation of obligations concerning the conservation of marine resources, even if the use of the alleged "unsustainable" fishing method is considered legal at a national level. Always in accordance with the statements of the ITLOS and the Arbitral Tribunal respectively in *SRFC* and *South China Sea* case-laws, the State's responsibility arises whenever the standards of the so-called "due diligence" are not respected. Such standards presuppose the adoption by the State not only of appropriate measures but also an adequate vigilance upon their correct enforcement[389].

2. Multilateral measures preventing IUU Fishing

The role played by IUU fishing in the progressive deterioration of fish stocks worldwide has led to a general growing awareness on the issue. In this sense, it also contributed the inclusion by the *UN General Assembly* in 2015 of Target 4 in Goal 14 of the *UN Sustainable Development Agenda*. The target urged all States to "effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices"[390] by 2020. However, considering today it is still estimated an annual loss of 11-26 million tonnes of fish due to IUU, the target does not seem to have been fulfilled. In fact, globally one in

[385] 2001 IPOA-IUU, para. 3.3.2
[386] LOSC 1982, art. 119
[387] Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, ITLOS Reports 2015, 2 April 2015
[388] Republic of the Philippines v. the Peoples' Republic of China, PCA Case No. 2013-19, 12 July 2016
[389] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 293-294, Oxford: Hart Publishing
[390] The 2030 UN Sustainable Agenda, Goal 14 target 4

five fish is caught with IUU fishing practises, with an economic loss which is overall equivalent to an amount oscillating between 10 to 23 billion per year[391].

In this context, States have understood the importance of cooperation in addressing the phenomenon, since the lack of common actions at an international or regional level can reduce the effectiveness of national and unilateral measures countering IUU fishing. In this sense, developed countries began to cooperate with less developed ones to the protection of fish stocks, achieving reciprocal benefits[392]. The collaboration can also consist in the implementation of fisheries frameworks into the legislation of developing countries which still do not have an effective regulatory scheme for IUU fishing. For instance, Thailand was considered by the European Union in 2015 as a country not having an appropriate legislation for facing IUU fishing. Thus, it enacted new reforms implementing measures against IUU fishing in compliance with international law, avoiding the eventual imposition by EU of seafood export banners. The same legislative process has been followed by Vietnam with the entrance into force of a new regulation on the topic in 2019[393].

However, the most effective way of cooperation in combating IUU fishing has been the stipulation of multilateral agreements. Considering the significative contribution given in defining IUU fishing, the most important instrument in enhancing cooperation among states is the IPOA-IUU, the plan of action adopted by the FAO Council in 2001 in compliance with the *1995 Code of Conduct for Responsible Fisheries*. The scope of the plan is "to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law"[394]. A fundamental role in the establishment of the IPOA-IUU has been made by Australia, which officially called FAO to adopt a plan of action for combating IUU fishing through the submission of a paper to the Twenty-third Session of the Committee on Fisheries (COFI)[395]. Today, the IPOA-IUU is classified as a voluntary international instrument, belonging to the so-called "soft-law" since it uses expressions such as "encourage", "should" and "to the possible extent". In other words, it does not impose upon States any international duties, but it contains only recommendations. However, its relevance is worldwide recognized and even the annual *UN General Assembly Resolutions on Oceans and Law of the Sea* stress the importance of implementing its measures[396].

As we will analyse in this chapter, The IPOA-IUU requests flag States, port States, coastal States, and market States to adopt "in an integrated manner"[397] certain measures to combat IUU fishing. It also constitutes a basis

[391] A. M. Song, J. Scholtens, K. Barclay, S. Bush, M. Fabinyi, D. Adhuri and M. Haughton, Collateral damage? Small-scale fisheries in the global fight against IUU fishing, Fish and Fisheries, 2020, p. 832
[392] B. Hutniczak and F. Meere, International Co-operation as a Key Tool to Prevent IUU Fishing and Disputes over It, International Community Law Review, 2020, p. 441
[393] D. Welling, EU yellow card decision on Thailand will have "spillover" benefits, Intrafish, 2019
[394] 2001 IPOA-IUU, para. 8
[395] K. Riddle, Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious, Ocean Development and International Law, 2007, pp. 269-272
[396]E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 298-299, Oxford: Hart Publishing
[397] 2001 IPOA-IUU, para. 9

for the adoption of the *2005 Port State Measures Agreement*. Moreover, under its influence several conservative management measures have been developed within the RFMOs. In particular, IPOA-IUU's paragraphs 78 and 79 recommends the adoption of such measures even to non-members countries in spirit of cooperation and it generally calls States to take part to RFMOs[398]. Besides, it also encourages scientific research aimed at fishing identification[399] and the implementations of both the *1995 Fish Stocks Agreement* and the *1993 Compliance Agreement*[400].

With reference to Flag States, the IPOA-IUU requests these latter to effectively exercise jurisdiction upon vessels flying their flags, in order to control they are not engaged in IUU fishing. More importantly, the Flag State must guarantee its capability in performing such monitoring activity before the registration of ships under its flag. IPOA-IUU also calls Flag States to share their data about transhipment with RMFOs and other States. With reference to Coastal States, the IPOA-IUU requires similar duties: activities of surveillance over ships navigating in their economic exclusive zone; cooperating with other states; granting the right to fly their flags only to vessels with no reasonable grounds for suspecting their engagement in IUU fishing.

Instead, with regard to Port States, IPOA-IUU asks them to allow the entrance only in certain ports. Moreover, activities of inspection shall be periodically carried out, denying the entrance to vessels clearly engaged in IUU fishing. Finally, it must be noted the IPOA-IUU also allows States to use their market power for prompting other international actors or non-cooperating countries to take measures in compliance with the standards of their plans of action to deter IUU fishing. In this sense, the Parties to IPOA-IUU shall promote multilateral trade-related measures aimed at fighting IUU fishing with import and exports bans[401].

In this context, an important step towards the full implementation of the 2001 IPOA-IUU has been made with the adoption during the 36th Session of the FAO Conference of the *2009 Port State Measures Agreement*, which officially entered in force in 2016. This document has a legally binding nature and reflects the new belief Port States should have an active role in tackling IUU fishing. Its relevance can be fully understood considering the limited number of provisions dealing with port state measures before the *1995 Fish Stocks Agreement*. In fact, the attention in combating IUU Fishing was all drawn on Flag States, whose importance in developing conservative and management measures was stressed particularly by the *1993 FAO Compliance Agreement*. According to this latter, Port States were only called to cooperate with Flag States in the detection of vessels endangering the effectiveness of international conservation and management measures, but not vice-versa. Moreover, also the *1995 FAO Code of Conduct for Responsible Fisheries* did not address properly port states responsibility in combating IUU Fishing. Only the *1995 Fish Stocks Agreement* promoted for the first-time port states measures and the changing view about the role of port states in combating IUU fishing was

[398] 2001 IPOA-IUU, para. 80
[399] 2001 IPOA-IUU, para. 77
[400] 2001 IPOA-IUU, paras. 11-12
[401] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 299-300, Oxford: Hart Publishing

embodied subsequently in the 2001 IPOA-IUU. Afterwards, the FAO Secretary-General started to convene several Expert and Technical Consultations aimed at developing a harmonized system of port states measures through the creation of a voluntary regional instrument against IUU fishing[402]. The outcome was the adoption of the *2005 Model Scheme on Port State Measures to Combat Illegal, Unreported, and Unregulated Fishing.* Simply known as "Model Scheme", it has soft law nature since there was no political will to develop a legally binding document[403].

The process towards an internationally recognized regulation of port states measures, on the basis of the Model Scheme and the 2001 IPOA-IUU, culminates in the adoption of the *2010 Port States Measures Agreement*, which was approved in the 36th Session of the FAO Conference in November 2009. It was the UN General Assembly to suggest in 2006 the development of legally binding global instrument concerning IUU Fishing, with the explicit scope to "prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems"[404]. Such agreement officially entered into force on 5th June 2016 and its main function consists in the denial of entrance to ports for ships upon which there are evidence of engagement in IUU fishing.

Precisely, the denial of the use of port can be possible at three different stages: before the entrance; upon the entry; once the inspection has been performed. Before the entrance, the access to the port must be denied when from the information given to the port states a sufficient proof of engagement in IUU Fishing can be deduced[405]. In this context, it is internationally agreed ships flying the flag of countries not Parts of the *Port States Agreement* do not have a right to enter a port[406]. There are also cases in which, even if a vessel is suspected of IUU fishing, there is no sufficient evidence to prove it. Under these circumstances, the agreement allows port states to grant the entrance, despite for the only purpose of inspecting the ship. When the results of the inspection highlight an engagement in IUU fishing, the use of the port must be denied and the Flag State of the vessel must be informed, together with the eventual RFMO to which it is member. The ratio is spreading the outcome of the inspection as soon as possible, so that appropriate harmonised actions could be undertaken. In this sense, the aim is denying to the vessel the access to all ports of the region, rendering almost impossible its landing and transhipping[407]. On the other hand, scholars share the opinion the main weakness of the

[402] E. Witbooi, Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context, The international Journal of Marine and Coastal Law, 2014, pp. 297-300
[403] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 300, Oxford: Hart Publishing
[404] FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2010, art. 2
[405] E. Witbooi, Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context, The international Journal of Marine and Coastal Law, 2014, p. 300
[406] A. Serdy, The Shaky Foundation of the FAO Port State Measures Agreement: How Watertight is the legal seal against access for foreign fishing vessels, International Journal of Marine and Coastal Law, 2016, pp. 422-441
[407] E. Witbooi, Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context, The international Journal of Marine and Coastal Law, 2014, p. 301

agreement is the lack of authority for the imposition of trade-related measures, which are expressly not included. The reason must be found in the conception of the agreement as a tool differing from a trade instrument[408].

Another example of multilateral action against IUU fishing can be found in the various kind of conservative management measures adopted within the RFMOs. Above all, the "blacklists" of vessels presumed of being engaged in IUU Fishing deserve a mention. The ships included in such lists are subject to severe punitive sanctions by States and other international actors. Moreover, the members of RFMOs are allowed to restrict the access to their ports against the blacklists' components. The ratio behind this faculty is causing a loss of market value which would have the effect to disincentive IUU fishing[409]. Instead, the main issue arising from IUU Fishing vessel lists deals with their transparency: although paragraphs 63 and 66 of 2001 IPOA-IUU explicitly require listing shall be made "through agreed procedures in a fair, transparent and non-discriminatory manner"[410], the inclusions in lists are often politicized. Moreover, another criticism regarding the blacklists deals with the criteria used for their compiling. In fact, different methods are used by the different RFMOs around the globe[411].

Besides, RFMOs also often recommend the use of port measures, whose practise has been reinforced especially after the entrance in force, as we have already seen, of the *Port States Agreement* in 2016. For instance, a cooperative approach towards the development of common port measures can be found in RFMOs such as the Indian Ocean Tuna Commission, the North-East Atlantic Fisheries Commission and the South-East Atlantic Fisheries Organization. Indeed, the European Union adopted between 2010 and 2011 port states measures against IUU fishing even before the ratification of the *Port States Agreement*[412].

