Department of
Legal Studies

PhD program in Public, European and International Legal Studies
XXXVI CYCLE

GUIZZARDI RIGHETTI GIAMPAOLO
Registration n. 875553

'Non erit innocens malus': Looking for Justice over *maritime Crimes of International Concern*. A tale of dichotomies

- DOCTORAL DISSERTATION -

in cotutelle between

Tutor: Prof. Irini Papanicolopulu
Co-tutor: Prof. Jean-Christophe Martin

Coordinator: Prof. Antonello Tancredi

ACADEMIC YEAR 2023-2024

To my Mother,
the best crocodile, my moral co-author and shearer of the griefs and joys of this Odyssey of crime and sea. To my grandmother Luisa, who has not seen the end of this journey.
This is for you.

TABLE OF CONTENT

3. Denying humanity: genocide, CaH, slavery and torture
3.1 Genocide: the 'crime of crimes' never(?) perpetrated at sea
3.2 Crimes against humanity
3.2.1 The Mediterranean migrants' hecatomb
3.3 Slavery, enslavement, slave-related practices, modern slavery and trafficking in human beings
3.4 Torture and other inhuman and degrading treatments
4. Environmental crimes
4.1 Plunder in natural resources, wildlife smuggling, IUU fishing, environmental destruction as a means of warfare
4.2 The proposed crime of ecocide
5. Trafficking in weapons and the link to atrocities
6. Terrorism and maritime terrorism

CHAPTER III. TAXONOMIES OF EVIL AND THE QUEST FOR A UNIFIED REGIME OVER (MARITIME) CRIMES OF INTERNATIONAL CONCERN. PIRACY: THE PROTOTYPE OF CRIME AT SEA

Introduction
1. The crimes and their taxonomy. Arguments and critics of the international v transnational dichotomy
2. General principles of criminal jurisdiction (notes)
3. A-territorial and extraterritorial (also called universal) criminal jurisdiction
3.1 The ICC and its jurisdiction. A few notes
4. Transnational crimes
4.1 The UN Drug Convention and the SUA
4.2 The 'Palermo system'
5. Piracy (and armed robbery at sea): *THE* maritime crime between history and *rechtsgüter theorie*
5.1 A history of piracy (brief notes)
5.2 The piratical evil
5.3 Prosecuting pirates: the legal framework and current practice
6. Intertwined crimes and the proposed unified regime over crimes of international concern

SECTION III: THE SEA

CHAPTER IV. A ZONAL INVESTIGATION ON MARITIME JURISDICTION: FROM GENERAL PRINCIPLES TO THE APPLICATION OF THE REGIME OF THE LAW OF THE SEA TO CRIMES OF INTERNATIONAL CONCERN

1. Introduction
1.1 Pathologies and issues with the regime of maritime jurisdiction (notes)
1.2 The maritime zones under the law of the sea: definition and geographical extension. Some notes on the problem of competing maritime claims
2. Sovereignty: internal waters, territorial waters and archipelagic waters; port state jurisdiction over violations perpetrated in other maritime zones

FOREWARD

This Dissertation condensates three years of life, doubts, studies and research. Sometimes it has been a lovely hike, in other moments it has been a steep climb.
Thanks to my doctoral supervisors, Prof. Papanicolopulu and Prof. Martin, for having guided me in this incredibly challenging yet rewarding journey into the law of the sea and the crimes of the oceans. To Dr Alice Ollino, marvelous scholar and incredible friend. To my other guardian angels from Bicocca, Drs. Andrea Longo and Daniele Mandrioli, my Utrecht supervisor Prof. Selene Trevisanut and the NILOS. Thanks to the Peace Palace Library, the Hague Academy of International Law, Prof. Gianmaria Farnelli, Judges Paik and Lijnzaad, Prof. Oude Elferink, Rudall, Blokker, Ryngaert. To my family and friends (cats included), *grazie. Di tutto*.

TABLE OF AUTHORITIES

1. International treaties and statutes of international tribunals

- UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)
- UNESCO Convention on the Protection of Underwater Cultural Heritage (2001)
- UN 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 Stock (1995)
- International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171
- UNGA, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991.
- UNGA, *Convention on the Physical Protection of Nuclear Material*, 26 October 1979, No. 24631.
- UNGA, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, A/RES/3166.
- UNGA, *Drafting of an international convention against the taking of hostages.*, 15 December 1976, A/RES/31/103.
- UNGA, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517.
- UNGA, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349.
- UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263.
- UNGA, *Request for the inclusion of a supplementary item in the agenda of the 44th session: General Assembly: international criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs and across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes: letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General.*
- UNGA, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422.

- UNGA, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, A/59/766.
- UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, Rome, Italy, 15 June - 17 July 1998, *Documents of the Committee of the Whole, Extract from Volume III of the Official Records of the United Nations Diplomatic, Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents), DOCUMENT A/CONF.183/C.1/L.59,* [incorporating document A/CONF.J83/C. 1/L59/Corr. I of] I July 1998], Bureau: proposal regarding part 2, [10 July 1998]
- Charter Of Fundamental Rights Of The European Union, 2012/C 326/02
- Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).
- Convention on Load Lines, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)
- Convention on the International Regulations for Prevailing Collisions at Sea,
- Council of Europe Convention on Action against Trafficking in Human Beings (2005)
- Council of Europe Convention on the Protection of the Environment through Criminal Law Strasbourg, 4.XI.1998:
- EU-Seychelles transfer agreement (Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, 2 December 2009)
- EU-Tanzania Transfer Agreement (COUNCIL DECISION 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania)

- Exchange of notes constituting an agreement on the procedure to be followed in the modification of the limits of the territorial sea in the Gulf of Finland, 6 april and 4 may 1994.
- FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993)
- Geneva Convention on the Territorial Sea and the Contiguous Zone (1958)
- Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War;
- Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships;
- Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines;
- Hague Convention (XI) relative to Certain Restrictions with regard to the Exercise of Capture in Naval War;
- Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War
- UN, Rome Statute of the International Criminal Court, 17th July 1998 (2187 UNTS 3),
- IMO, International Convention for the Safety of Life at Sea (SOLAS), 1974
- IMO, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.
- IMO, Protocol of 1988 relating to the International Convention on Load Lines, 1966.
- International Convention For The Suppression Of The Financing Of Terrorism (1997)
- LEAGUE OF NATIONS, *Greece and Turkey Agreement to facilitate the Application of certain Provisions of the Treaty of Lausanne and of Declaration No. IX annexed to that Treaty,* signed at Athens, December 1, 1926, *with Annex, Final Protocol and Declaration of the same Date, as well as two Protocols and a Proces-Verbal of Signature, signed at Angora, June 21, 1925.*
- LEAGUE OF ARAB STATES, Arab Charter on Human Rights, 15 September 1994,
- LEAGUE OF NATIONS, *Additional to the international convention for the unification of certain rules concerning the immunity of state-owned vessels, signed at Brussels on April 10th, 1926*, 24 May 1934.
- LEAGUE OF NATIONS, *International convention for the unification of certain rules relating to the immunity of state owned vessels*, 10 April 1926.
- LEAGUE OF NATIONS, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414,

- INTERNATIONAL MARITIME ORGANIZATION, *Convention on the prevention of marine pollution by dumping of wastes and other matter 1972 and 1996 protocol* (2003)
- INTERNATIONAL MARITIME ORGANIZATION, International Convention for the Prevention of Pollution from Ships (MARPOL) (1973)
- NATO *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces* (1951)
- UN, ECONOMIC AND SOCIAL COUNCIL (ECOSOC), *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988.
- UN GENERAL ASSEMBLY, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, UNTS 1678, I-29004.
- UN, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, UN Treaty Series 1973.
- UN, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, UN Treaty Series 1990.
-
- ORGANIZATION OF AFRICAN UNITY (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 2 December 2021]
- UN Convention on Fishing and Conservation of the Living Resources of the High Seas (1958)
- *Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930*. London, 6 November 1936 (1936 London Submarine Protocol)
- UN, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
- UN, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2001)
- ILC, *Draft Statute for an International Criminal Court* (1994),
- IMO, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005.
- IMO, *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 14 October 2005.

- INTERNATIONAL ATOMIC ENERGY AGENCY, *Amendment to the Convention on the Physical Protection of Nuclear Material*, 8 July 2005.
- INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.
- INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.
- INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention on Offences and Certain Acts Commited on Board Aircraft*, 14 September 1963.
- UN, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (not in force);
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)
- UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000;
- UN, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013)
- UN, Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area (2010)
- Regulations on prospecting and exploration for polymetallic sulphides in the Area
- The European Convention on Human Rights (ECHR). Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5,
- The United Nations 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 (2001),
- UN Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949
- UN Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

- INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010 (Doc 9959).
- UN Convention (IV) relative to the Protection of Civilian Persons in Time ofWar. Geneva, 12 August 1949
- UN Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949
- The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),
- UN Commission on Human Rights, Convention on the Rights of the Child., 7 March 1990, E/CN.4/RES/1990/74,
- UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, United Nations Convention on Conditions for Registration of Ships Adopted by the United Nations Conference on Conditions for Registration of Ships on 7 February 1986 (1986);
- NATO Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (1951)

2. Judicial and *quasi-judicial* decisions by international courts and tribunals

- *Case Concerning Filleting Within the Gulf of St. Lawrence Between Canada and France***.** Decision of 17 July 1986, *Reports of International Arbitral Awards*, Vol. XIX,
- ECHR (Grand Chamber), *Al-Adsani V. The United Kingdom***,** case *no. 35763/97,* 21 November 2001
- ECHR, *Case Of Hirsi Jamaa And Others V. Italy*, Application no. 27765/09, Judgment, 23 February 2012
- ECHR, *Grand Chamber, Case Of Korbely V. Hungary, Application No. 9174/02, Judgment*, 19 September 2008
- ECHR, GRAND CHAMBER, *Medvedyev and others v. France*, Application no. 3394/03, judgment, 29 March 2010.
- ECHR, SECOND SECTION, *Case Of Siliadin V. France* (Application no. 73316/01), 26 july 2005,
- ECJ, *Bosphorus Queen Shipping Ltd Corp. V. Rajavartiolaitos*. Reports of Cases before the Court of Justice and the Court of First Instance, Opinion Of Advocate General Wahl delivered on 28 February 2018,
- ECJ, GRAND CHAMBER, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, 3 june 2008, Case C-308/06, European Court Reports 2008 I-04057, ECLI identifier: ECLI:EU:C:2008:312
- IACHR, *Case of Almonacid-Arellano et al v. Chile*, Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs)
- ICC, *Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence" - Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*,
- ICC, *Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence" - Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*,
- ICC, Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3, 4 March 2009
- ICC, Pre-Trial Chamber II, *Situation In Uganda In The Case Of The Prosecutor V. Joseph Kony, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence*, No. ICC-02/04-01/05, 23 November 2023,
- ICC, Office Of The Prosecutor *Policy Paper On Case Selection And Prioritisatio*n, 15 September 2016,

- ICC, Situation In The Republic Of Côte D'Ivoire In The Case Of The Prosecutor V. Laurent Gbagbo And Charles Blé Goudé, *Decision on counsel for Mr Gbagbo's request for reconsideration of the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé*, 28 may 2020,
-
- ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu And Narcisse Arido,* Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber VII ICC-01/05-01/13, 22 March 2017,
- ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo*, Public with annexes I and II Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber III, ICC-01/05-01/08, 21 June 2016,
- ICC, *Situation In The Democratic Republic Of The Congo In The Case Of The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Order on the organisation of common legal representation of victims, Trial Chamber II, ICC-01/04-01/07, 22 July 2009
- ICC, *Situation in the Republic of Côte d'Ivoire, The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Decision on counsel for Mr Gbagbo's request for reconsideration of the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions on the release*, ICC-02/11-01/15-1355-Red, 28 May 2020, para. 69
- ICC, *Situation In The Republic Of Mali In The Case Of The Prosecutor V. Ahmad Al Faqi Al Mahdi,* Public Judgment and Sentence, Trial Chamber VIII, ICC-01/12-01/15, 27 September 2016
- ICC, *Situation In Uganda In The Case Of The Prosecutor V. Dominic Ongwen*, Trial Chamber IX, Sentence No.: ICC-02/04-01/15, 6 May 2021
- ICC, *Situation In Uganda In The Case Of The Prosecutor V. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ICC-02/04-01/15, 4 February 2021
- ICC, Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia, *Judgment On The Appeal Of The Prosecutor Against Pre-Trial Chamber I's 'Decision On The "Application For Judicial Review By The Government Of The Union Of The Comoros"'*, No. ICC-01/13 OA 2, Date: 2 September 2019
- ICC, *Prosecutor v. Muthaura, Kenyatta and Ali,* "Decision on the confirmation of charges", ICC-01/09-02/11, 23 January 2012, para. 176.

- ICJ, *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea, (Nicaragua v. Colombia*), Judgment, 21 April 2022
- ICJ, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970
- ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment*, I.C.J. Reports 1985,
- ICJ, *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), Judgment, I.C.J. Reports 1982, *Dissenting Opinion Of Judge Oda*,
- ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009
- ICJ, *Fisheries Jurisdiction* (*United Kingdom v. Zeeland*), Merits, Judgment, I.C.J. Reports 1974
- ICJ, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997,
- ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012,
- ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971
- ICJ, *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969
- ICJ, *Nottebohm Case* (second phase), Judgment of April 6th, 1955: I.C. J. Reports 1955,
- ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C. J. Reports 2003
- ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) V. The Prosecutor (Respondent) Case No. Ictr-99-52-A, In The Appeals Chamber, Judgement 28* november 2007,
- ICTR, *Laurent Semanza V. The Prosecutor*, ICTR-97-20-A, Appeals Judgment, 20 may 2005
- ICTR, *Prosecutor v Nahimana et al.* (Media case) (ICTR-99-52-A), Appeal Judgement, 28 november 2007
- ICTR, *Prosecutor v Seromba Athanase* (ICTR-2001-66-A), Appeal judgment, 12 march 2008
- ICTR, *The Prosecutor V Jean-Paul Akayesu,* Trial Chamber I, 2 September 1998, Case No. ICTR-96-4-T
- ICTR, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, 13 December 2004
- ICTY, *Prosecutor V Dragoljub Kunarac Et Al.*, IT-96-23& IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002

- ICTY, *Prosecutor V. Dragoljub Kunarac* et al., IT-96-23-T, Trial Chamber Judgment, 22 February 2001
- ICTY, *Prosecutor V. Drazen Erdemovic, Separate And Dissenting Opinion Of Judge Cassese,* Appeals Chamber Judgment 7 October 1997, IT-96-22
- ICTY, *Prosecutor V. Du[ko Tadi] A/K/A/ "Dule",* IT-94-1-T, Trial Chamber Opinion and Judgment, 7 May 1997, paras. 647-8, p. 235.
- ICTY, *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, 15 July 1999,
- ICTY, *Prosecutor v. Dusko Tadic aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995
- ICTY, *Prosecutor V. Miroslav Kvocka et al.*, IT-98-30/1-A, Appeals Chamber Judgment, 28 February 2005
- ICTY, *Prosecutor v. Perišić*, "Judgement", IT-04-81-T, 6 September 2011, para. 82.
- ICTY, *Prosecutor V. Radoslav Brđanin,* IT-99-36-T, Trial Chamber Judgment 1 September 2004
- ICTY, *Prosecutor v. Radovan Karadžić,* Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV (TC), 24 March 2016
- ICTY, *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber Judgment, 30 November 2006
- ICTY, *The Prosecutor v. Anto Furundžija,* IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998
- ICTY, *The Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Judgement (TC), 29 May 2013
- ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic,* "Judgement", IT-96-23-T and IT-96-23/1-T, 22 February 2001
- ICTY, *Prosecutor v. Tadić*, "Appeals Judgement", IT-94-1-A, 15 July 1999,
- IMT NUREMBERG, *Nazi Conspiracy And Aggression, Volume I,* Washington (1946),
- IMT NUREMBERG, *Trial The Major War Criminals Before The International Nuremberg, 14 November 1945 -1 October 1946*, Two hundred and fifteenth day, Friday 30 August 1946, afternoon session, Nuremberg (1948),
- INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, *Judgment Of The International Military Tribunal For The Far East* (1948)
- INTERNATIONAL MILITARY TRIBUNAL NUREMBERG, *United States v Göring et al.* (1946), in Trial Of The Major War Criminals Before The International Military Tribunal Nuremberg 14 November 1945 -1 October 1946, Nuremberg (1947)

- INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, *Prosecutor V. Vujadin Popovič et Al.*, IT-05-88-A, Appeals Chamber Judgment, 30 January 2015
- IRMCT, *Prosecutor V Mico Stanišić and Stojan Župljanin*, Appeals Chamber Judgment, IT-08-91-A, 30 June 2016
- ITLOS, *"Grand Prince" (Belize v. France), Prompt Release,* Judgment, ITLOS Reports 2001, Declaration of Judge Wolfrum
- ITLOS, "*ARA Libertad" (Argentina v. Ghana), Provisional Measures,* Order of 15 December 2012, ITLOS Reports 2012
- ITLOS, "*Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment*, ITLOS Reports 2004
- ITLOS, *"Tomimaru" (Japan v. Russian Federation),* Prompt Release, Judgment, ITLOS Reports 2005-2007
- ITLOS, *"Volga" (Russian Federation v. Australia), Prompt Release, Judgment*, ITLOS Reports 2002, *Separate Opinion Of Judge Cot*
- ITLOS, *Ara Libertad,* joint separate opinion of Judges Wolfrum and Judge Cot
- ITLOS, *Case Concerning The Detention Of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation)*, case no. 26. Request for the prescription of provisional measures. Order,
- ITLOS, *Case Concerning The Detention Of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Request for the prescription of provisional measures*, case no. 26, Order, 25 May 2019,
- ITLOS, Fisheries Advisory Opinion, Written Proceedings, *Written Statement Of The International Union For Conservation Of Nature And Natural Resources, World Commission On Environment Al Law, Specialist Group On Oceans, Coasts And Coral Reefs,*
- ITLOS, *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment*, ITLOS Reports 1999,
- ITLOS, *M/V "SAIGA*" (Saint Vincent and the Grenadines v. Guinea), Prompt release, Judgment, ITLOS Reports 1997,
- ITLOS, *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*,
- ITLOS, *M/V "Norstar" (Panama v. Italy), Judgment*, ITLOS Reports 2018–2019
- ITLOS, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment*, ITLOS Reports 2014
- ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, ITLOS Reports 2015

- ITLOS, SEABED DISPUTE CHAMBER, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011
- ITLOS, *The M/V "Norstar" Case (Panama V. Italy) List of cases: No. 25, Joint Dissenting Opinion Of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin And Lijnzaad And Judge Ad Hoc Treves,*
- ITLOS, Virginia G, *Declaration of Judge Nelson*,
- ITLOS; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*,
- OFFICE OF THE PROSECUTOR, Situation on Registered Vessels of Comoros, Greece and Cambodia, *Article 53(1) Report*, 6 november 2014
- PCA, *In The Matter Of The Chagos Marine Protected Area Arbitration (Mauritius/United Kingdom)*, Annex VII Arbitration, *Award*, 18 march 2015
- PCA, *Muscat Dhows Case, France V. Great Britain*, 8 August 1905
- PCA, *The Arctic Sunrise Arbitration, Netherlands v Russia, Award on the Merits,* PCA Case No 2014-02, ICGJ 511 (PCA 2015), 14th August 2015
- PCA, *The Republic Of Malta V. The Democratic Republic Of São Tomé And Príncipe* (Duzgit Integrity Arbitration), PCA Case Nº 2014-07, 5 September 2016
- PCIJ, *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B. No 41, Individual Opinion by M. Anzilotti
- PCIJ, **S.S.** *'Lotus', France v Turkey, Judgment, Judgment* No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927)
- STL, *Interlocutory Decision On The Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-II-OIIIIAClRI76bls, 16 february 2011, para. 134, p. 83.
- STL, *Interlocutory Decision On The Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-II-OIIIIAClRI76bls, 16 february 2011
- THE UNITED STATES-PANAMA GENERAL CLAIMS COMMISSION, *Compañia de Navegación Nacional (Panama) v. U.S*, 29 June 1933, VOLUME VI, Dissenting opinion of Panamanian Commissioner,
- TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947