In this context, RFMOs have played a fundamental role also in identification of non-cooperating countries against which adopting trade restrictive measures[413]. These latter will be fully examined in the last paragraph of this chapter, together with their compatibility under international law. Finally, it must be highlighted RFMOs have also strengthened cooperation between states in tracking international movements of IUU fishing vessels through the adoption of "catch documentation schemes" (CDSs). Their function consists in issuing a certificate witnessing the legality of a catch to the correspondent owner and subsequently allowing its access to the market. However, the RFMOs usually develop CDSs differing to the unilateral ones operated by the

[408] D. Doulman and J. Swan, A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Fisheries and Aquaculture Circular 1074, 2012, p. 68

[409] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 301-302, Oxford: Hart Publishing

[410] 2001 IPOA-IUU, paras. 63 and 66

[411] European Commission, Community action plan for the eradication of illegal, unreported and unregulated fishing, COM (2002) 180 Final, para. 3.3

[412] R. Caddell and E. J. Molenaar, Problems and Progress in Combating IUU Fishing, Strengthening International Fisheries Law in an Era of Changing Oceans, 2019, p. 303

[413] G. Hosch, Trade Measures to Combat IUU Fishing: Comparative Analysis of unilateral and multilateral approaches, International centre for trade and sustainable development, 2016, p.9

European Union[414]. In order to address this issue, the FAO adopted specific CDS Guidelines in July 2017. These latter solved the debated point stating that multilateral or regional CDS should be preferred over unilateral ones and highlighted the effectiveness of schemes involving both flag and coastal state[415]. Once again, it was stressed the importance of cooperative approaches in combating IUU Fishing.

3. The 1995 Straddling Stocks Agreement: a legal basis for interception on high seas to counter IUU fishing

Circumscribing the field of analysis to the high seas, the only provisions of the *United Nations Convention on the Law of the Sea* potentially applicable to IUU fishing are its articles 116-120. Generally, this set of rules remarks the Flag State primary responsibility to exercise its jurisdiction over its vessels when these latter are engaged in unlawful fishing activities such as IUU fishing. Moreover, article 117 LOSC expressly imposes upon States a duty to adopt, with respect to their nationals, measures for the conservation of the living resources of the high seas[416]. In this sense, considering IUU fishing as a threat to long-term biological capital and sustainable fisheries, this provision has constituted in practise a legal basis for the exercise of the States' jurisdictional powers against their nationals engaged in IUU fishing even if they operate on board of a foreign vessel.

However, we must notice how the *United Nations Convention on the Law of the Sea* does not provide any general legal basis for maritime interceptions operations (MIOs) against foreign-flagged vessels suspected of being engaged in IUU fishing on the high seas. Nevertheless, as we have already pointed out with reference to drug trafficking, the boarding of a foreign ship when there are reasonable grounds to suspect its engagement in illegal, unreported and unregulated fishing may be granted under article 110 LOSC when the aforementioned ship is a stateless vessel[417].

In this context, the main multilateral treaty providing to contracting States a right of at-sea inspection in international waters of contracting party vessels is the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, also known as 1995 Straddling Stocks Agreement. In particular, the need of such global treaty providing a legal ground for enforcement actions on the high seas became indisputable after the *Estai* caselaw. This latter concerned a dispute between Canada and Spain on the legitimacy of fishing activities immediately outside the Canadian exclusive economic zone, but always in international waters. Precisely, Canada claimed its right to exercise its jurisdiction over the Spanish fishing vessels, which were accused of having hunted the marine environment. On the contrary,

[414] R. Caddell and E. J. Molenaar, Problems and Progress in Combating IUU Fishing, Strengthening International Fisheries Law in an Era of Changing Oceans, 2019, pp. 304-305
[415] 2017 FAO CDS Guidelines, para. 5.1
[416] LOSC 1982, art. 117
[417] E. Papastavridis, Maritime Interception to Safeguard the Fundamental Freedoms of the High Seas, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 199-200

Spain sustained that Canadian enforcement powers over its vessels would breach the fundamental principle of freedom of the high seas, together with the principle of exclusive jurisdiction of the Flag State. In this situation, it was surprising the response of the International Court of Justice, which explicitly held it lacked jurisdiction to decide on the matter[418].

Thus, the importance of the *1995 Straddling Stocks Agreement* was evident. In this sense, the Agreement firstly promotes a system of cooperation for the conservation and management of particular straddling and highly migratory fish stocks mainly based on RFMOs. However, article 8 of the treaty also highlights that the obligation to not undermine the conservation and management measures of the relevant RFMOs must be respected also by non-parties States to these organizations[419]. Consequently, even non-members States shall cooperate in the conservation and management of straddling and highly migratory fish stocks on the high seas[420].

In addition, as already said before, the 1995 Fish Stocks Agreement plays a fundamental role in addressing the procedures for the exercise of enforcement jurisdiction in international waters to ensure the respect of conservation and management measures. In this sense, its article 21 allows States Parties to the Agreement which are members to a subregional or regional fisheries management organizations to board and inspect a contracting party vessel on the high seas in areas covered by such RFMOs. The peculiarity is that such right to inspect is provided whether or not the Flag State of the fishing vessel boarded is a State participating to the RFMO: it is sufficient the ship is flying the flag of a State party to the *1995 Fish Stocks Agreement*[421]. Moreover, the article specifies the boarding shall be performed through means of "duly authorized inspectors", who must present at the time of the boarding their credentials to the master of the ship. Furthermore, we must notice that the entire procedure applies only in the absence of a boarding system already provided by the regional fisheries management organization[422].

Thus, it is requested to States the establishment of boarding and inspection procedures through subregional and regional management organizations and the boarding State shall promptly notify the Flag State of the alleged breach of conservative and management measures by the vessel flying its flag[423]. After the notification, the Flag State can alternatively take enforcement actions upon the ship or allow the boarding State's investigation. In cases the Flag State fails to respond and to take actions, the duly authorized inspectors are entitled to request to the master to bring the vessel to the nearest port[424].

[418] Fisheries Jurisdiction Case (Spain v. Canada), ICJ Reports 1998/507
[419] 1995 Straddling Fish Stocks Agreement, art. 8
[420] 1995 Straddling Fish Stocks Agreement, art. 17
[421] 1995 Straddling Fish Stocks Agreement, art. 21
[422] E. Papastavridis, Maritime Interception to Safeguard the Fundamental Freedoms of the High Seas, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, p. 200
[423] 1995 Straddling Fish Stocks Agreement, art. 22
[424] 1995 Straddling Fish Stocks Agreement, art. 21

Generally, despite its strong points, the at-sea inspection system provided by the *1995 Fish Stocks Agreement* has also some weaknesses. For instance, the scope of its inspection schemes does not encompass the high seas fisheries in general: in fact, the 1995 Agreement refers only to straddling and highly migratory fish stocks. In addition, we shall always remember that the field of application of RFMOs is limited to only some geographical areas of the world. Finally, more importantly, being based on the Flag State's consent, the at-sea inspection procedures of the *1995 Fish Stocks Agreement* are subordinated to the ultimate discretion of the Flag State in regard to prosecution and sanctions[425].

In conclusion, we must also notice that there are several regional fisheries organizations which have incorporated, within their treaties, principles of the *1995 Fish Stocks Agreement*. For instance, we can mention *Commission of Antarctic Marine Living Resources* (CCAMLR Commission), the *Northwest Atlantic Fisheries Organization* (NAFO) and the *North Pacific Anadromous Fish Commission* (NPAFC). In particular, this latter was established in 1993 between Japan, USA, Canada and Russia for the protection of certain salmon species. Its main outcome has been the promotion of a reciprocal boarding and inspection scheme, providing a legal basis for the visit of any other party's fishing vessel on the grounds of reasonable suspicion of breaches of the Convention. The boarding State is also entitled to arrest the persons on board but only the Flag State may impose penalties upon the vessel[426].

4. National Plans of Action in combating IUU Fishing

The 2001 IPOA-IUU encourages all States to adopt national plans of actions (NPOAs) for combating IUU fishing. Precisely, paragraph 25 clearly requests the parties "to further achieve the objectives of the IPOA and give full effect to its provisions as an integral part of their fisheries management programmes and budgets"[427]. In other words, the international agreement recommends the enforcement within national jurisdictions of several measures which would strengthen the States' capabilities in facing IUU fishing. Implementing these measures would have as outcome a more effective control over the management of fishing vessels and their owners. Moreover, not later than 3 years after the adoption of the IPOA-IUU, States were asked to review the implementation of their national plans every 4 years. The aim of such request is enhancing coordination among different legislations and consequently increasing the effectiveness of the measures undertaken.

However, it must be noted the number of national plans of action combating IUU Fishing is still low. This is the main reason we have stressed in the previous paragraph the importance of multilateral actions against IUU fishing since national plans still cannot be considered the main tool for combating the phenomenon. Nevertheless, the few national plans existing has been adopted by countries playing a fundamental role in international fisheries. In this sense, such states may exercise a positive influence upon other international

[425] Y. Tanaka, The International Law of the Sea, 3rd edition, 2019, p. 314
[426] E. Papastavridis, Maritime Interception to Safeguard the Fundamental Freedoms of the High Seas, The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans, 2013, pp. 202-203
[427] 2001 IPOA-IUU, para. 25

actors towards the implementation of NPOAs[428]. In this brief paragraph we will examine the most important national plans of action adopted by countries in different geographical areas of the world.

Japan has adopted its national plan of action in 2004, which was approved by the Minister of Agriculture, Forest and Fisheries after the proposal of the Fisheries Agency of Japan. It's a brief document of only eleven pages arranged in eight sections, shorter than the IPOA-IUU. Moreover, its title does not even use the expression "national plan of action" and it is indexed merely *"Implementation of the IPOA-IUU: National Actions"*. The plan takes inspiration from the "*Pacific Islands Model Plan"*, which was adopted always under the auspices of FAO in 2005 by the small islands of the South Pacific. However, in spite of their similar structure the two instruments differ with reference to their substantial content: in the Japan's plan of action the measures and their details are not completely revealed but only presented. The reason must be found in the tradition of Japan as distant-water fishing nation and on its will to avoid too many details regarding its fishing activities.

The Japanese national plan contains a specific section named *"All State Responsibilities"*, which mentions the country's legislation dealing with IUU fishing and all the international instruments Japan has ratified. In this section, the main national acts combating IUU fishing are identified in the *Fisheries Law* and the *Law on the Management of Fishing Vessels*. Furthermore, it contains a provision requesting to Japanese nationals involved in foreign fisheries the report of all the activities and individuals engaged in IUU fishing they encounter. Such report must be sent to the Ministry of Finance, which elaborates sanctions for violations of national law on the topic. Besides, in accordance with the recommendations of the IPOA-IUU, Japan has developed over time accurate systems for fishing licensing, fishing vessel registration, trade restrictions and port measures. For instance, a fisherman willing to harvest tuna, which belongs to the species subject to international management, must comply with all the points requested by Japanese law for obtaining the fishing license[429].