3. Domestic case-law

- AUSTRALIA, HIGH COURT OF AUSTRALIA, *CPCF v Minister for Immigration and Border Protection*, [2015] HCA 1, 28 January 2015
- AUSTRALIA, HIGH COURT OF AUSTRALIA, *The Queen v Tang* [2008] HCA 39, *28 August 2008*, M5/2008
- CANADA, SUPREME COURT, *B010 v. Canada* (Citizenship and Immigration), 2015 SCC 58 (CanLII), [2015] 3 SCR 704, 27 November 2015
- CANADA, SUPREME COURT, *The Ship "North" v. The King* (1906), 37 SCR 385,
- FRANCE, COUR DE CASSATION, CHAMBRE CRIMINELLE - Formation restreinte hors RNSM/NA, 19 avril 2017, n° 16-82.111, ECLI:FR:CCASS:2017:CR00789.
- FRANCE, COUR DE CASSATION, CHAMBRE CRIMINELLE, 11 juin 2008, n° 07-83.024 ECLI:FR:CCASS:2008:CR02836
- FRANCE, COUR DE CASSATION, CHAMBRE CRIMINELLE, 25 septembre 2012, n° 10-82.938, ECLI:FR:CCASS:2012:CR03439
- ITALY, CONSTITUTIONAL COURT, Sentenza 192/2023 (ECLI:IT:COST:2023:192), 27 September 2023
- ITALY, CORTE DI CASSAZIONE, Sezione I Penale, n. 13076, 3 March 2020 n. 13076
- ITALY, CORTE DI CASSAZIONE, Sezione I penale, n. 14510, 27 March 2014
- ITALY, CORTE DI CASSAZIONE, Sezione I penale, n. 19314, 7 may 2019
- ITALY, CORTE DI CASSAZIONE, Sezione I Penale, n. 31652, 13 august 2021
- ITALY, CORTE DI CASSAZIONE, Sezione I Penale, n. 36052, 20 August 2014
- ITALY, CORTE DI CASSAZIONE, Sezione I Penale, n. 36837, 25 july 2017
- ITALY, CORTE DI CASSAZIONE, Sezione I Penale, n. 431, 10 January 2023
- ITALY, CORTE DI CASSAZIONE, Sezione V Penale, n. 48250, 12 september 2019
- ITALY, PROCURA DELLA REPUBBLICA presso la Pretura Circondariale di Reggio Calabria, *N. 2114/94RGNR Reggio Calabria 23.07.96, Oggetto:- Trasmissione Atti Fascicolo Proc. 2114/94 RGNR al Sig.S. Procuratore della Repubblica, Dott. Alberto Cisterna, Reggio Calabria*,
- ITALY, TRIBUNALE DI CATANIA, Quinta Sezione Penale in sede di riesame ex art. 309 c.p.p., *Proc. n. 293/2014 R.I.M.C*, 20 february 2014
- KENYA, HIGH COURT, *Mohamud Mohamed Hashi & 8 ors, Re, Hashi alias Dhodi and ors v Chief Magistrate's Court, Mombasa*, Judicial review judgment, Misc App No 434 of 2009, ILDC 1603 (KE 2010), 9th November 2010,
- MAURITIUS, INTERMEDIATE COURT OF MAURITIUS, *Police v Mohamed Ali Abdeoulkader and ors*, Cause No.850/2013, 2014 INT 311, 6 november 2014;
- NETHERLANDS, COURT OF APPEAL IN THE HAGUE, case no. 22-004920-12, ECLI:NL:GHDHA:2014:1006, 21 march 2014

- NETHERLANDS, HOGE RAAD DER NEDERLANDEN, *The Public Prosecutor v. Guus Kouwenhoven,* ECLI:NL:HR:2018:2349, 18 december 2018
- NETHERLANDS, THE, 'S-HERTOGENBOSCH COURT OF APPEAL, *Ruling of the three judge panel at the Court of Appeal in 's-Hertogenbosch, rendered, after referral of the case by the Supreme Court following the appeal lodged against the judgement of the District Court in The Hague of June 7, 2006, case no. 09-750001-05, in the criminal case against Guus Kouwenhoven*, 21 april 2017.
- PHILIPPINES, SUPREME COURT, *Arigo v Smith, Arigo and ors v Swift and ors,* Petition for the issuance of a writ of Kalikasan with prayer for the issuance of a temporary environmental protection order, GR No 206510, ILDC 2315 (PH 2014), 16th September 2014
- PHILIPPINES, SUPREME COURT, *People of the Philippines v Tulin and ors*, Appeal, GR No 111709, ILDC 1309 (PH 2001), 30th August 2001
- SEYCHELLES, SUPREME COURT, *The Republic vs. Mohamed Aweys Sayid and eight (8) others,* 15 december 2010
- SINGAPORE, HIGH COURT OF THE REPUBLIC OF SINGAPORE, *Ng Kok Wai v Public Prosecutor*, [2023] SGHC 306, 27 october 2023
- SPAIN, AUDIENCIA NACIONAL, SALA DE LO PENAL, Sección 4ª, Sentencia de 3 May. 2011, rec. 93/2009
- SPAIN, AUDIENCIA PROVINCIAL, SANTA CRUZ DE TENERIFE, SECCIÓN 6, 13 december 2022, Nº de Recurso 33/2022, Nº de Resolución 372/2022
- SPAIN, *Prosecutor v Central Criminal Court No 5, Appeal decision*, ILDC 2678 (ES 2014), Order No 41/2014, AAN 225/2014, 4th July 2014, reported in ÍÑIGO ÁLVAREZ, L., *Oxford Reports on International Law [ORIL], International Law in Domestic Courts [ILDC]*, 13 september 2017
- SPAIN, TRIBUNAL SUPREMO, Sala de lo Penal, Sección 1, Sentencia Penal Nº 593/2014, Rec 10435/2014 de 24 de Julio de 2014,
- SPAIN, TRIBUNAL SUPREMO, Sala de lo Penal, Sección 1, Sentencia Penal Nº 582/2007, Rec 183/2007 de 21 de Junio de 2007
- UK, COURT OF APPEAL, CRIMINAL DIVISION, *Regina V John Simon Blight, Nigel Ingram*, EWCA Crim 280, case No: A2-201802762/A2-201802764, 12 February 2019,
- UK, COURT OF QUEEN'S BENCH, May 24 And 25, 1864, *Re Tervan And Others, Before Cockburn, C.J., Crompron, Blackburn, And Shee, JJ.*, reported in Cox, E., Record of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland (1864)
- UK, HOUSE OF LORDS, *Joyce Appellant; And Director Of Public Prosecutions Respondent*, 1 February 1946, 01 Feb 1946 [1946] AC 347, HL
- UK, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, *Naim Molvan, owner of motor vessel "Asya" v. Attorney-General for Palestine,* on appeal from the

Supreme Court of Palestine, A.C. 351, 20 April 1948, *reported in* BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, *British International Law Cases* vol. 1, London (1964),

- UK, SCOTTISH HIGH COURT OF JUSTICIARY, *Note of Appeal against conviction and sentence by Lieuwe Hoekstra and Jan van Rijs and Ronny van Rijs and Hendrik van Rijs v. Her Majesty's Advocate* [2000] Scothc 11, 28th January, 2000
- UK, SUPREME COURT, *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC10 (4 March 2015)
- US COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, *US v Ali Mohamed Ali (aka Ahmed Ali Adan, aka Ismail Ali)*, no. 12–3056, 718 F.3d 929, 11 June 2013
- US COURT OF APPEALS, THIRD CIRCUIT, *United States v Best*, Appeal judgment, ILDC 1869 (US 2002), 304 F3d 308 (3d Cir 2002), 18th September 2002.
- US DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, *United States v Salad and ors, Decision on motion to dismiss*, 908 F Supp 2d 730 (ED Va 2012), ILDC 2027 (US 2012), 30th November 2012,
- US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, *The Lusitania, Gertrude Adams and ors v Cunard SS Co, Ltd, Trial judgment*, 251 F 715 (SDNY 1918), ILDC 1581 (US 1918)
- US, COURT OF APPEALS, ELEVENTH CIRCUIT, *Odyssey Marine Expl. Inc. v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) • 23 Fla. L. Weekly Fed. C 425 • 2011 A.M.C. 2409, 21 September 2011
- US, COURT OF APPEALS, ELEVENTH CIRCUIT, *United States v Bellaizac-Hurtado and ors,* Appeal judgment, 700 F3d 1245 (11th Cir 2012), ILDC 1949 (US 2012), 6th November 2012
- US, COURT OF APPEALS, Eleventh Circuit, *United States v. Marino-Garcia* 679 F.2d 1373 (11th Cir. 1982) Decided Sep 7, 1982
- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v Dávila-Reyes, Appeal judgment*, 937 F 3d 57 (1st Cir 2019), ILDC 3083 (US 2019), 3rd September 2019
- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v Del Carmen Cardales-Luna*, Appeal judgment, 632 F3d 731 (1st Cir 2011), ILDC 1777 (US 2011), 20th January 2011
- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v Nueci-Peña (Francisco),* Appeal judgment, ILDC 2355 (US 2013), 711 F3d 191, 1441 (1st Cir 2013), 711 F 3d 191, 19th March 2013
- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v. Angulo-Hernandez, et al.*, 565 F.3d 2, 4, Nos. 07-2428, 07-2497, 07-2453, 07-2460, 5 may 2009

- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v. Matos-Luchi, et al.*, 627 F.3d 1, 4, 1 December 2010
- US, COURT OF APPEALS, FIRST CIRCUIT, *United States v. Nueci-Peña*, 711 F.3d 191, 197, 19 March 2013
- US, COURT OF APPEALS, FOURTH CIRCUIT, *United States v Shibin (Mohammad Saaili)*, Appeal judgment, Case No 12-4652, ILDC 2160 (US 2013), 722 F 3d 233 (4th Cir 2013), 12th July 2013
- US, COURT OF APPEALS, Fourth Circuit, *United States v. Dire,* case no. 680 F.3d 446 (4th Cir. 2012), decided May 23, 2012
- US, COURT OF APPEALS, Ninth Circuit, *Mr. Justice Field, in Re Ah Sing* (1882), 13 Fed. Rep. 286,
- US, COURT OF APPEALS, NINTH CIRCUIT, *US V. Marin et al.*, No. 22-50154 D.C. No. 3:21-cr-01021-DMS-2, No. 22-50155 D.C. No. 3:21-cr-01021- DMS-1, 19 july 2023
- US, COURT OF APPEALS, Second Circuit, *Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Peña-Irala,* case no. No. 191, Docket 79-6090, 630 F.2d 876; 1980 U.S. App. LEXIS 16111, 30 june 1980
- US, COURT OF APPEALS, SECOND CIRCUIT, *Mastafa and ors v Chevron Corporation and Banque Nationale de Paris Paribas, Appeal judgment,* 770 F 3d 170 (2d Cir 2014), ILDC 2604 (US 2014), 23rd October 2014,
- US, DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *United States v Carvajal and Miranda,* Reconsideration of motion to dismiss, 924 F Supp 2d 219 (DDC 2013), ILDC 2006 (US 2013), 20th February 2013
- US, DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, *United States v Rosario and Martinez, Trial judgment*, 17 F Supp 3d 144 (DPR Apr 30, 2014), ILDC 2356 (US 2014), 30th April 2014
- US, DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, *United States v James-Robinson (Cesar) and ors*, Lower Court Decision, 515 F.Supp. 1340 (S.D. Fla. 1981), ILDC 935 (US 1981), 11th June 1981,
- US, DISTRICT COURT, N.D. FLORIDA, TALLAHASSEE DIVISION, *Global Marine Exploration, Inc. v. Republic of Fr.* 500 F. Supp. 3d 1296 (N.D. Fla. 2020), 16 november 2020
- US, SUPREME COURT, *Schooner Exchange v. McFaddon*, 11 U.S. 116, 24 February 1812,
- US, SUPREME COURT, Syllabus, *Stewart v. Dutra Construction Co., Certiorari to the United States Court of Appeals for the First Circuit,* no. 03-814. Argued November 1, 2004, Decided February 22, 2005,
- US, SUPREME COURT, *The United States v. Smith* (1820), in Williams, S.K. (ed.), *Cases Argued And Decided In The Supreme Court Of The United States, 5,6,7,8 Wheaton, Vol. 5,* Rochester (1926),

- US, SUPREME COURT, *Wildenhus's Case, Appeal From the Circuit Court Of The United States For The District Of New Jersey* (1887)

4. Other international sources and documents

- 'Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment', (GA Res. 3452), 1975)
- ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law* (*jus cogens*), with commentaries (2022)
- ANNAN, K., *The Secretary-General Address At The Opening Of The Signing Conference For The United Nations Convention Against Transnational Organized Crime Palermo, 12 December 2000* https://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-12-12_1.html.
- Art. 5 Universal Declaration of Human Rights (UDHR)
- Article 19. Yearbook of the International Law Commission, vol. II part two (1976),
- ILC, *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, 1950,
- ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law* (jus cogens) 2022
- ILC, *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019*, A/CN.4/727
- Article 7 of Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29 (1935)
- CCAMLR, *Resolution 19/XXI* (Flags of non-compliance)(2002);
- COMMITTEE AGAINST TORTURE, Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, *General Comment No. 2*, CAT/C/GC/2 24 January 2008
- COMMITTEE AGAINST TORTURE, *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, General Comment No. 2*, 24 January 2008
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985,
- Draft Code of Crimes against the Peace and Security of Mankind (1996)
- Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29 (1935)
- *Draft Report, Circulated To The Members Of The Committee On April 3rd, 1930*, (Work Of The First Sub-Committee.)
- *Draft Report, Circulated To The Members Of The Committee On April 3rd, 1930*, (Work Of The First Sub-Committee.),

- FAO, *Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing*, Miami, 23-25 September 2003
- FINANCIAL ACTION TASK FORCE, *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011)
- HUMAN RIGHTS COMMITTEE (2004) General Comment 31: Nature and the General Legal Obligation Imposed on States Parties to the Covenant. UN Doc. CCPR/C, para. 8
- ICC Rules of Procedure and Evidence
- ICC, Office Of The Prosecutor, *Policy Paper On Case Selection And Prioritisation*, 15 September 2016, para. 7, p. 5 https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf
- ILC Articles concerning the law of the sea with commentaries," (1956) Yearbook of the ILC, vol. II, p. 297; reproduced in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993),
- ILC, *Articles concerning the Law of the Sea, with commentaries, 1956*, Article 29, Yearbook of the International Law Commission (1956)
- ILC, *Articles concerning the Law of the Sea, with commentaries, 1956*, Article 68(2), Yearbook of the International Law Commission (1956),
- ILC, Draft articles on Prevention and Punishment of Crimes Against Humanity (2019);
- ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts* (2001),
- ILC, Memorandum presented by the Secretariat, "Regime of the High Seas" (A/CN.4/32),
- ILC, *Report of the International Law Commission Covering the Work of its Seventh Session 2 May - 8 July 1955, Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), Extract from the Yearbook of the International Law Commission:- 1955*, vol. II,
- ILC, *Report of the International Law Commission Covering the Work of its Sixth Session*, 3 28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693),
- ILC, *Report of the International Law Commission on the Work of its Eighth Session*, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), Draft Article 66, commentary,
- ILC, *Yearbook Of The International Law Commission 1954 Volume II Documents of the sixth session including the report of the Commission to the General Assembly* (1954),

- ILO, *Report V(2), substandard vessels, particularly those registered under flags of convenience*, international labour conference 62nd (maritime) session (1976);
- ILO, The Work in Fishing Convention, 2007 (No. 188): Getting on board. Issues paper for discussion at the global dialogue forum for the promotion of the work in fishing convention, 2007 (no. 188) (15-17 may 2013) (2013);
- IMO, Registration of ships and fraudulent registration matters, https://www.imo.org/en/OurWork/Legal/Pages/Registration-of-ships-and-fraudulent-registration-matters.aspx#:~:text=Some%20countries%20only%20register%20vessels,for%20international%20trade%20at%20all
- IMO, *Report of the legal committee on the work of its 109th session, Measures to prevent unlawful practices associated with the fraudulent registration and fraudulent registries of ships*, 7 April 2022,
- IMO, Resolution A.1025(26) Code Of Practice For The Investigation Of Crimes Of Piracy And Armed Robbery Against Ships, Adopted on 2 December 2009 (Agenda item 10)
- INSTITUT DE DROIT INTERNATIONAL, *Règles relatives à l'usage du pavillon national pour les navires de commerce* (1896)
- INTERNATIONAL LAW COMMISSION, 'Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur', *Yearbook of the International Law Commission*, vol. II (1950);
- INTERNATIONAL LAW COMMISSION, 'Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries', *Yearbook of the International Law Commission*, Vol. II (1950);
- INTERNATIONAL LAW COMMISSION, *Documents Of The Eighth Session, Including The Report Of The Commission To The General Assembly Regime Of The High Seas And Regime Of The Territorial Sea, Document A/Cn.4/97, Report By J. P. A. François, Special Rapporteur*,
- INTERNATIONAL LAW COMMISSION, *Documents Of The Eighth Session, Including The Report Of The Commission To The General Assembly Regime Of The High Seas And Regime Of The Territorial Sea, Document A/Cn.4/97, Report By J. P. A. François, Special Rapporteur*,
- INTERNATIONAL LAW COMMISSION, *Documents Of The Eighth Session, Including The Report Of The Commission To The General Assembly Regime Of The High Seas And Regime Of The Territorial Sea, Document A/Cn.4/97, Report By J. P. A. François, Special Rapporteur*,
- INTERNATIONAL LAW COMMISSION, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries* (2019), General Commentary

- INTERNATIONAL LAW COMMISSION, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission*, vol. II, Part Two (1996)
- INTERNATIONAL LAW COMMISSION, Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954) https://legal.un.org/ilc/texts/instruments/english/commentaries/7_3_1954.pdf.
- INTERNATIONAL LAW COMMISSION, *Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9* (A/3159), Draft Article 66
- INTERNATIONAL LAW COMMISSION, Seventy-third session Geneva, 18 April–3 June and 4 July–5 August 2022 *Peremptory norms of general international law (jus cogens) Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading Identification and legal consequences of peremptory norms of general international law (jus cogens)*.
- INTERNATIONAL LAW COMMISSION, Twelfth report on the draft Code of Crimes against the Peace and Security of Mankind / by Doudou Thiam, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II part 2 (1994);
- INTERPOL; UNEP, *Strategic Report Environment, Peace And Security A Convergence Of Threats* December 2016, The Convergence of Threats to Environment, Peace and Security Foreword file:///C:/Users/Utente/Desktop/INTERPOL-UNEP%20Strategic%20Report%20-%20Environment,%20Peace%20and%20Security%20-%20A%20Convergence%20of%20Threats.pdf.
- IOM, *Protecting migrants at sea*, Bangkok (2018),
- IOM, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, Jakarta (2016),
- JAGHAI-BAJULAIYE, S., *Joint Submission to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children*, 1 june 2020 (2020)
- JALLOH, C.C., 'Annexes A. Universal criminal jurisdiction', in International Law Commission, *Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018)*, General Assembly Official Records Seventy-third Session Supplement No. 10, New York (2018)
- LEAGUE OF NATIONS, *Acts Of The Conference For The Codification Of International Law Held at The Hague from March 13th to April 12th, 1930*, Meetings Of The Committees vol. III Minutes Of The Second Committee Territorial Waters, C. 351 (b). M. 1 45 (b). 1930. V. Geneva, August 19th, 1930,
- LEAGUE OF NATIONS, *Acts Of The Conference For The Codification Of International Law Held At The Hague From March 13th To April 12th, 1930,*

Meetings Of The Committees, Vol. Ill, Minutes Of The Second Committee, Territorial Waters

- LEAGUE OF NATIONS, *Acts Of The Conference For The Codification Of International Law Held At The Hague From March 13th To April 12th, 1930, Meetings Of The Committees*, Vol. Ill, Minutes Of The Second Committee, Territorial Waters,
- *Memorandum of Understanding on Port State Control* (1982)
- OECD, maritime security – ownership and control of ships: options to improve transparency. Discussion paper, 17 december 2003 (2003);
- OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *International legal protection of human rights in armed conflict*, New York (2011);
- Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), Annex. 2; Eighth Session, Supplement No. 9 (A/2456)
- PALMER, G. ET AL. *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (July 2011)
- PROLIFERATION SECURITY INITIATIVE, *Statement of Interdiction Principles*, 14.05.2018. https://www.psi-online.info/psi-info-en/botschaft/-/2077920
- Recommendation E of the ad hoc Committee (E/1988, pp. 25-26).
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50
- Second United Nations Conference on the Law of the Sea Geneva, Switzerland 17 March – 26 April 1960 Document:- A/CONF.19/L.15 Final Act of the Second United Nations Conference on the Law of the Sea Extract from the Official Records of the Second United Nations Conference on the Law of the Sea (Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act).
- UN Stockholm Declaration Of The United Nations Conference On The Human Environment (1972),
- Third United Nations Conference on the Law of the Sea 1973-1982 Concluded at Montego Bay, Jamaica on 10 December 1982 Document:- A/CONF.62/L. 8/Rev.1 Statement of activities of the Conference during its first and second sessions Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume III (Documents of the Conference, First and Second Sessions),
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted with the UNGA Res. 60/147 on the 16th december 2005,
- UN COMMITTEE AGAINST TORTURE (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2,