Another national approach to IUU fishing deserving a mention is the one of Taiwan, which belongs to the leading distant water fishing nations (DWFNs). Due to its reputation of being engaged in IUU fishing practises, Twain has been several times subject to international sanctions. For instance, the country was sanctioned in 2005 by the *International Commission for the Conservation of Atlantic Tunas* (ICCAT), which sustained the Asian country's behaviour was not consistent with the necessary monitoring standards flag states shall exercise on their registered vessels. Moreover, in 2015 the European Union issued against Twain a "yellow card", identifying it as a country not making its best efforts in the fight against illegal, unreported and unregulated fishing. The yellow card is legally only a "warning" and Twain obtained its removal in 2019. However, there are still risks in the future the State may be sanctioned by EU with a "red card", being identified as a "non-cooperating third country", with the subsequent ban on importation of Taiwanese fishes. In order to avoid this

[428] K. Riddle, Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious, Ocean Development and International Law, 2007, pp. 271-272

[429] Shih-Ming Kao, International Actions Against IUU Fishing and the Adoption of National Plans of Action, Ocean Development & International Law, 2015, pp. 6-8

treatment, the competent authority for fisheries management in Twain, also known as Fisheries Agency of Twain, started to enact conservative management measures (CMMs) and implementing in the national legislation several international instruments, even if not having binding nature such as the *Voluntary Guidelines for Flag State Performance* (the Guidelines). These latter were adopted in 2014 by FAO and their scope was manly highlighting how, despite the growth importance of port states measures, the flag states still play a fundamental role in combating IUU fishing. Today, it is still unclear if there is political will among States to undertake a process aimed at an international binding instrument on flag states responsibilities, similarly to the successful development of the Port States Agreement in "hard law". Going back to Twain's efforts against IUU fishing, nowadays its regulations take into account the majority of principles contained in the Guidelines.

Moreover, in 2013 the Asian island also voluntary adopted its own national plan of action against IUU fishing (NPOA-IUU), although it is still not a member of FAO. This plan formally complies at the fullest extent with almost all the IPOA-IUU's provisions, including sections named "all States responsibilities", "flag states responsibilities", "coastal States measures", "port States measures", "internationally agreed market-related measures", "research", "adoption of CMMs within the framework of regional fisheries management organizations" and "supportive of the special requirements of developing countries". Finally, it deserves a mention also the Taiwanese law "Act for Distant Water Fisheries", which was enacted in 2016 with the scope of obtaining the removal of the yellow card issued by EU in 2015. This law not only strengthened CMMs against IUU fishing through improvements in the catch's traceability, but it also significantly increased the fines for breaches of legislation dealing with fisheries[430].

Furthermore, another example of national plan of actions' effectiveness is given by the USA's NPOA. The *National Plan of Action of the United States of America to Prevent, Deter, and Eliminate Illegal, Unregulated, and Unreported Fishing* was adopted in 2004 and reviewed in 2007. It was the result of a coordinated work between the Department of State and several governmental agencies. As well as the Japan's national plan we have already examined, it also contains a section indexed "All State Responsibilities", enumerating all the international instruments ratified and the international organizations to which it has the status of member[431]. From a structural point of view, the USA's NPOA differs from the others because instead of listing its recommendations at its end, it merely expresses them at the end of each section. Moreover, the United States have not always agreed with all the multilateral actions and initiatives taken at the international level: for instance, in its national plan the US has manifestly shown its disapproval towards the "blacklists". In fact, despite its support to internationally agreed market-related measures against IUU fishing, USA expressed its

[430] Tsung-Han Tai, Shih-Ming Kao and Wan-Chun Ho, International Soft Laws against IUU Fishing for Sustainable Marine Resources: Adoption of the Voluntary Guidelines for Flag State Performance and Challenges for Taiwan, Sustainability, 2020, pp. 1-9

[431] Shih-Ming Kao, International Actions Against IUU Fishing and the Adoption of National Plans of Action, Ocean Development & International Law, 2015, pp. 9-10

concern upon the practise of unilateral negative listing and its eventual breach of due process. The plan makes an explicit reference to the *US Lacey Act*, which is considered the main piece of legislation for the prosecution of individuals engaged in IUU fishing activities, regardless of their location. Moreover, the *Lacey Act* allows American officials to exercise their authority over vessels for the violation of the fisheries regulations of any state. This approach is peculiar, considering not all States have an equivalent act in their legislation.

The USA's NPOA stresses the importance also of the *U.S. Magnuson-Stevens Fishery Conservation and Management Act* and of the *U.S. High Seas Fishing Compliance Act*: they both remark how vessels without nationality fall into the scope of the legal category "vessels subject to the jurisdiction of the United States". Thus, the two acts allow American officials to prosecute stateless vessels in exclusive economic zone for breaches of US law and on the high seas for violations of international conservation and management measures. The national plan of action of USA also addresses the matter of the use of sanctions as deterrence against IUU fishing: creating an economic hardship on fishers may prompts them to engage only in legal activities. Finally, it must be noted the USA's national plan not only contains a record of actions already undertaken but it also provides a list of suggestions on how addressing IUU fishing in the future. In this sense, the last part of the USA's NPOA deals with monitoring, control and surveillance (MCS) activities, recommending proper MCS tools for combating IUU fishing[432].

In this context, also New Zealand has adopted in 2004 its own plan of action to prevent, deter and eliminate IUU fishing. Differing from others national plans, above all the Japanese NPOA, it contains all the sections required by IPOA-IUU and it seems to be perfectly in line with the FAO international instrument. In fact, each section includes in its beginning a brief box describing the requests of the IPOA-IUU. Moreover, following the example of USA's NPOA, it also underlines the weakness of the national legislation combating IUU fishing, suggesting eventual improvements to implement. Despite its reputation of Coastal State, the NPOA deals significantly with the sections indexed "All State Responsibilities" and "Flag State Responsibilities" rather than on the one named "Coastal State Responsibilities". Besides, it must be noted how the NPOA stresses the New Zealand's government commitment to review periodically the plan in order to effectively address all the matters concerning IUU fishing in the future[433].

Finally, the *Australian National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing* is the last document deserving its examination under this paragraph. It was adopted in July 2005 by the Australian Department of Agriculture, Fisheries and Forests and its long text closely follows the requirements of IPOA-IUU, addressing them more accurately than all other NPOAs. Such as the USA's national plan, it does not only consist in a mere record of actions undertaken in combating IUU fishing, but it

[432] K. Riddle, Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious, Ocean Development and International Law, 2007, pp. 272-274

[433] Shih-Ming Kao, International Actions Against IUU Fishing and the Adoption of National Plans of Action, Ocean Development & International Law, 2015, pp. 8-9

also suggests further implementations to improve the whole legal framework. Moreover, differing from all the other documents, it has a specific section named "Reporting"[434].

5. Drivers and causes of IUU Fishing

There are several elements of economic or social nature fostering IUU activities. Generally, individuals commit illegal acts when there are low levels of surveillance, and the private benefits would be much more consistent than the expected sanction. In other words, IUU fishing became a major international issue around the globe due to the high economic profits it generates. In this sense, legal and jurisdiction measures are not probably the best options in countering the phenomenon, which instead shall be addressed considering its economic dimension. This approach has been shared also by the *Organism for Economic Co-operation and Development* (OECD) *Committee for Fisheries*, which completed in April 2004 an important three-year research on the main economic causes of illegal, unreported and unregulated fishing. This study constitutes still today the most accurate analysis on the topic, and it was carried out with the participation of several governments, IGOs, NGOs and RFMOs. The thesis shared among the participants is that only lowering the expected benefits of IUU fishing and enhancing its costs individuals would start to engage in other activities[435].

The first factor contributing to IUU fishing is the fishing overcapacity of vessels. This situation arises when ships facing large management costs are induced to engage in IUU fishing due to their high fishing capacities, which are often limited by an inappropriate allocation of fishing rights. Moreover, the excess capacity of fishing vessels is often balanced also by the granted fishing possibilities within a national or regional fleet. In fact, there are several cases of IUU fishing activities taking place within areas regulated by the *Regional Fisheries Management Organizations*. These latter sometimes impose limitations on the total allowable catches (TACs), reducing the fishing possibilities to levels considered "insufficient" by their members[436]. The difficulties in combating IUU fishing driven by the vessels' excess capacity are enhanced by the practise of "ships reflagging", making even more complex the identification of the individuals benefiting from the illegal activities. Generally, scholars share the view programmes aimed at reducing fishing capacities should provide alternative employment opportunities to the involved fishermen: only in this manner vessels would not engage in IUU fishing activities[437]. It must be noted problems of overcapacities regard mostly fishing vessels belonging to developing countries[438]. In this context, the *World Summit on Sustainable Development* has

[434] Shih-Ming Kao, International Actions Against IUU Fishing and the Adoption of National Plans of Action, Ocean Development & International Law, 2015, p. 9
[435] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, pp. 482-483
[436] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 690
[437] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, p. 483
[438] OECD (2005), Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing, OECD Publishing, Paris, p. 38

stressed the need to eliminate the subsidies contributing to the excess capacity of fishing vessels and, consequently, to IUU fishing[439].

Moreover, another main economic driver of IUU fishing is the high market value of some fish species, for instance tuna, Orange roughly and the Patagonian toothfish. In fact, when the catch regards fishes very valuable on the market, the economic profits of the owners of IUU fishing vessels increase. A possible measure to undertake for countering the phenomenon consists in the promotion of labelling schemes[440]. These latter have the function of pointing out the legal origin of the fishes caught. Besides, a fundamental role in combating IUU fishing is played also by the effectiveness of the domestic fisheries management regimes. In fact, when within these frameworks a satisfying income is conferred to fishermen for their activities, there are less chances IUU fishing would take place[441]. The principle behind this assertion lies in lowering the incentives for IUU fishing by enhancing the revenues that can be made from legal activities. This reasoning is confirmed by the fact that countries with weak management regimes are more likely affected by IUU fishing[442].

The effectiveness of domestic management regimes is strictly related to the general weakness of the international frameworks combating IUU fishing. This must be considered as an institutional factor causing IUU fishing. The provisions addressing this phenomenon belong often to voluntary instruments, above all the 2001 IPOA-IUU. This makes their enforcement more complex. Moreover, whenever the measures against IUU fishing are embodied in binding international instruments, they apply only to the States that are parties to the Conventions in question. The only rules of law directly applicable to all international actors are the ones having customary nature, such as the ones contained in LOSC. As we have already seen in the first paragraph of this chapter, the *United Nations Convention on the Law of the Sea* provides an indirect legal basis for measures against IUU fishing by the general obligation to protect the living and non-living resources of the world's oceans[443].

However, a gap in the international legal framework of IUU fishing not covered even by the LOSC consists in the faculty of ships to easily reflag, moving from one fishing register to another. Thus, fishermen engaged in IUU activities often register their vessels in countries which are not parties to regional fisheries organizations. Moreover, these countries most of the times are "open register" States, allowing the registration into their national registries to vessels whose beneficial ownership and control is found elsewhere than in their territory. These States are also known, as we have already examined in chapter one of this work, "flags of convenience" (FOC) countries. In other words, a vessel is flying a "flag of convenience" when its owner holds

[439] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 690
[440] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, p. 486
[441] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 690
[442] OECD (2005), Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing, OECD Publishing, Paris, p. 40
[443] LOSC 1982, art. 192

economic control or resides in a State other than the Flag State[444]. Therefore, there is not an actual link between the owner of the vessel and the Flag State. Flying a flag of convenience means for IUU fishing performers being beyond the reach of national and international regulations.

Flags of convenience have been referred also with the expression "flags of non-compliance": they belong to States with legal frameworks characterized by regulatory loopholes, allowing fishermen to circumvent conservation and management measures against IUU fishing[445]. Although the two terms have been considered interchangeable, their distinction is relevant in the analysis regarding IUU fishing activities, since it helps to avoid confusion. Generally, a flag of non-compliance is a flag of a State whose legal framework fails to comply with its international obligations[446]. This definition can be applied also with reference to the main international instruments promoting a sustainable exploitation of living marine resources and thus combating IUU fishing. Furthermore, another type of flag relevant in relation to IUU fishing activities is the so-called "flag of no legislation". It is considered flying such flag the vessel having the flag of a State which has not ratified any of the relevant treaties regarding the safeguard of the marine environment. The main international agreements belonging to this category are: LOSC; the *UN Fish Stocks Agreement*; the *Compliance Agreement*[447].

All in all, vessels engaged in IUU fishing activities on the high seas are manly flying flags of convenience, flags of non-compliance and flags of no-legislation. Their common feature is belonging to States which generally poorly control their vessels, despite their obligation under international law to exercise effective jurisdiction over them. Thus, "open registry" States such as Honduras and Panama are considered a major cause of IUU fishing. In addition, another factor reducing the operating costs of IUU fishing is the existence of tax heavens: the majority of countries not respecting the regional conservative measures of RFMOs have been listed by the OECD as such. In this sense, engaging in IUU fishing activities under the flag of tax heavens allows vessels to hide their true identity behind the right of secrecy granted by banks established in the registering State[448].

In this context, one more institutional driver of IUU fishing is the insufficient level of monitoring, control and surveillance (MCS) measures. This problem involves both the domestic and regional levels within RFMOs. In fact, lowering the States' capacity to successfully catch IUU fishermen, these latter are more likely to engage in such illegal activity[449]. On the contrary, an effective surveillance of governments and regional entities upon IUU fishing cases can constitute a significative demonstration effect of no-toleration of illegal activities.

[444] D. Miller and R. Sumaila, Flag use behaviour and IUU activity within the international fishing fleet: refining definitions and identifying areas of concern, Marine Policy, 2014, pp. 204-205
[445] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 690
[446] FAO, Expert consultation on flag state performance, 2009
[447] D. Miller and R. Sumaila, Flag use behaviour and IUU activity within the international fishing fleet: refining definitions and identifying areas of concern, Marine Policy, 2014, p. 206
[448] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 691
[449] FAO Technical Guide for Responsible Fisheries, 2002, no. 9

Fostering monitoring, control and surveillance (MCS) measures would have as outcome reinforcing the IUU fishermen's fear to be caught and fined. A possible solution can be the board of observers on vessels, even though scholars have underlined the high costs upon shipowners of such eventual measure[450]. An important entity deserving a mention in relation to this topic is the *International Network for the Co-operation and Co-ordination of Fisheries-Related Monitoring Control and Surveillance Network* (MCS Network). Within this latter, States share their results of conservation measures undertaken, with aim of increasing their effectiveness and reducing their costs. The most significant experience witnessing the importance of implementing adequate levels of monitoring and control is represented by Namibia: the African country, after having introduced reforms in its legal framework enhancing surveillance and sanctions for those hunting the marine environment, has seen a decrease of IUU fishing activities in its waters[451].

The case of Namibia can be used also to highlight the important role of another factor constituting a driver of IUU fishing: the insufficient level of sanctions, both economic and non-monetary, against the phenomenon. In this sense, the OECD IUU Workshop has promoted a study according to which it would be necessary to increase the actual penalties against IUU fishing of 24 times[452]. In fact, only few countries seem to have today adequate levels of sanctions addressing illegal, unreported and unregulated fishing. Instead, the majority of States still have legal frameworks providing penalties not sufficient to exercise a deterrent effect on such illegal activities. On the other hand, it must be taken into account fishermen do not have the economic capacity to pay, considering their low income. In this case, economic sanctions do not have effect in deterring the phenomenon. Thus, scholars have pointed out how such monetary penalties shall be directed against shipowners and not the crew[453]. Another possible measure against IUU fishermen being caught can be the forfeiture the vessel, which may be more successful than fines. However, sometimes IUU fishing of very high market value fish is so profitable that its revenues may exceed the value of the vessel itself, which is consequently abandoned once the illegal activities has been terminated. Finally, vessels usually try to avoid paying fines joining fake fishing companies and therefore making complex their identification[454].

Other than economic and institutional drivers, there are also social factors contributing to the spread of IUU fishing activities. Above all, a fundamental role is played by the poor economic conditions of individuals populating undeveloped or developing countries. In fact, fishermen employed in companies responsible of IUU fishing activities usually belong to the most vulnerable social classes. Thus, they often work without adequate social protection and under circumstances which lack the minimum safety standards required. This

[450] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, pp. 485-486
[451] OECD (2005), Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing, OECD Publishing, Paris, pp. 38-39
[452] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 691
[453] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, p. 486
[454] OECD (2005), Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing, OECD Publishing, Paris, p. 39

situation is made even more complex by the absence of an international convention on fishermen's labour conditions in fishing vessels[455]. An example of how weak social conditions can dramatically enhance the rate of IUU fishing activities has been given in the early 1990s by the illegal hunting of trochus in Australian waters, which was mostly carried out by Indonesian fishermen below the poverty threshold. These fishermen, being economically on their last legs, were ready to engage in IUU fishing despite the high freedom and monetary penalties they were risking[456].

Unfortunately, among the elements fostering IUU fishing there are also numerous cases of corruption, influencing the licensing processes and the scientific quotas. For instance, several investigations have revealed how, in some Pacific island countries, fishing licences are issued without accurate oversight, with complete lack of transparency in their negotiations[457]. Similar problems characterize also other regions of the globe, such as the African continent: some studies have highlighted African nations fisheries officials being involved in companies of the fishing industry towards which they have granted licenses[458]. Besides, it was also discovered in 2011 by the Japanese Government an illicit agreement between some Japanese fishing companies and Russian officials aimed at obtaining the allowance to exceed the officially established quotas on payment of 6 million dollars[459]. The last remark about the causes of IUU fishing regards globalization as a whole. Several aspects of this latter facilitate illegal, unreported and unregulated fishing by increasing the demand of fish products. In order to meet this demand, fishermen and fishing companies are induced to satisfy the market even engaging in illegal activities in violation of national and international regulations. In this sense, globalization can be considered a driver of IUU fishing because it creates the incentives for individuals to take part in such transnational crime[460].

5.1 High market value of IUU fishes: the Patagonian Toothfish case

As we have seen in the latter paragraph, one economic driver of IUU fishing is the high market value of some fish species, for instance the Patagonian toothfish. This latter belongs to the Antarctic cod family and under its name they have been traditionally reconducted not only the Patagonian toothfishes in strict sense *(Dissostichus eleginoides)* but also the Antarctic toothfishes *(Dissostichus mawsoni)*. The Patagonian toothfish is caught in the Southern Ocean, also known as the Antarctic Ocean or the Austral Ocean and it is since several years the main target of IUU fishing practises around the globe. Indeed, such fish is traded in the international market under various names: "bacalao de profundidad" is the term used in Chile, "robalo" in Spain, "mero" in Japan, while "Chilean sea bass" in Canada and USA. Thus, considering all these nomenclatures, it is not

[455] C. Schmidt, Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, The International Journal of Marine and Coastal Law, 2005, p. 486
[456] B. Le Gallic and A. Cox, An economic analysis of illegal, unreported and unregulated (IUU) fishing: key drivers and possible solutions, Marine Policy, 2006, p. 691
[457] Q. Hanich and M. Tsamnyi, Managing fisheries and corruption in the Pacific island region, Mar Pol, 2009, pp. 386-388
[458] M. Martini, Illegal unreported and unregulated fishing and corruption, Transparency International, 2013, pp. 4-6
[459] Japan Today, 26th January 2011
[460] D. Liddick, The dimensions of a transnational crime problem: the case of IUU fishing, Trends Organ Crim, 2014, pp. 297-300 and pp. 307-309

always easy to determine the amount of IUU catch entering the market. Its fisheries within the high seas are managed by the *Commission for the Conservation of Antarctic Marine Living Resources* (CCAMLR). This RFMO, which was created in 1980 and whose Convention entered in force in 1982, is particularly concerned with the development of conservative management measures aimed at protecting the Patagonian toothfish from excessive exploitation. In fact, living in one of the most remote areas of the world, monitoring, control and surveillance activities over its fishing are very expensive and IUU fishermen have few risks of being captured[461].

IUU fishing of Patagonian Toothfish became a major problem in coincidence with the decline of other valuable fisheries in the early 1990s. Due to its length of approximately 2 meters and its white meat, the Patagonian Toothfish became the main object of desire of the international market and started to be known as "white gold". However, on the other hand, its biological characteristics render it susceptible of overfishing: it has a late sexual maturity, being capable to reproduce only once having reached 6/9 years and it has also low fertility rates. In addition, it has always had a high market value, around 4.55 dollars per pound at landing. In this context, the first reported activities of IUU fishing regarding the Patagonian Toothfish have been documented in 1993 and in the season 1996/97 the CCAMLR estimated a total catch from IUU fishing around 100,000 metric tonnes, corresponding to 500 million dollars[462].

These data brought scholars to discuss about the effectiveness of the conservative management measurers undertaken by the CCAMLR. Consequently, the members of the Convention began to develop new techniques for countering the illegal practises and their efforts played an important role in the reduction of IUU fishing levels. Above all, the CCAMR implemented a catch documentation scheme (CDS) aimed deterring the landing of IUU fishes into ports. As we have already seen in this chapter, a CDS is an instrument used for tracking the trade flows and requiring all catches to be certificated by a catch document. In this sense, the *Convention for the Conservation of Antarctic Marine Living Resources* requires all its members to adopt CDSs and it also provides specific mechanisms for non-contracting parties to participate in trade activities once the same schemes have been implemented. Although this system permits to successfully monitor the importations and exportations of Patagonian Toothfish, it does not produce any effect in lowering the high market value as it would be needed. However, it recognizes the importance of trade analysis as a method through which obtaining important information for improving management measures[463].