- UNGA, Res. 177 (II), *Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal,* 21 november 1947 (1947) A/RES/177(II),
- UNGA, *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946 (1946) A/RES/95,
- UNSC res. 2292 (2016)
- UN WORKING GROUP ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION, *Report of the Working Group on the use of mercenaries as means of violating human rights and impeding the exercise of the right of peoples to self-determination,* 4 August 2022, A/77/268,
- UN, *Slavery, the slave trade, and other forms of servitude : report / submitted by the Secretary-General pursuant to resolution 388 (XIII) of the Economic and Social Council, of 10 September 1951,* 27 January 1953,
- UNCTAD, *Action on the question of open registries*, TD/B/C.4/220 (1981)
- UNDOC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011), p. 25 https://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf.
- UNGA Res. 2234(XXII)(1967)
- UNGA Res. 2467(XXIII)(1968)
- UNGA res. 2750 C (XXV) / 1970 setting the agenda for Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction set forth in General Assembly resolution 2467 A (XXIII)
- UNGA Res. 3067 (XXVIII)(1973)
- UNGA Res. 33/73 (1978),
- UNGA, *Declaration on the Preparation of Societies for Life in Peace* (A/RES/33/73)
- ICC, FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, DONE AT ROME ON 17 JULY 1998, U.N. DOC. A/CONF.183/10, *Annex I. Resolutions Adopted By The United Nations Diplomatic Conference Of Plenipotentiaries On The Establishment Of An International Criminal Court,*
- UNGA, Seventy-sixth session, Agenda item 74 (b), Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Resolution adopted by the General Assembly on 28 July 2022, 76/300. *The human right to a clean, healthy and sustainable environment.*
- INSTITUT DE DROIT INTERNATIONALE, *Report. Preliminary Note On The Work Of Commission 11 – "Piracy, Present Problems"* (2022)

- UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES, *Framework Principles On Human Rights And The Environment: The Main Human Rights Obligations Relating To The Enjoyment Of A Safe, Clean, Healthy And Sustainable Environment* (2018),
- UNSC Res. 2608 (2021)
- *Unlawful death of refugees and migrants - Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (A/72/335), 15 august 2017
- UNODC, *Combating Transnational Organized Crime Committed at Sea Issue Paper* (2013)
- UNODC, *Global Study on Firearms Trafficking* (2020)
- UNODC, *Global Study on Smuggling of Migrants* (2018)
- UNODC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011)
- UNODC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011),
- UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (2017)
- UNSC res. 1540 (2004)
- UNSC res. 1566 (2004)
- UNSC res. 1625 (2005)
- UNSC res. 1838 (2008)
- UNSC res. 1976 (2011)
- UNSC res. 2608 (2021)
- UNSC Res. 579 (1985)
- UNSC Res. 2375 (2017)
- UNSC Res. 827 (1993)
- WORLD BANK, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa. A World Bank study* (2013)
- *Yearbook of the International Law Commission*, vol. II part 2 (1980)
- UNGA, *General Assembly official records, 48th session: 83rd plenary meeting*, New York, Friday, 17 December 1993
- UNGA, *The Crime of Genocide*, 11 December 1946, A/RES/96,
- UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
- International Law Commission, A/Cn.4/53, 4 April 1952 *Report On The Regime Of The Territorial Sea By J.P.A. Francois, Special Rapporteur*, p.3.
- A/CN.4/61 (French only) and Add.1 & Corr.1, *Second Report on the Regime of the Territorial Sea*, by Mr. J.P.A. François, Special Rapporteur, Topic: Law of

the sea - régime of the territorial sea. Extract from the Yearbook of the International Law Commission- 1953 , vol. II,

- A/CN.4/61 (French only) and Add.1 & Corr.1, *Second Report on the Regime of the Territorial Sea*, by Mr. J.P.A. François, Special Rapporteur, Topic: Law of the sea - régime of the territorial sea. Extract from the Yearbook of the International Law Commission- 1953 , vol. II,
- UNGA, *Definition of Aggression*, 14 December 1974, A/RES/3314,
- COUNCIL REGULATION (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999,
- UNGA Res. 73/343, 20 September 2019, preambular para. 4.
- IMO, *Resolution A.1142(31)* Adopted on 4 December 2019, (Agenda item 11), *Measures to prevent the fraudulent registration and fraudulent registries of ships*,
- ICC-IMB, *Piracy and Armed Robbery against Ships Report 01 january-31 december 2020* (2021)
- ICC-IMB, *Piracy and Armed Robbery against Ships Report 01 january-30 september 2021* (2021)

5. National legislation

- CHINA (PRC), Criminal Law of the People's Republic of China, Article 6
- CYPRUS, The Merchant Shipping (Registration Of Ships, Sales And Mortgages) Laws Of 1963 To 2005, §§ 5(1)(a)(ii) and 5°
- FRANCE, Code des transports (as amended by the Ordonnance n°2021-1843 du 22 décembre 2021 - art. 18), Article L5112-1-3
- ITALY, Codice della Navigazione, Art. 258
- LIBERIA, Liberian Code of Law (1956), Title 21
- MAURITIUS, Revised Laws of Mauritius P8A – 1 [Issue 4], Piracy And Maritime Violence Act, Act 39 of 2011 – 1 June 2012, Section 5 https://attorneygeneral.govmu.org/Documents/Laws%20of%20Mauritius/A
- PANAMA, Código de Trabajo (1995),
- PANAMA, Decreto Ejecutivo N° 32 (De lunes 04 de febrero de 2019) por medio del cual se toman acciones y medidas contra las naves registradas en la marina mercante de la República de Panamá y empresas marítimas vinculadas con la financiación del terrorismo,
- PANAMA, Ley General de Marina Mercante (2008),
- PHILIPPINES, Presidential Decree No. 532 August 8, 1974, section 2(d)
- ROMAN EMPIRE, Digesta Iustiniani, 14.II.9 (De Lege Rhodia de Iactu)Spain,
- SPAIN, Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, Article 23.4(d), amended by the Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal, publicada en el Boletín Oficial del Estado, el 14 de Marzo de 2014
- UK, Merchant Shipping (Registration of Ships) Regulations (1993) Z%20Acts/P/PIRACY%20AND%20MARITIME%20VIOLENCE%20ACT.pdf
- US, Code of Federal Regulations, Title 46 Chapter I Subchapter G Part 67 Subpart C, in particular para. 67.30 (Requirement for citizen owner) and para. 68.5 (Requirements for citizenship under 46 U.S.C. App. 883-1.)
- US, Maritime Drug Law Enforcement Act (MDLEA), codified in Title 46, Chapter 705 of the U.S. Code, Sections 70501 through 70508, 1986,
- US, Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945.
- US, Proclamation 2668--Policy of the United States with respect to coastal fisheries in certain areas of the high seas, 28 September 1945

SECTION I: PRELIMINARY MATTERS

'[Κ]αὶ ἐκάλεσεν ὁ θεὸς τὴν ξηρὰν γῆν καὶ τὰ συστήματα τῶν ὑδάτων ἐκάλεσεν θαλάσσας. καὶ εἶδεν ὁ θεὸς ὅτι καλόν […] καὶ εἶπεν ὁ θεός ποιήσωμεν ἄνθρωπον κατ᾽ εἰκόνα ἡμετέραν καὶ καθ᾽ ὁμοίωσιν, καὶ ἀρχέτωσαν τῶν ἰχθύων τῆς θαλάσσης καὶ τῶν πετεινῶν τοῦ οὐρανοῦ καὶ τῶν κτηνῶν καὶ πάσης τῆς γῆς καὶ πάντων τῶν ἑρπετῶν τῶν ἑρπόντων ἐπὶ τῆς γῆς […] καὶ ηὐλόγησεν αὐτοὺς ὁ θεὸς λέγων αὐξάνεσθε καὶ πληθύνεσθε καὶ πληρώσατε τὴν γῆν καὶ κατακυριεύσατε αὐτῆς καὶ ἄρχετε τῶν ἰχθύων τῆς θαλάσσης καὶ τῶν πετεινῶν τοῦ οὐρανοῦ καὶ πάντων τῶν κτηνῶν καὶ πάσης τῆς γῆς καὶ πάντων τῶν ἑρπετῶν τῶν ἑρπόντων ἐπὶ τῆς γῆς.'[1]

[1] BIBLIA, *Genesis*, 1.10-28.

INTRODUCTION

5. A gap in the literature. The need for a comprehensive study on jurisdiction over maritime crimes of international concern.

A simple *Boolean search* on Google of the string 'crime AND sea AND jurisdiction' gives about 24100000 results in less than a second. While some of the results are spurious and other refer to the same sources, this elementary empirical test allows to visualise the oceanic proportions of the problems and the bibliography thereon. Even more considering that the previous experiment concerns a single language. Making the same experiment in French, Spanish and Italian adds to this number, respectively, other 28800000, 500000 and 125000 results. Of course, not all the results above are international legal analyses of maritime crime, maritime jurisdiction, international and transnational crimes and related subjects, yet the relevant literature is large enough to fill non-inconspicuous libraries which *no honest man*[2] could ever claim having read in their entirety.

Still, these analyses, reflecting the *progressive specialization of knowledge*[3] and the fragmentation of international law,[4] however, tend to concentrate on *individual aspects of crime-at-sea,* individual crimes, and specific geographic areas, examining these subjects from either a criminal or a maritime perspective.

This means losing sight of the complexity of the phenomenon, its underlying forces and the challenges faced by law on the oceans, as it will be synthetically examined in the next Paragraph and through the various Chapters of this Dissertation.

To understand crime-at-sea it is necessary to understand crime, the sea and how the marine element affects the legal and factual configuration of crime. It is necessary to *read crime through the lens of the sea and the sea through the lens of the crime.*[5]

A major source of inspiration in this sense has come from Papanicolopulu's foundational monograph on *International Law and the Protection of People at Sea*. Whereas Professor

---

[2] As Mummery once declared of the possibility to conquer the *Dent du Geánt*, in the Mont Blanc Massif, 'nobody will ever get up that peak by fair means'. STEPHEN, L., 'Round Mont Blanc. By Leslie Stephen. A Paper read before the Alpine Club, December 12, 1871', *The Alpine Journal: A Record Of Mountain Adventure And Scientific Observation. By Members Of The Alpine Club. Vol. V. May 1870 To May 1872*, London (1872), p. 304.