The importance of the catch documentation schemes for combating Patagonian Toothfish's IUU fishing can be fully understood only with reference to the other main conservation management measure provided by the

[461] K. Riddle, Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious, Ocean Development and International Law, 2007, p. 267
[462] C. Joyner and L. Aylesworth, Managing IUU Fishing in the Southern Ocean: Rethinking the Plight of the Patagonian Toothfish, Ocean Yearbook, 2008, pp. 249-254
[463] E. Grilly, The price of fish: A global trade analysis of Patagonian (Dissostichus eleginoides) and Antarctic toothfish (Dissostichus mawsoni), Marine Policy, 2015, pp. 186-187

CCAMLR: the total allowable catch limits (TACs). These latter fixe the maximum amount of toothfish that can be fished in the geographical areas falling within the scope of CCAMLR and they are set annually after having consulted a *Scientific Committee*. Once the total amount of allowable catches has been reached, the interested area is formally "closed" to other fishing activities. In this context, the catch documentation schemes are aimed at monitoring the respect of the TAC amounts of harvested toothfish. In other words, such schemes combat IUU fishing promoting a restriction of international trade and thus reducing the incentives for fishermen in engaging in illegal activities.

More precisely, the toothfish products are traced in all their trade cycle by means of a *Dissostichus Catch Documents* (DCDs). These papers indicate the place, the date and the amount of catch and they must be compiled in any case of trans-shipment, landing, export or import. This process involves both Flag and Port States: while the former shall issue the catch documents to only authorized vessels, the latter must verify at the landing that the catches are effectively in compliance with the information contained in the papers. If so, a "Certificate of Landing" can be issued. Moreover, for the purpose of exporting quantities of Patagonian Toothfish, the Government Export Authority of the relevant State must certify the correct content of the catch document and verify the exported catches do not exceed the fixed limits[464].

Furthermore, in the case of Patagonian Toothfish, it must be noted the efforts of non-governmental organizations such as *Traffic* and *Greenpeace* in publicizing the names of companies involved in IUU fishing. The *Coalition of Legal Toothfish Operators* (COLTO), which was founded in 2003 with the scope of ensuring the long-term sustainability of Toothfish resources and the preservation of critical biodiversity of the southern oceans, periodically offers monetary rewards to anyone sharing information about illegal vessels. Its action constitutes only one example of the successful private initiatives undertaken in this sector[465]. Finally, Patagonian Toothfish is often the object of several frauds and fish substitutions. For instance, in China, where traditionally high-quality fishes are consumed, a molecular survey has recently revealed that the analysed product, labelled as a particular type of expensive fish called *"Anoplopoma fimbria"*, was actually the Patagonian Toothfish. This has led to an investigation about the eventual existence of a trade pattern aimed at laundering IUU fishes catches of Toothfish through mislabelling[466].

6. Market-related measures vs IUU fishing

In order to combat IUU fishing reducing its revenues and increasing its costs, a fundamental role is played by trade-related measures, which constrain the access to the market. Such measures are considered by some

[464] L. Little and M. Orellana, Can CITES Play a Role in Solving the Problem of IUU Fishing: The Trouble with Patagonian Toothfish, Colorado Journal of International Environmental Law and Policy, 2004, pp. 44-46
[465] OECD (2005), Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing, OECD Publishing, Paris, p. 39
[466] X. Xiong, DNA barcoding reveals substitution of Sablefish (Anoplopoma fimbria) with Patagonian and Antarctic Toothfish (Dissostichus eleginoides and Dissostichus mawsoni) in online market in China: How mislabelling opens door to IUU fishing, Food Control, 2016, p. 380

scholars, above all Chang, to better protect the environment than others in relation to their costs[467]. Their legitimacy has still not gained universal acceptance under international law and consequently their potentials in countering IUU fishing has not been expressed at the fullest extent. Nowadays, trade measures against IUU fishing are mainly adopted by the European Union, international organizations and RFMOs, some States on their own such as USA and some multilateral treaties. Among these latter, the *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) deserves a specific mention[468].

With the term "trade measures" is intended any instrument which restricts, prohibits or merely imposes conditions on importations and exportations of fish products with the scope of eliminating IUU Fishing. The majority of scholars share the opinion a trade measure is considered as such whenever it implies these effects. In other words, it is not important the possible legal qualification, for instance the one of "port state measure", used by States to address it[469]. An explicit reference to trade measures is made by the *2001 FAO's International Plan of Action* (IPOA) *on IUU Fishing*, which stresses their extraordinary nature stating they can be used only under "exceptional circumstances", after having consulted the interested States and respecting the States' right to fish in a sustainable manner. In other words, their enforcement is legitimate only when all the others possible measures have proven to be unsuccessful. Moreover, the IPOA-IUU underlines how the adoption of trade measures shall be always in accordance with international law, "including principles, rights and obligations established in WTO Agreements". Besides, market-related measures must be implemented in respect of the principle of non-discrimination, in a fair and transparent manner and the multilateral ones must always be preferred to the ones taken unilaterally[470].

Generally, the use of market-related measures is restricted to only marine catches of fishes internationally traded, representing the 37 % of the global fisheries catch. There are several examples of trade-related measures combating IUU Fishing, which can however be distinguished in two main types. On one hand we have the so-called "trade sanctions", mostly know as trade restrictive measures (TREMSs) enacted by one or more than one market states. On the other, we have the catch certification schemes, which we have already partially analysed dealing with the exploitation of the Patagonian Toothfish. This latter category includes both the trade documentation schemes and the catch documentation schemes (CDS). Both these two types of trade measures can be taken indifferently at a unilateral or multilateral level[471]. While the first type of measures is

[467] H. Chang, Toward a greener GATT: environmental trade measures and the shrimp-turtle case, Faculty Scholarship at Penn Law, 2000, pp. 31-32
[468] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, pp. 1-2
[469] R. Churchill, International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 320-321, Oxford: Hart Publishing
[470] 2001 IPOA-IUU, para. 66
[471] G. Hosch, Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches, International Centre for Trade and Sustainable Development, 2016, pp. 1-10

manly aimed at the identification of countries having responsibilities for IUU fishing, the second type's scope consists in obtaining the necessary information about how the products is sourced[472].

Substantially, a measure is unilateral when adopted by a State at the national level without implementing any multilateral measure. In this context, also the European Union adopts unilateral measures. Differently, a measure is multilateral when it is adopted directly within the legal framework of international organizations, RFMOs and international treaties. Moreover, a measure, regardless of its multilateral or unilateral nature, can be directed towards States or individual fishing vessels. There is also a third category of trade measures, neither multilateral nor unilateral, adopted by non-governmental organizations (NGOs). The certification scheme released by the Marine Stewardship Council to products which derive from stocks asserted being sustainably fished constitutes the main example. In fact, the scheme influences the consumer's purchases and, thus, it affects trade[473].

Focusing the attention on unilateral measures, the European Union has developed a comprehensive approach in deterring IUU fishing through an effective use of the market. The process started in 1983 with the introduction of the *EU Common Fisheries Policy* (CFP), which has been reformed several times. The CFP fully complies with the all the main EU law principles and its field of application is circumscribed within the Member States' maritime zones. However, in application of the Flag State principle, its jurisdiction encompasses the authority of the flag state when a European vessel is fishing on the high seas. The scope of the Common Fisheries Policy is ensuring the sustainability of fishing activities, which must be "environmentally sustainable in the long-term and managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies"[474]. Pursuant to the EU CFP, the European community enacted the *Council Regulation (EC) No. 1005/2008*, which is also known simply as *EU IUU Regulation* and whose outcome is the creation of a common system to prevent, deter and eliminate illegal, unreported and unregulated fishing. It was established with the proposal of attributing to EU a "specific responsibility in leading international efforts on the fight against IUU fishing"[475] and its aim is ensuring fish products imported in European territory do not derive from IUU fishing activities but instead they have been caught in compliance with all the relevant conservation and management measures. Scholars have deduced from the wording contained in the proposal a sort of moral duty in making the European Union the main entity at the forefront in combating IUU fishing[476].

[472] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 210
[473] R. Churchill, International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 324-325, Oxford: Hart Publishing
[474] Regulation (EU) No. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, art. 2
[475] COM (2007) 602 final, Proposal for a Council Regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing
[476] R. Churchill, International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 307, Oxford: Hart Publishing

The *IUU Regulation* is inspired from several RFMOs instruments, it entered in force in 2010 and it allows the Member States to enforce trade-related measures against the so-called "non-cooperating" States, which are identified in the countries not respecting international law and their obligations of coastal, port, market or flag states. Generally, a "yellow card" is issued in respect of these countries, which is eventually followed by a "red card" when after the first warning the necessary measures for complying with the IUU Regulation are not undertaken. The red card consists in a total ban on exports towards the European Union and in the inclusion of the non-cooperating country in the EU blacklist. These sanctions can be eventually removed when the recipient countries provide the needed implementations in their national frameworks[477].

Specifically, the conditions which determine the classification of a country as "non-cooperating third state" and its consequent inclusion in the blacklist are three: the failure to control the vessels flying its flag, which participate with recurrence in IUU trade flows; the failure to respect its duty to cooperate in the exchange of information and in the enforcement of sanctions; the failure to implement international regulations and the recommendations of the relevant RFMOs. The issue of yellow cards led for the first time to the total ban of exports to the EU only in March 2014, with regard to three countries: Belize, Cambodia, Guinea[478]. Afterwards, other three States (Fiji, Vanuatu and Togo) were pointed out as possible violators of their international obligations, but it was not issue towards them a proper red card due to their evident progress in combating IUU fishing. Therefore, the whole procedure is based on accurate monitoring activities of risk and, when the identified States do not comply, the EU is entitled to adopt trade measures of various kind[479].

Another example of vessels lists at a unilateral level other than the European one can be found with reference to the USA. In fact, the Secretary of Commerce shall compile a list each two years of those countries presumed to be engaged in IUU fishing. This list must be submitted to the Congress and the States which have been identified shall take all the necessary measures for obtaining the certification of allowance for their vessels to enter US ports. Otherwise, the access would be denied and trade-related measures such as import prohibitions on fisheries products could be taken[480].

Similarly, at an intergovernmental level, one more instance of listing can be found within the *International Commission for the Conservation of Atlantic Tunas* (ICCAT)[481]. This latter compiles "backlists" of vessels suspected of having engaged in IUU fishing and it relies for their track on the so-called vessel monitoring system (VMS), which consists in the installation of electronic equipment on fishing vessels. Thus, the Commission further prohibits its Parties to import and to allow the landing or transhipment of fisheries

[477] A. Leroy, F. Galletti and C. Chaboud, The EU restrictive trade measures against IUU Fishing, Marine Policy, 2016, pp. 85-86
[478] R. Churchill, International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 309-310, Oxford: Hart Publishing
[479] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, pp. 210-211
[480] High Seas Driftnet Fishing Moratorium Protection Act
[481] ICCAT, Recommendation 02-23, Establishment of a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the ICCAT convention area, para. 9

products from ships included in the negative lists. On the contrary, some RFMOs have also promoted positive lists, also known as "whitelists", in which they are included only the vessels whose landing and transhipments are allowed. Their adoption prevents the circumvention of blacklists by vessels changing their names and other relevant information about their registration[482].

Going in depth with the analysis of the market-related measures, it must be noted that the European Union mainly uses the tool of catch documentation schemes for preventing IUU fisheries products from entering the single market. Generally, a catch documentation scheme is defined by the IPOA-IUU as a "system that tracks and traces fish from the point of capture through unloading and throughout the supply chain"[483]. Practically, these schemes mention all the information regarding the vessel name, the day of the fisheries catch and the eventual transhipments. In other words, such documents must accompany all the imports and exports of fish products and the competent authorities of flag states are entitled to certify that these activities have been performed in accordance with the relevant international law[484].

As we have already seen in the paragraph 4.1 of this chapter, a similar tool has been adopted within the RFMO named CCAMLR with regard to IUU fishing concerning the Patagonian Toothfish. Moreover, also in the North-East Atlantic Fisheries Commission (NEAFC), which was established in 1980, a catch documentation scheme is used to deter illegal, unreported and unregulated fishing. Instead, an example of catch documentation scheme adopted multilaterally is the one agreed between the member of the CITIES with the scope of restricting trade concerning the specifies safeguarded by the Convention. Although the scope of CITIES does not expressly consist in combating IUU fishing, the catch documentation system may be applicable to some fish's species traditionally object of excessive exploitation determined by illegal activities[485].

Along with catch documentation schemes, the traceability requirements are another instrument used for enhancing the effectiveness of trade-related measures combating IUU fishing and their disposal has been in the last years facilitated by the technological advancement. In this sense, the EU IUU Regulation explicitly "seeks to ensure full traceability" of marine fishery products traded by the European Member States and tracked with the catch documentation scheme. Substantially, the traceability consists in the electronic storage of data regarding the trade flows and the introduction of a European system concerning the traceability of fisheries products has been provided by another piece of legislation, the *EU Regulation 1224/2009*[486]. In this context, it must be noted also how the importance of traceability requirements has been stressed even by the

[482] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 210
[483] FAO voluntary guidelines for catch documentation schemes, para. 2.1
[484] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, p. 3
[485] M. Young, Protecting endangered marine species: collaboration between the food and agriculture organization and the CITES regime, Melbourne Journal of International Law, 2010, pp. 441–490
[486] Council Regulation (EC) No. 1224/2009 establishing a community control system for ensuring compliance with the rules of the common fisheries policy

2015 *Presidential Taskforce on Combating IUU Fishing and Seafood Fraud* in USA, with the aim of increasing the information regarding the seafood available to the consumer[487].

6.1 Are they compatible with International Trade Law?

In the examination of trade-related measures against IUU fishing, scholars have debated on their compatibility with international law. Generally, it is common opinion market-related measures do not collide with the international law of the sea and, in particular, with the *United Nations Convention on the Law of the Sea* (LOSC). In fact, this latter with reference to the conservation and management of living resources in the areas of the high seas merely imposes upon the States duties to cooperate among each other[488]. In this sense, the LOSC sets only some principles States must follow, without fixing content requirements of the conservative measures needed in order to comply with its wording. Consequently, the main doctrine shares the view trade-related measures adopted by States towards other countries, which lack to take all necessary actions for combating IUU fishing, shall be considered consistent with international law of the sea[489].

Differently, eventual tensions may arise between trade-related measures and international trade law. Indeed, market-related measures are not expressly permitted by international law, and they have a wide range of trade law implications, especially with the *WTO Agreement on Technical Barriers to Trade* (TBT) and the *General Agreement on Tariffs and Trade* (GATT). Generally, States do not have an obligation to trade with other countries and they can legitimately enforce trade restrictions towards other international actors. This principle has been confirmed also in the *Nicaragua* case-law by the International Court of Justice in 1984[490]. However, a State may be obliged to entertain trade relations on the basis of its status of "party" to an international organization, such as the WTO[491]. Thus, a catch documentation scheme or a mere traceability requirement can potentially be classified as a "technical regulation" in accordance to the TBT agreement, but it arises the need to detect if it creates or not an unjustifiable technical barrier to trade. Similarly, a unilateral import or export ban may contravene the GATT's prescriptions which promote trade traffics, unless they fall into the exceptions of GATT Article XX[492]. In both cases, the main matter questioning the compatibility with the international trade law provisions is the extra-jurisdictional nature of the measure[493].

Initially, the first WTO (World Trade Organization) "covered agreement" whose compatibility with trade-related measures is analysed is the GATT. This latter generally aims at reducing tariffs and other barriers to

[487] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 210
[488] LOSC 1982, artt. 117-118
[489] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, p. 6
[490] Nicaragua vs United States, Jurisdiction and Admissibility, Judgement, ICJ Reports 1984, para. 276
[491] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 311, Oxford: Hart Publishing
[492] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 211
[493] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, p. 6

international trade, promoting an open system. Indeed, the compatibility between GATT and market-related measures is challenged only with reference to four articles: articles I.1, III; V and XI. Article I.1 provides that trade measures of a WTO Member shall not determine discrimination between foreign trading partners of other WTO members, fixing particular custom duties or other charges or in relation to rules on import and export of "like products". This is the principle of the most-favoured nation[494]. Instead, article III deals with the principle of national treatment, according to which a WTO member must not promote any discrimination between domestic products and imported foreign products of the same genre: they must be addressed by the same laws and the same taxation must be applied[495]. Besides, article V regulates the so-called freedom of transit, stating there should not be any kind of discrimination in the transport of goods by a WTO member across the territory of another WTO member for exporting the cargo to a Third State[496]. Finally, article XI addresses the so-called "quantitative restrictions" on imports and exports of any product from or to any other WTO member, prohibiting them and imposing a general duty upon WTO members to not institutionalize and maintain them for any reason[497].

All these provisions are considered susceptible to be breached by trade-related measures against IUU fishing. However, the incompatibility of such measures may be not unlawful if they are permitted under GATT Article XX, which lists a wide range of exceptions justifying violations. Actually, this article applies only when the trade-related measures satisfy two different cumulative requirements: on one hand, they must constitute at least one of the exceptions contained in the provision; on the other hand, the trade-related measures shall also be consistent with the requirements fixed by the so-called "chapeau", which is the introductory clause of Article XX. According to this latter, the trade measure is justified only if it is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". In this sense, the arbitrary and unjustifiable discrimination and the "disguised restriction" are two interrelated concepts, as it has been stated by the WTO Appellate Body in the caselaw *US-Gasoline*[498]. The discrimination is considered arbitrary when its reasons do not have a real connection with the policy objective that justifies the measure under article XX, whereas the restriction is disguised only if the measure does not pursue the policy objective, but it is rather driven by a trade-restriction scope[499]. In other words, a trade-related measures can be applied only when it is not more restrictive than necessary, and it has a fair and transparent nature[500].

[494] GATT 1994, art. I1
[495] GATT 1994, art. III
[496] GATT 1994, art. V
[497] GATT 1994, art. XI
[498] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, p. 8
[499] R. Churchill, International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 334, Oxford: Hart Publishing
[500] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 212

Going forward with the analysis of the exceptions of GATT article XX, letter b) allows measures which are "necessary to protect human, animal or plant life or health". Thus, trade-related measures against IUU fishing, if "necessary" to protect animal life from overfishing, fully fall under the scope of this provision. In order to be "necessary", a measure shall not have any alternative reasonably available which would achieve the same policy objective[501]. Moreover, under letter d) measures inconsistent with the GATT may be legitimate if they are necessary to secure compliance with relevant domestic laws and regulations which are instead consistent with the GATT. Differently from letter b), letter d) has a limited relevance in relation to trade measures concerning IUU fishing: the cases in which it can potentially find application exist in theory, but they are only few in practice[502]. Furthermore, letter g) of article XX constitutes the main exception through which trade-related measures against IUU fishing can find justification within the GATT legal framework. In fact, it permits measures inconsistent with the GATT when "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". Consequently, a trade-related measure is justified under letter g) when it relates to the conservation of such resources. In light of the fact fisheries resources belong to the category of "exhaustible natural resources", trade measures against IUU fishing fall under the scope of the provision. However, another requirement must be present so that the exception applies: there must be restrictions on domestic products or consumption of the exhaustible natural resources in question[503].

In this context, the second WTO (*World Trade Organization*) "covered agreement" whose compatibility with trade-related measures deserves an analysis is the *Agreement on Technical Barriers to Trade* (TBT), which deals with the so-called "technical regulations". The technical regulation is defined by the Annex I.1 of the TBT agreement as "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method"[504]. Scholars have debated if, under certain circumstances, trade-related measures against IUU fishing such as catch documentation schemes and traceability requirements can fall into the scope of this definition. In fact, being a technical regulation would exempt a market-related measure from compliance with several additional non-discrimination requirements[505].

Generally, the WTO Appellate Body has stated in the caselaw *Seal Products* that the scope of the definition contained in Annex I.1 "appears to be limited to those documents that establish or prescribe something and

[501] P. Van den Bossche and W. Zdouc, The Law and Policy of the World Trade Organization, Cambridge University Press, 2013, pp. 556-560
[502] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, p. 333, Oxford: Hart Publishing
[503] X. Ma, An economic and legal analysis of trade measures against illegal, unreported and unregulated fishing, Marine Policy, 2020, p. 8
[504] 1995 TBT Agreement, Annex I.1
[505] M. Young, International Trade Law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing, Marine Policy, 2016, p. 212

thus have a certain normative content"[506]. Moreover, it must be noted article 2.1 of the Agreement on Technical Barriers to Trade can be assimilated to GATT articles I and III, since it requires WTO members to apply to the importations from other members a "treatment not less favourable" in comparison with the one granted to domestic "like products". Besides, Article 2.1 TBT has a similar content to the one of Article XX GATT: it states technical regulation must not be discriminatory by creating unnecessary obstacles to trade and they shall not be more trade-restrictive than necessary to fulfil their legitimate objective[507].

However, there are several objectives listed in the TBT which can potentially be obtained through the implementation of catch documentation schemes and traceability requirements aimed at combating IUU fishing. They are mainly the ones dealing with "national security requirements, the prevention of deceptive practises, the protection of human health or safety, animal or plant life or health, or the environment"[508]. In this sense, especially catch documentation schemes may be considered technical regulations and consequently fully compatible with international trade law.