[3] *Ex multis* ALLWOOD, J.S. ET AL. (eds.), *Controversies and Interdisciplinarity: Beyond Disciplinary Fragmentation for a New Knowledge Model*, Amsterdam (2020).

[4] KOSKENNIEMI, M., *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission*, Helsinki (2007).

[5] More *infra* para. 3.

Papanicolopulu focused her research on the idea of '*ubi homo ibi jus*',[6] this Dissertation seeks to discuss the dark side of humanity, its -to borrow a theological formula- its *mysterium iniquitatis*: '*ubi homo ibi crimen'*. The *denial* of those *very rights* examined in Papanicolopulu's monograph of which this Dissertation would humbly aspire to be the (criminal)[7] *sequel*.

5.1 Clarifying the scope of the analysis: a tale of criminal dichotomies between land and sea in search of coherence and an end to impunity.

According to the Biblical cosmogony, in the Creation, God drew a distinction between the waters (called Seas) and the dry land (called Earth). That was the second day. On the fifth day, God, having resolved to create humankind in His image and according to His likeness,[8] endowed it with the power over the fish of the sea, the birds all the other animals and beasts. Humankind should have been fruitful and multiply, filled the earth and subdued it. That was on the fifth day of the Creation.

Whether it can be disputed that the author of the *Génesis* (either by himself or upon divine inspiration) ever intended to sketch an even embryonic version of the *nòmos of the Earth*,[9] there are still surprising (prophetic?) similarities between the Biblical human *sovereignty on land* and the mere *enjoinment* of the *natural resources* of the sea and UNCLOS: '*non erit impossibile apud Deum omne verbum*'.[10] Speculating on the Biblical underpinnings of the law of the sea patently falls outside the scope of this Dissertation. Still, the Biblical quote allows us to introduce the conceptual framework of this analysis, *i.e.* how the physical and human geography of crime-at-sea shape both its dynamics and discipline, as schematised below.

---

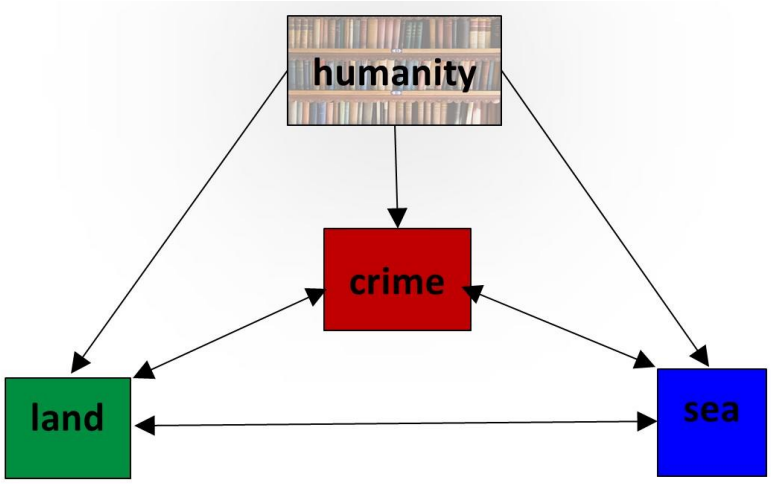
[6] DEL VECCHIO, G., *General Principles of Law*, Boston (1956), p. 39: 'The preliminary thought that the law corresponds to human necessity and is inseparable from the very life of man is implied in all the doctrines of jus naturae. Ubi homo, *ibi jus*. (Where there is man, there is law.) Wherever there is a trace of human life, inevitably there is at least the germ of a juridical system since it must be possible to pronounce a judgment of right or wrong in every situation involving the relationship *hominis ad hominem*.'

[7] Hopefully not in a derogative sense.

[8] Although Grotius in the *De Jure Belli ac Pacis* famously attempted to provide a non-theological foundation to his theory of the jus naturae et gentium ('etiamsi daremus […] non esse Deum, aut non curari ab eo negotia humana'. GROTIUS, H. *De Jure Belli ac Pacis, Prolegomena,* para. 11) his philosophy remained solidly rooted in Christian voluntarist philosophy and the idea of 'the creation of human beings in imagine Dei […] grounds the functioning of humans as keepers, the establishment of human's dominium' (NIJMAN, J. E., 'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium', in Koskenniemi, M., García-Salmones, M., Amorosa, P. (eds.), *International Law and Religion: Historical and Contemporary Perspectives*, Oxford (2017), p. 94) which, through and since Grotius has thus entered into the bloodstream -or rather, the DNA- of international law.

[9] SCHMITT C., ET AL., *Il Nomos Della Terra Nel Diritto Internazionale Dello "Jus Publicum Europaeum"*, Milan (1991).

[10] VULGATA, *Evangelium secundum Lucam*, 1.37.



To properly understand the jurisdictional regime applicable to crimes (of international concern) perpetrated at or in connection with the sea, it is vital to acknowledge the -often intertwined and overlapping- forces and tensions behind it, in particular: 1) the materialities of land and sea; 2) human geography on the waves; 3) geographies of crime and different shades of *de jure* or *de facto* maritimeity;[11] 4) the anthropocentric and land-centric perspectives of international law, including the law of the sea;[12] 5) the sea as a *prism* highlighting and revealing the frailties and shortcomings of the dogmatic *distinction of crimes between international and transnational crimes*.

The endless ocean, perpetually moving, inhospitable, inhuman.[13] No city can be built upon its waters, no garrison nor fortress. Its waves bear no memory of human borders.[14] From this

[11] *Infra* Chapter I.

[12] This conceptual *land-centric perspective*, also referred to as *land-bias* and other equivalent expressions is not actually limited to legal science, but it permeates more intrusively and generally science as such, and in particular the sea-related sciences. See *ex multis* GRANCHER, R., SERRUYS, M-W., CHANGES on the Coast. Towards a Terraqueous Environmental History, *Journal for the History of Environment and Society* 6(2021), pp. 11-34.

[13] According to the largely prevailing view. See for instance with regard to fisheries ACHESON, J.M., Anthropology of Fishing, *Annual Review of Anthropology* 10(1981), p. 276: 'The sea is a dangerous and alien environment, and one in which man is poorly equipped to survive. It is a realm that man enters only with the support of artificial devices […] and then only when, weather and sea conditions allow. The constant threat of storm, accident, or mechanical failure makes fishing at sea a very dangerous occupation anywhere in the world.' *Contra* LAMBERT, D., MARTINS, L., OGBORN, M., Currents, visions and voyages: historical geographies of the sea, *Journal of Historical Geography* 32 (2006), p. 483.

[14] Even in the South China Sea, where China and the other local conflicting powers are militarising atolls, rocks and submerged emerged shoals strengthening and expanding their surface, and building outposts, runways, fortresses and other structures, these do not come out of nowhere nor fluctuate on the ocean's waters but are built on pre-existing landforms.

consideration stems the Grotian argument that the waters repel every human attempt to occupy them and subject them to his rule.[15]

Because of this inoccupability, no state has sovereignty over the remotest stretches of the seas, their public order cannot be maintained according to the rules established for the land, instead subject -with the exception of Antarctica- to the territorial sovereignty of states, a different (*rectius*, antipodal) paradigm had to be developed: a *nòmos* of the sea.[16]

Anthropologically, humans remain in their essence terrestrial animals, whose existence relies on and revolves around the land.[17] From our ancestral cradle, nested in the African Rift Valley, our progenies has developed and strived on the land.[18] Through the centuries and the millennia, with the development of scientific knowledge and the invention of increasingly technologically advanced instruments (since the mid-XX century),[19] humans have developed the ability to explore and exploit the resources, living and non-living, of the remotest recesses of the oceans. Still, their existence has remained largely land-centric or at least, it appears to require a nexus with some land to flourish.[20] Besides its anthropological explanations, it is epistemologically evident that there is a *stark disparity between human concentration on the land and at sea*.

---

[15] GROTIUS, H., *De jure belli ac pacis* (1625), Kelsey, Francis W., Translator. Butler, William E., New Introduction. Oxford (1925), paras. 2.2.1-2.3.2.

[16] The public order of the sea (the so-called *nòmos* of the sea) relies on the (exclusive) jurisdiction and control every state can and must exercise upon the vessels having its nationality. If a crime is perpetrated on the high seas, ordinarily it falls under the jurisdiction of the flag state(s) of the vessel(s) on which it happens, or which happen to be involved in it. An exception to this rule is piracy: here the disruptive potential of the public order of the sea, navigation and trade has customarily justified a universal *jus puniendi*. See *infra,* Chapters I-II. With regard to the loopholes or weaknesses of flag-state jurisdiction see Chapter IV.

[17] See KHAN, D.-E., 'II Themes, 9 Territory and Boundaries', in Fassbender, B., Peters, A. (eds.), *The Oxford Handbook of the History of International Law*, Oxford (2012), pp. 225-6. *Ibid.* p. 227: 'as a rule, for human societies a bordered territory has always served a double function: It constitutes a basic prerequisite for survival and a means of identification ('raumbezogene Identität').'

[18] The highly suggestive theory of an alleged 'aquatic ape' human origin has not been accepted by mainstream literature. On the contrary, as observed by the anthropologists, 'throughout most of the hominin evolutionary past, the only association with the aquatic world was the exploitation of lake shores and river margins as part of local terrestrial faunal communities.' See FOLEY, R., LAHR, M.M., The role of "the aquatic" in human evolution: Constraining the aquatic ape hypothesis, *Evolutive Anthropology* 23(2014), pp. 56-9.

[19] OXMAN, B.H., The Territorial Temptation: a Siren Song at Sea, *The American Journal Of International Law* 100(2006), pp. 832 ff.

[20] A different relationship between humanity and sea can however be identified in the Pacific populations, who maintain a more fluid and dynamic relationship with land and sea, moving from island to island to trade, live and breed. Rather than focusing on the land, their perspective appears to be pivoted on the moving human communities living on a certain piece of land. LIXINSKI, L., MCADAM, J., TUPOU, P., Ocean cultures, the Anthropocene and international law: cultural heritage and mobility law as imaginative gateways. *Melbourne Journal of International Law*, 23(1)(2022), pp. 1-22.