7. The Transnational Criminal Dimension of IUU Fishing

Until now, we have addressed IUU fishing mainly as a fisheries management issue, reconducting the countermeasures against it only to the ambit of the relevant regional fisheries management organizations (RFMOs). However, illegal, unreported and unregulated fishing has become over the years a global phenomenon with several implications for food security and environmental matters. Indeed, several recent studies have witnessed that illegal fishing often constitutes a vehicle for the commission of other crimes at sea, above all the so-called "fisheries crimes" but also other forms of transnational crimes such as drug trafficking and smuggling of migrants. In particular, the "fisheries crime" is a legal concept of national Nordic roots whose conduct has been criminalized for the first time in 1937 by Norwegian law[509].

In the absence of an internationally recognized definition of fisheries crimes, the United Nations Office on Drugs and Crime (UNODC) has addressed these latter as "a range of illegal activities in the fisheries sector including illegal fishing, document fraud, drug trafficking and money laundering"[510]. Moreover, the main doctrine has highlighted how fisheries crimes encompass all the serious offences committed along the entire fisheries value chain, regardless their *locus commissi delicti* is onshore or offshore[511]. In this sense, the definition of "fisheries crime" may go beyond fishing *per se* and this doctrinal approach has been strengthened by the INTERPOL (International Criminal Police Organization) Project Scale, according to which the fisheries

[506] Seal Product case, note 69 at para. 5.10, WTO Appellate Body
[507] E. R. Van der Marel, Problems and Progress in Combating IUU Fishing, In R. Caddell & E. J. Molenaar (Eds.), Strengthening international fisheries law in an era of changing oceans, 2019, pp. 335-336, Oxford: Hart Publishing
[508] 1995 TBT Agreement, art. 2.2
[509] G. Stolvisk, The development of the fisheries crime concept and processes to address it in the international arena, Marine Policy (105), 2019, p. 123
[510] UN Office on Drugs and Crime, Fisheries Crime Fact, sheet 2
[511] P. Vrancken, E. Witbooi, J. Glazewski, Introduction and overview: Transnational organised fisheries crime, Marine Policy (105), 2019, p. 118

crime "looks at all types of illegality and criminality which facilitate or accompany illegal fishing activities but reach beyond the traditional definition of illegal fishing. These associated criminal activities may include fraud, avoidance of taxes and handling of stolen goods, corruption, money laundering, document falsification, drug trafficking, and human trafficking"[512].

The outcome is that countering fisheries crimes seems to request an approach going beyond the understanding of IUU fishing as a mere fisheries management issue hunting the marine environment. Instead, today there is a growing trend within the international community to categorize IUU fishing as an illegal activity having a transnational criminal dimension[513]. Precisely, it has been observed the practise of several States to sanction IUU fishing with criminal penalties rather than with administrative ones and to consider it as a profit-driven transnational organized crime (TOC), which is the legal category used to address serious cross-border offences whose victims are located in more than one country[514]. For instance, in South Africa the breaches of almost all the provisions of the *1998 Marine Living Resources Act* are punished alternatively with a fine of 2 million dollars or with detention of up to five years. Similarly, in Indonesia who fishes without license is sanctioned with an imprisonment of six years[515].

Indeed, it must be noted that IUU fishing is not mentioned by the United Nations Convention against Transnational Organized Crimes (UNTOC), which instead addresses with specific provisions other criminal activities such as the smuggling of migrants and firearms trafficking. In this context, although illegal fishing is still not officially acknowledged as a TOC *per se*, important steps have been undertaken by several States and organizations in this direction[516]. This process began in June 2008 during the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at UN Headquarters in New York, where it was argued IUU fishing should be addressed as a criminal phenomenon against which international police cooperation plays a fundamental role. Then, the relationship between IUU fishing and organized crimes has been once again underlined in an even more incisive manner by Indonesia at the Conference of States parties of the 2000 United Nations Convention against Transnational Organised Crimes (UNTOC). Besides, in 2011

[512] K. Y. Page and A. J. Ortiz, What's in a Name: the Importance of Distinguishing between "Fisheries Crime" and IUU Fishing, In M. H. Nordquist & J. N. Moore & R. Long (Eds.), Cooperation and Engagement in the Asia-Pacific Region, 2019, p. 435, Centre for Oceans Law and Policy

[513] I. Chapsos and S. Hamilton, Illegal fishing and fisheries crime as a transnational organized crime in Indonesia, Trends Organ Crim, 2019, p. 260

[514] According to the United Nations Convention against Transnational Organized Crime:

- [A]n organized crime group is a "structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences in order to obtain, directly or indirectly, a financial or other material benefit"
- [A]n offence is transnational if "(a) It is committed in more than one state; (b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) It is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or (d) It is committed in one state but has substantial effects in another state" (United Nations Centre for International Crime Prevention (2000) Assessing Transnational Organized Crime: Results of a Pilot Survey of 40 Selected Organized Criminal Groups in 16 Countries, Trends in Organized Crime, 6(2): 48–49)

[515] G. Stolvisk, The development of the fisheries crime concept and processes to address it in the international arena, Marine Policy (105), 2019, p. 123

[516] I. Chapsos and S. Hamilton, Illegal fishing and fisheries crime as a transnational organized crime in Indonesia, Trends Organ Crim, 2019, pp. 255-257

the UNODC commissioned a study on transnational organised crime in the fishing industry which reported the vulnerability of the whole sector to TOCs such as human trafficking, forced labour, corruption and document fraud. Thus, the transnational dimension of several fishing activities was once again pointed out[517].

However, the most important step towards the recognition of IUU fishing as transnational organized crime has been probably made by UNODC in 2016, when it launched the global campaign on fisheries crimes. In fact, in this occasion the "Fishnet" project was developed with the scope to enhance developing countries' capacity to counter fisheries crimes. In this sense, this important campaign witnessed the political will to recognize the challenges of transnational fisheries crimes and the importance of multilateral and coordinated actions in combating them. Furthermore, also other international bodies are concretely contributing to stress the transnational dimension of illegal fishing. For instance, the INTERPOL has established a specific fisheries crime working group, which operates as an international platform where innovative policing approaches are developed and shared. Besides, the ILO has launched a program to combat the spread of forced labour in the sector, whereas the OECD has promoted research on tax crimes in relation to fisheries activities. In this sense, differently from FAO which as we have seen in the previous paragraphs mainly works on fisheries management not dealing with TOCs, such international organizations have all a criminal mandate.

Thus, we can conclude there are two different legal regimes combating IUU fishing: on one hand a system based on trade sanctions and port state measures; on the other a system based on investigation and prosecutions of crimes concerning the fisheries value chain[518].

8. Partial conclusions and observations regarding IUU fishing

In conclusion, IUU fishing constitutes a major threat to sustainable fisheries and food security of several countries. When in 1982 the *United Nations Convention on the Law of the Sea* (LOSC) was ratified, the concept of IUU fishing still did not exist and the term "illegal, unreported and unregulated fishing" (IUU) was used for the first time in 1997 during the sixth session of the *Commission for the Conservation of Antarctic Marine Living Resources* (CCAMLR) and, as we have seen, only in 2001 the phenomenon was addressed with a proper definition by the *United Nations Food and Agriculture Organization* (FAO).

Differently from piracy, IUU fishing takes place on both high seas and in areas subject to the jurisdiction of coastal States (territorial waters or EEZ) and does not constitute a universal jurisdiction crime: its repression strongly relies on the principle of exclusive jurisdiction of the Flag State. In other words, the LOSC does not include IUU fishing among the exceptions listed in article 110 and providing the legal basis for the exercise of the right of visit. Thus, there is no any international customary law of boarding and inspection applicable to all high sea's fisheries against IUU fishing. Nevertheless, as we have already pointed out with reference to

[517] G. Stolvisk, The development of the fisheries crime concept and processes to address it in the international arena, Marine Policy (105), 2019, pp. 124-125
[518] G. Stolvisk, The development of the fisheries crime concept and processes to address it in the international arena, Marine Policy (105), 2019, pp. 126-128

drug trafficking, the visit of a foreign ship when there are reasonable grounds to suspect its engagement in illegal, unreported and unregulated fishing may be granted under article 110 LOSC when the aforementioned ship is a "stateless vessel".

In this context, it must be noted the *1995 Fish Stocks Agreement*, the main multilateral treaty providing to contracting States a right of at-sea inspection in international waters of contracting party vessels. In fact, this treaty predisposes some procedures for the exercise of enforcement jurisdiction on the high seas to ensure the respect of conservation and management measures protecting straddling and highly migratory fishing species. Precisely, its article 21 allows States Parties to the Agreement which are members to a subregional or regional fisheries management organizations to board and inspect a contracting party vessel on the high seas in areas covered by such RFMOs. The peculiarity is that such right to inspect is provided whether or not the Flag State of the fishing vessel boarded is a State participating to the RFMO: it is sufficient the ship is flying the flag of a State party to the *1995 Fish Stocks Agreement*.

Furthermore, we have noted in this chapter the recent tendency to attribute an active role in tackling IUU fishing to Port States. This trend is witnessed by the adoption of the *2009 FAO Port State Measures Agreement*, an important legally binding instrument entered in force in 2016.

Generally, multilateralism constitutes the main approach in facing the phenomenon and trade-related measures are an important instrument which can be undertaken for successfully reducing its revenues and increasing its costs.

The main obstacle for the repression of IUU fishing is represented by the so-called "flags of convenience", which have been analysed in chapter I of this work. In such cases, there is not an actual link between the owner of the vessel and the Flag State: flying a flag of convenience means for IUU fishing performers being beyond the reach of national and international regulations addressing the phenomenon. In fact, these "open registers" States are often countries not parties to regional fisheries organizations (RFMOs). Furthermore, a subcategory of FOCs are the so-called "flags of non-compliance", expression used for addressing States with poor legal frameworks allowing fishermen to circumvent conservation and management measures against IUU fishing.

Finally, it has been observed in recent times the growing trend within the international community to categorize IUU fishing as an illegal activity having a transnational criminal dimension. In fact, today several States sanction IUU fishing with criminal penalties rather than with administrative ones and consider it as a profit-driven transnational organized crime (TOC), which is the legal category used to address serious cross-border offences whose victims are located in more than one country. This approach goes beyond the understanding of IUU fishing as a mere fisheries management issue hunting the marine environment and it leads us to conclude there are two different legal regimes combating the phenomenon: on one hand a system based on trade sanctions and port state measures; on the other a system based on investigation and prosecutions of crimes concerning the fisheries value chain.

The next section will deal with the final conclusions on the legal issues examined during the whole work.

Conclusions

The aim of this work was providing an accurate examination of the main illicit activities and crimes committed on the high sea, which is the marine space beyond national jurisdiction. In this sense, we have deeply analysed the two fundamental principles at the heart of the legal regime of the high seas, also known as *mare liberum*.

On one hand, the principle of freedom of the high seas provides that all States, whether coastal or land-locked, have an equal right of legitimate usage regarding the international waters and, on the other hand, it is imposed upon all States a general obligation of non-interference in peacetime towards non-national vessels. In addition, the principle of the exclusive jurisdiction of the Flag State provides that ships in international waters are subject only to the jurisdiction of the State under whose flag they are sailing. In this context, we have focused the attention on three different illicit activities committed in international waters: piracy, drug trafficking and IUU fishing. As an outcome, we have observed a recent increase of maritime interception operations (MIOs) to counter the aforementioned threats and we have questioned whether the fundamental principle of the freedom of the high seas has lost its relevance in modern international law.

In order to answer this question, at first we have examined the right of visit under article 110 LOSC and the so-called right of hot pursuit under article 111 LOSC, constituting the two main exceptions in customary international law to the principle of non-interference on the high seas. Especially with regard to the former, we have highlighted its role in providing a legal basis for the interception of vessels in international waters, being the main vehicle through which States have exercised their national jurisdiction in a marine space conceived to be beyond their enforcement powers. Thus, we have noticed the inclusion of piracy in the text of article 110 LOSC as one of the limited cases enabling a warship to legitimately intercept on the high seas a foreign ship, when there are reasonable grounds to suspect its engagement in the commission of the crime. The other crimes included by the provision among the exceptions justifying the boarding of a non-national ship are slave trade and unauthorized broadcasting, together with the cases of stateless vessels or vessels with suspicious nationality. Thus, we have concluded piracy represents the paradigmatic "universal jurisdiction crime" since all nations are entitled to exercise their jurisdiction on pirates and all states can consequently try pirates for their crimes. In this sense, the laws regulating the prosecution of pirates do not only restrict the scope of the principle of freedom of the high seas, but they also constitute a limit to the principle of exclusive jurisdiction of the flag state.

In other words, with reference to piracy, the scope of the States' national jurisdictional powers on the high seas reaches its highest extent and it finds its rationale in the need of maintenance of international peace and security at sea. However, the interception of ships suspected of being engaged in piracy constitutes a practise deeply rooted in international law of the sea, as it is witnessed by its inclusion in a provision having customary nature. In this sense, it seems the principle of freedom of the high seas has not been breached in its foundations, especially considering it has never been conceived as having an absolute character.

But can we reach the same conclusions also with reference to the recent States' practise of interdiction of vessels to counter threats such as drug trafficking and IUU fishing?

These illegal activities are not included in the limited cases listed in article 110 LOSC, providing the legal basis for the exercise of the right of visit. Thus, at least at first sight, the maritime interdiction operations (MIOs) undertaken to combat their spread seem to challenge the relevance of the fundamental principle of freedom of the high seas.

In fact, as we have observed in this work, the *United Nations Convention on the Law of the Sea* refers to drug trafficking in international waters only with its article 108, which imposes upon States a general duty to cooperate in the repression of the illicit traffic in narcotics. Moreover, the same provision also provides that any State with "reasonable grounds for believing" that a ship flying its flag is engaged in illicit traffic can request other the States' cooperation to suppress such traffic. In this sense, the LOSC does not address the more common situation where a State is willing to interdict on the high seas a ship suspected of drug trafficking flying the flag of another foreign state. In other words, there is no customary rule permitting the right to visit of drug smuggling vessels on the high seas. However, we can conclude, also through the examination of some concrete cases, that article 110 LOSC can potentially apply to drug trafficking when the illicit traffic involves "stateless vessels": it is not uncommon the use by drug smugglers of vessels without nationality for their activities.

In this context, it must be noted there are several multilateral and bilateral treaties providing exceptional measures for the interception in international waters of foreign vessels suspected of illicit traffic in narcotics. Among all, the *1988 UN Narcotics Convention* with its article 17, the so-called "boarding provision". The importance of such provision is witnessed by its revolutionary content since it provides for the first time the right to board the vessels of other states parties engaged in drug trafficking. Precisely, it promotes a system of ad-hoc flag state consent based on a request of authorization that the intervening State must send for approval to the Flag State. The mechanics of the *1988 UN Narcotics Convention* have been strengthened by the *1995 Agreement of the Council of Europe*. Moreover, afterwards other regional and bilateral treaties have addressed the issue of drug trafficking on the high seas with even more expediency, exempting the boarding State from requesting an ad hoc authorization to the Flag State in each drug smuggling case. In fact, such treaties often constitute themselves an *a priori* authorization for interdicting all the foreign vessels suspected of drug trafficking in the concerned area.

In light of this analysis, we can conclude that States' national jurisdictional powers on the high seas with reference to drug trafficking are enhancing their scope, finding a legal basis in various multilateral and bilateral boarding agreements. Moreover, despite the absence of a customary rule permitting the right to visit of drug smuggling vessels, the principle of freedom of the high seas should not be considered to having lost its relevance. In fact, drug trafficking interdictions always respond to a need of maintenance of *ordre public* at

sea, which has traditionally constituted a major claim for national jurisdiction on high seas also with reference to other illicit conducts included in article 110 LOSC, above all slave trade.

Finally, with reference to IUU fishing, we have observed it takes place on both high seas and in areas subject to the jurisdiction of coastal States (territorial waters or EEZ) and, differently from piracy, it does not constitute a universal jurisdiction crime: its repression strongly relies on the principle of exclusive jurisdiction of the Flag State. Thus, there is no any international customary law of boarding and inspection applicable to all high sea's fisheries against IUU fishing. Nevertheless, as we have already pointed out with reference to drug trafficking, the visit of a foreign ship when there are reasonable grounds to suspect its engagement in illegal, unreported and unregulated fishing may be granted under article 110 LOSC when the aforementioned ship is a "stateless vessel".

In this context, it must be noted the *1995 Fish Stocks Agreement*, the main multilateral treaty providing to contracting States a right of at-sea inspection in international waters of contracting party vessels. In fact, this treaty predisposes some procedures for the exercise of enforcement jurisdiction on the high seas to ensure the respect of conservation and management measures protecting straddling and highly migratory fish species. Precisely, its article 21 allows States Parties to the Agreement which are members to a subregional or regional fisheries management organizations to board and inspect a contracting party vessel on the high seas in areas covered by such RFMOs. The peculiarity is that such right to inspect is provided whether or not the Flag State of the fishing vessel boarded is a member to the RFMO: it is sufficient the ship is flying the flag of a Party to the *1995 Fish Stocks Agreement*. However, its main weakness is being based on the Flag State's consent, so its at-sea inspection procedure is subordinated to the ultimate discretion of such State in regard to prosecution and sanctions. Thus, we must affirm the mechanism of interdiction provided by the *1995 Fish Stocks Agreement* does not constitute an exception to the principle of the exclusive jurisdiction of the flag State.

In view of this examination, we can conclude that States' national jurisdictional powers on the high seas with reference to IUU fishing are moderately enhancing their scope, surely not as much as they are doing with regard to drug trafficking. Moreover, it seems the fundamental freedom of the high seas has not been curtailed. In fact, despite the absence of a customary rule permitting the boarding of vessels engaged in IUU fishing, the few maritime interceptions operations combating the phenomenon respond to the need of protection of *bon usage* of the high seas, which has traditionally constituted a *leitmotiv* of the law of the sea. In this sense, maintaining a *bon usage* of the oceans means promoting a non-abusive use of the freedoms of the high seas.

Thus, we must conclude the recent extensive practise of interdiction by States of foreign vessels on the high seas has not determined any substantial changes to the legal order of the oceans.

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UN Security Council Resolution 2246/2015

UN Security Council Resolution 2316/2016

UN Security Council Resolution 2383/2017

UN General Assembly Resolution 72/279/2018

UN Security Council Resolution 2500/2019

List of Abbreviations

AIS Approved International Shipping Enterprise Scheme

ASEAN Association of South-East Asian Nations

ATP Allied Tactical Publication

BBJN Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

BMP Best Management Practices

CCMAR Convention for the Conservation of Antarctic Marine Living Resources

CDSs Catch Documentation Schemes

CFP European Common Fisheries Policy

CITIES Convention on International Trade in Endangered Species of Wild Fauna and Flora

CMM Conservative Management Measure

COFI Committee on Fisheries

COLTO Coalition of Legal Toothfish Operators

DCD Dissostichus Catch Documents

DEA American Drug Enforcement Administration

DTOs Drug Trafficking Organizations

DTVIA Drug Trafficking Vessel Interdiction Act

DWF Distant Water Fishing

DWFN Distant Water Fishing Nation

ECCAS Economic Community of Central Africa States

ECHR European Court of Human Rights

ECOWAS Economic Community of West Africa States

EEZ Exclusive Economic Zone

EIA Environmental Impact Assessment

FAO Food and Agriculture Organization

FARC Revolutionary Armed Forces of Colombia

FOCs Flags of Convenience

GATT General Agreement on Tariffs and Trade

GGC Gulf of Guinea Commission

ICCAT International Commission for the Conservation of Atlantic Tunas

ICC International Criminal Court

ICJ International Court of Justice

ICS International Chamber of Shipping

ICTY International Criminal Tribunal for the Former Yugoslavia

ICTR International Criminal Tribunal for Rwanda

IGO Intergovernmental Organization

ILBI International Legally Binding Instrument

ILC International Law Commission

ILO International Labour Organization

IMO International Maritime Organization

IMT International Military Tribunal

INTERPOL International Criminal Police Organization

IPOA-IUU International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

ITLOS International Tribunal for the Law of the Sea

ITU International Telecommunication Union

IUU Illegal, unreported and unregulated (fishing)

LOSC United Nations Convention on the Law of the Sea

LPVs Low-Profile Vessels

MAOC Maritime Analysis and Operations Centre

MARPOL Convention on the Prevention of the Pollution at Sea

MCS Monitoring, Control and Surveillance

MIO Maritime Interception Operation

MPAs Marine Protective Areas

NAFO Northwest Atlantic Fisheries Organization

NATO North Atlantic Treaty Organization

NEAFC North-East Atlantic Fisheries Commission

NGO Non-Governmental Organization

NPAFC North Pacific Anadromous Fish Commission

NPOA National Plan of Action

OECD Organization for Economic Cooperation and Development

OSPAR Convention for the Protection of the Marine Environment in the North-East Atlantic

PCASP Private Contracted Armed Security Personnel

PLF Palestine Liberation Front

ReCAAP Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

RFMO Regional Fisheries Management Organization

SPSS Self-Propelled Semi-Submersibles

SOLAS International Convention for the Safety Life at Sea

SUA Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

TAC Total Allowable Catch

TBT Agreement on Technical Barriers to Trade

TOC Transnational Organized Crime

TREMSs Trade Restrictive Measures

UDHR Universal Declaration of Human Rights

UKMTO United Kingdom Maritime Trade Operations

UN United Nations

UNCTAD United Nations Conference on Trade and Development

UNTOC United Nations Convention against Transnational Organised Crimes

UNODC United Nations Office on Drugs and Crimes

VMS Vessel Monitoring System

VPSs Vessel Protection Detachments

WTO World Trade Organization