Think of a *megalopolis as Tokyo, Mexico City, Shanghai or Cairo* with dozens of millions of inhabitants and look on a map of the seas where you can find such a human presence on the seas. Whereas the crews of civil and military vessels can amount to thousands, over all of the seven or eight billion humans living on earth, only a minimal fraction -though still numerically relevant- of them can be found at sea at any given moment, concentrated around the shores or along the trading routes, or in the fishing areas or the areas used to exploit the resources of the sea.

The difference between humanity at sea and humanity on land, though, is not merely quantitative but also *qualitative*. On the land, humans tend to create both relationally and spatially defined communities, creating puzzles of spatially defined -not merely ephemeral- *génoi*.

This element of *stability* and the existence of a *shared identitarian quid* can hardly be identified at sea where (apart from the populations living along the coasts) humanity is generally distributed in *accidental, ephemeral 'floating Babels'*. Or, to put it differently, is gathered in purely casual and temporary groups of seafarers coming from the fourth corners of the Earth for the sake of their businesses.

To illustrate this fact suffice it to refer to the composition of the crews of two ships recently attacked in the Gulf of Aden,[21] the Bahamian M/V *Galaxy Leader*[22] and the Liberian-flagged M/V *Central Park*.[23] These *-lato sensu-* cargo ships respectively had crews from the Philippines, Bulgaria, Ukraine, Romania and Mexico and, in the latter case, a Turkish captain and Russian, Vietnamese, Bulgarian, Indian, Georgian and Filipino nationals.[24]

Combining the previous considerations concerning the different materialities of land and sea and the human geography thereupon,[25] it is necessary to discuss the impact of these elements on the definition and characteristics of *crime-at-sea*.

---

[21] In the context of the recent attacks launched by the Iran-backed Houthi attacks against Israel-related vessels as a retortion for the ongoing campaign in Gaza. See GAMBRELL, J., US Navy seizes attackers who held Israel-linked tanker. Missiles from rebel-controlled Yemen follow, *Associated Press*, 27 November 2023 https://apnews.com/article/israel-palestinians-hamas-war-yemen-ship-attack-526842504dc9f6bb7ca6e1d5104f77a3.

[22] Owned by a company registered in the Isle of Man (subsidiary of an Israeli company) and operated by a Japanese enterprise.
https://www.marinetraffic.com/en/ais/details/ships/shipid:374788/mmsi:311408000/imo:9237307/vessel:GALAXY_LEADER.

[23] owned and operated by a London-based, Jewish-owned and operated company. https://www.marinetraffic.com/en/ais/details/ships/shipid:3700298/mmsi:636016933/imo:9725823/vessel:CENTRAL_PARK.

[24] The jurisdictional implications of these overlapping nationalities of the crews, vessels and operators will be examined in Chapter III. Still, referring to them already in the Introduction helps to understand the unique complexities of maritime jurisdiction.

[25] See in this sense the dated (yet still meaningful and useful) analysis by ALEXANDER, L. M., Geography and the Law of the Sea, *Annals of the Association of American Geographers* 58(1)(1968), pp. 177–97.

For this purpose, it will be distinguished between *exclusively land-based crimes, congenitally maritime crimes and merely contingent maritime crimes* (amphibious crimes that can with some *caveats* take place both on land as well as at sea).[26]

Starting from the *exclusively land-based crimes*, this exclusivity can be both a *de jure* (in which the definition itself requires either directly or indirectly a qualified nexus with the land) or *de facto* aspect of the crime, *i.e.* it is based on elements that cannot be found at sea, such as *genocide*.

While nothing in its definition expressly binds genocide to the land, *its factual conditions cannot usually be found at sea*. The scarcity of humans at sea and their casual, ephemeral agglomeration is incompatible with a crime that targets specific human groups with the intent to destroy all or, in part, such a group. If someone wants to pursue such a plan, it is far more practical to do it on land without the logistic inconveniences (lack of humans, absence of identitarian communities, waves and lack of stable infrastructures etc.) connected to the marine environment. This explains why, except for the Armenians of Trebizond exterminated on the Black Sea by the Ottomans during WWI, there have historically been no instances of genocide at sea.[27]

The *different magnitudes of land-based humanity and humanity at sea*, however, appear to be a horizontal issue common to crimes perpetrated at sea, as magniloquently illustrated by the *Freedom Flotilla* incident (concerning war crimes perpetrated on the high seas).[28]

Whereas war crimes -violations of the laws and customs of war giving rise to individual criminal responsibility- have regularly appeared in the jurisprudence, before the *Freedom Flotilla incident*, the most recent case law on war crimes at sea dated back to Nuremberg and Tokyo and the bloodiest war in human history.

Left essentially with *only land-based* precedents[29] (usually accounting for large numbers of victims), the (former) ICC Prosecutor argued *that an alleged crime resulting in ten deaths and dozens of injured individuals was of insufficient gravity* to deserve an investigation by the ICC. Yet, in her

---

[26] As a *caveat,* I do not mean that every *actus reus* of these crimes can be perpetrated everywhere, but that specific cases amounting to the aforementioned crimes can be perpetrated at sea, on land and so on.

[27] *Infra,* Chapter I.

[28] *Ibid.*

[29] In a similar sense, with a slightly different focus (extraterritorial application of human rights law in anti-piracy operations), PETRIG, A., *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects,* Leiden (2014), p. 439: 'The idea that human rights law may apply to a State acting beyond its borders has gained firm ground over the last several decades. And yet, most writings and the bulk of the case law pertains to the extraterritorial application of human rights law in land-based operations. Hence, the meaning of the criteria of "effective control" over persons or territory – instances where a State exercises jurisdiction in the sense of the jurisdictional clauses of human rights treaties – is not well-developed for the maritime context.' Emphasis added.

decision, the Prosecutor *seemingly failed to acknowledge the marine context of the crime and did not discuss its potential implication* in the unfolding of the crime.[30]

Anticipating a conclusion of this Dissertation, a correct evaluation of the impact of the marine element on the docket of the potential victims would have required a properly contextualised assessment of the gravity (*rectius,* the scale) of crimes at sea. *More specifically, in our case, the Prosecutor should have -at least- addressed the question of whether the comparatively diminutive scale of the crime resulted from its being a 'minor' incident or rather was a consequence of its marine context.*

Moving onto the last category of crimes-at-sea, the here-called *ontologically maritime crimes*, only a crime seems to meet this definition: piracy.[31]

Whereas, for instance, *IUU fishing* preponderantly affects saltwater fisheries -which account for the lion(fish) share of the catches (in 2020, 78.8 out of 90.3 million tons of fish came from the seas), it may also take place in inland waters such as rivers and lakes, and its very definition recognises its not-exclusively-marine dimension.[32]

Piracy, on the contrary, can only take place at sea[33] and within a ship-to-ship relationship (*i.e.* both the assailant and the victim must be ships and nothing else, as it shall be seen).[34]

Looking at its *actus reus*, 'acts of violence or detention, or any act of depredation, committed for private ends' can take place everywhere. Kidnapping for ransom[35] and robberies

---

[30] For instance, despite the enormity of the problems connected to the governance and the public order of the seas and the scholarly calls for a change of paradigm, maritime security studies (intersected in this Dissertation) have remained, according to Bueger and Edmunds, with very few exceptions, essentially seablind. BUEGER, C., EDMUNDS, T., Beyond seablindness: a new agenda for maritime security studies, *International Affairs* 93(6)(2017), pp. 1293 ff.

[31] At least in the form of direct perpetration since, as it shall be seen, its aiding and abetting does not require such a maritime exclusivity.

[32] In this sense para. 3.1.1 of the FAO's International Plan Of Action To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated Fishing, Rome (2001): 'activities […] conducted by national or foreign vessels in waters under the jurisdiction of a State'. With regard to inland IUU fishing, the phenomenon has been observed, from Lake Victoria and the Great African Lakes to the rivers of the British Columbia. See ANDERSON, J., *Implementation of a Regional Fisheries Strategy For The Eastern-Southern Africa and India Ocean Region. Options to Reduce IUU Fishing in Kenya, Tanzania, Uganda and Zanzibar*, SF/2011/21 (2011) https://www.fao.org/3/az391e/az391e.pdf; TAYLOR, G., Confronting illegal, unreported, and unregulated fishing on the Fraser, *Watershed Watch Salmon Society*, 26 May 2021 https://watershedwatch.ca/confronting-illegal-unreported-and-unregulated-fishing-on-the-fraser/. See also FAO, *The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation,* Rome (2022), p. 3 https://doi.org/10.4060/cc0461en.

[33] More specifically, only in the high seas, *i.e.* on the sea not subject to any national jurisdiction. If perpetrated within the territorial sea, piracy cannot be piracy and is henceforth defined as armed robbery at sea, *i.e.* 'piracy' perpetrated outside its geographical scope (the territorial sea instead of the high seas).

[34] WHEATON H., DANA R. H., *Elements of international law* (8th ed.), London, Boston (1866), p. 193, § 124, note 93.

[35] Think of John Paul Getty III.

are regularly perpetrated and repressed on land, yet *when these crimes take place on the high seas, they become piracy. In brief, it is the unique legal geography of the crime that shapes its construction*.

That being said, the strict dichotomy between land and sea has been more theoretical (or even more explicitly, rhetoric) than real. Not only is there a narrow strip of water adjacent to the coast subject to the *nòmos* of the land (the territorial sea),[36] but more and more extensive maritime areas have been drawn to the *nòmos* of the land under the so-called *territorialisation* of the seas.[37]

This phenomenon consists of *the progressive projection over the sea of the rights and* jurisdiction (or elements thereof) *enjoyed by states over their territories by virtue of a link between their territories and the adjacent sea.*[38]

While this link is principally understood in physical or geological terms, other non-geographical considerations (such as the historical usage and the interests of the neighbouring populations) have sporadically appeared in the ICJ jurisprudence.[39]

The very idea of flag-state jurisdiction had originally been conceived as a peculiar kind of territorial jurisdiction[40] though this theory has been recently replaced by the understanding of flag-state jurisdiction as a form of personal jurisdiction.[41]

In sum, whereas UNCLOS is usually called (perhaps too emphatically) the 'constitution of the oceans', it would perhaps be more appropriate to refer to it as the 'code of the human use[42]

---

[36] The pre-UNCLOS *cannon-shot rule* was amongst the most eloquent embodiments of the land-centric or land-based perspective of jurisdiction, as it sought to project territorial jurisdiction (the jurisdiction over the land) at sea. Another e when the coastline is deeply indented or there is a fringe of islands along the coast in its immediate vicinity, the baseline may be drawn by joining with straight lines the extremities of the coast or the islands, streamlining the profile of the coast, putting the marine waters inside (land-ward) the line within the internal waters such as lakes and rivers.

[37] As authoritatively recognised both in the constant jurisprudence of the ICJ as well as in the literature, 'land dominates the sea'. ICJ, *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3. para. 96, p. 51; PAPANICOLOPULU, I., The land dominates the sea (dominates the land dominates the sea), *QIL Zoom-in* 47 (2018), pp. 39-48.

[38] ICJ, *ibid*. Para. 101 p. 53: 'the continental shelf […] constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other'.

[39] ORAL, N., 'The Law of the Sea', in Espósito, C., Parlett, K., (eds.), *The Cambridge Companion to the International Court of Justice*, Cambridge (2023), pp. 375-6.

[40] Geologists may actually argue that there are way more similarities between ships and land than it can be *icto oculi* seen (as tectonic plates 'float' on the molten mantle not unlike ships on the sea).

[41] *Infra* Chapter III.

[42] DONALDSON, J.W., 'Chapter 5. Oil and Water: Assessing the Link between Maritime Boundary Delimitation and Hydrocarbon Resources', in Schofield, C., Lee, S., Kwon, M.-S. (eds.), *The limits of maritime jurisdiction*, Leiden (2014), p. 139. In this sense ECJ, GRAND CHAMBER, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, 3 june 2008, Case C-308/06, European Court Reports 2008 I-04057, ECLI identifier: ECLI:EU:C:2008:312, para. 55: 'UNCLOS's main objective is to codify, clarify and develop the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas.' In the same sense, BARNES, R.,

of the oceans' as its primary focus is still, according to the *European/Western tradition*[43] of international law[44] genetically *anthropocentric*.[45] To be more precise, it is *land-centric* because land-centrism mirrors the spatiality of human existence and is teleologically oriented to the satisfaction of its *material and ideal needs* reflected in the *Jus Publicum Europaeum,* as illustrated, *ex multis,* by the notion of *terra nullius*: 'if nature was not harnessed or controlled, it was open to appropriation by others. The French term for terra nullius captures this perfectly: territoire sans maître. Quite literally, then, this is land without a master, land that has not (yet) been brought under human subjugation or control.'[46]

5.2 The dichotomic taxonomy of crimes and their factual interconnectedness

The land-sea opposition, however, is only one of the two[47] fundamental dichotomies discussed in this dissertation, with the latter being the *opposition between international and transnational*

FREESTONE, D., ONG, D.M., '1. The Law of the Sea: Progress and Prospects', in *The Law of the Sea: Progress and Prospects*, Oxford (2006), p. 23.

[43] As illustrated by Roberts and Koskienniemi, the dominant model in international legal discourse and academia: ROBERTS, A., KOSKENNIEMI, M., *Is International Law International?,* Oxford (2017). With regard to the anthropocentrism of international law, a possible early evidence of it may be the idea of the *oikumene*, elaborated in the Greek-roman context then developed by medieval Christian theorists is particularly suggestive and relevant, as it provided a radically anthropocentric and land-centric view of the earth in which the *inhabited [land]* was the centre of the universe, surrounded -like a frame- by an impenetrable and unhabitable ocean. See KLEUS, G., THIERING, M., *Features of Common Sense Geography: Implicit Knowledge Structures in Ancient Geographical Texts,* Zürich (2014), p. 245; FRIEDMAN, J.B., FIGG, K.M., *Trade Travel and Exploration in the Middle Ages: An Encyclopedia*, Abingdon (2017), p. 458.

[44] See OLLINO, A., 'Chapter 9 Feminism, Nature and the Post-Human: toward a Critical Analysis of the International Law of the Sea Governing Marine Living Resources Management', in Papanicolopulu, I. (ed.), *Gender and the Law of the Sea,* Leiden (2019), p. 205.

[45] FITZMAURICE, A., 'Property, Trade and Empire', in Nijman, J.E., Lesaffer, R. (eds.), *The Cambridge Companion to Hugo Grotius*, Cambridge (2021), p. 284. In recent years, the Euro/Western, land- and anthropocentric paradigm has been increasingly criticised by critical legal scholars who have proposed instead different non-anthropocentric approaches to international law (in particular by posthumanist and ecological authors, such as Dr Emily Jones and Prof De Lucia). See JONES, E., *Feminist Theory and International Law: Posthuman Perspectives*, London (2023); GREAR, A., ET AL. (eds.), *Posthuman Legalities: New Materialism and Law Beyond the Human*, Cheltenham (2021); DE LUCIA, V., 'Ocean commons and an 'ethological' nomos of the sea, in De Lucia, V., Oude Elferink, A.G., Nguyen, L.N. (eds.), *International law and marine areas beyond national jurisdiction. reflections on justice, space, knowledge and power,* Leiden (2022), pp. 34-5.

[46] MICKELSON, K. 'The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State', in Natarajan, U., Dehm, J. (eds.*), Locating Nature: Making and Unmaking International Law*, Cambridge (2022), pp. 164-5.

[47] There might actually be a third one, namely a *dichotomy of* (the previous) *dichotomies*, *i.e.* the question of the relationships, coherence and dynamic between the jurisdictional regime applicable to international and transnational crimes under, on the one hand, criminal law, on the other, the law of the sea. As dichotomies are defined as 'divisions or contrasts between two things that are or are represented as being opposed or entirely different' and thus require a positive assessment of their opposite polarity, it may perhaps be too far-fetched to use such a term.

crimes analysed in Chapters II and III through the prism of the sea, highlighting and revealing the theoretical frailties and the practical shortcomings of this (criminal) dichotomy.

In brief, looking at the panorama of crimes perpetrated at sea, it is possible to notice certain patterns, one of which is the almost inextricable, *symbiotic* connection between the so-called international and transnational crimes. This symbiosis can take two forms, one *subjective* and one *objective*.

With regard to the *objective symbiosis*, this refers to the practical unfolding of the crimes and their mutual ancillarity or causality. For instance, trafficking in weapons, arming the authors of war crimes and crimes against humanity, or trafficking as a means to finance their criminal endeavours. Another example, migrant smuggling and trafficking and its nexus to 'modern' slavery.

The subjective symbiosis refers instead to the identity of the subjects involved (either as victims or offenders) in these crimes, as for instance, shown in the *movie Captain Philips*. Here the captain, having been taken prisoner by a Somali pirate, asked him: 'So you are a fisherman?'. To which the pirate leader quickly replied 'Yes, we are *all* fishermen'.[48]

As it will be seen, the depletion of natural resources, caused by the irresponsible overexploitation of marine livestock, has in many cases deprived coastal populations of their livelihood, forcing them to embark on other forms of business (crime included). How does the law acknowledge this interconnectedness and ancillarity? This will be one of the questions discussed in this Dissertation.

In this sense, on a purely normative level, it is questioned what the rationale of the distinction between international and transnational crimes is and whether such distinction is useful in practice, highlighting the existence of several crimes the categorization of which is ambiguous or at least contested in the literature, as in the case of terrorism and piracy. A distinction which, as it will be seen, has been -pun intended- wavering through history.[49] More radically, *a normative theory of international crime is still essentially missing*[50] as illustrated by the ILC studies on the subject: there is no universally agreed theory on what ought to be protected by international criminal law, and what constitutes an 'international crime'. Rather, what is indisputable is that

[48] GREENGRASS, P. (dir.), *Captain Phillips* (2013), at: 1h 03' 50".
[49] With regard to the fragmentation of ICL, see EINARSEN, T., *The Concept of Universal Crimes in International Law*, Oslo (2012), pp. 89-7.
[50] RAHMAN, M.M., KHAN, B.U., 'Chapter 4 The Contested Definitions of 'International Crimes'', in Uddin Khan, B., Bhuiyan, M. J. H. (eds.), *Human Rights and International Criminal Law*, Leiden (2022), p. 82.

international criminal law has developed incrementally and organically. Before challenging the *inter v. transnational* dichotomy it seems helpful to rapidly go back over the organic development of international and transnational criminal law.

5.2.1 The organic developments of the international and transnational criminal law systems

At its origins, international law recognised very few international crimes, proscribing only acts generally viewed as a serious threat to the international community's interests as a whole. These were, in the language of the Roman law[51] of the first internationalists usually defined as *crimina juris gentium*.[52]

For centuries, piracy was recognised as an international crime under customary international law, and, at the end of the nineteenth century, slave trade *joined the club* when that practice was outlawed by treaty.[53] The *Grotian moment*[54] of international criminal law was, however, the aftermath of the Second World War[55] when the horrors perpetrated by the Third Reich, the Japanese Empire and their allies appeared in their full scale during the Nuremberg and Tokyo trials.[56]

In this regard, it is particularly interesting the list of *crimina juris gentium* offered by Lemkin[57] in his monograph *Axis Rule in Occupied Europe* (1944): 'white slavery[58] and trade in children, piracy, trade in narcotics and in obscene publications and counterfaiting of money'.[59] Nuremberg opened a new chapter[60] in the history of international criminal law seeing the birth of those crimes which are currently regarded as the core crimes.[61]

---

[51] BERGSMO, M. ET AL, *supra* note 49, vol. 1 (2014), p. ix.
[52] CANNIZZARO, V., *Diritto Internazionale* (2016), p. 332; CONDORELLI, L., 'Chapitre 19. Présentation de la IIème partie', in Ascensio, H., Decaux, E., Pellet, A., *supra* note 50, para. 4 p. 242.
[53] BROWN, B.S., 'International Criminal law: nature, origins and a few key issues', in Brown, B.S. (ed.), *Research handbook on international criminal law*, Cheltenham (2011), p. 4.
[54] 'a term that denotes a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance'. SCHARF, M. P., 'The Grotian Moment Concept', *ILSA Quarterly*, 19(3) (2011), p. 16. BELLIVIER, F., Nuremberg, moment ou *momentum*?. *Grief*, 8(1)(2021), pp. 91-8.
[55] Hereinafter, WWII. Similarly, the First World War will be referred to as WWI.
[56] SCHARF, M.P., *ibid*.
[57] The father of the notion of genocide. See *infra* para 4.1.
[58] 'a system of procuring women and girls for prostitution by means of fraud or violence, and of transporting and detaining them in vice resorts against their will'. WOOLSTON, H., *Prostitution in the United States* (1921), pp. 159-60.
[59] LEMKIN, R., *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress. Introduction to the Second Edition by William A. Schabas* (2014), 'Chapter IX. Genocide', p. 94.
[60] or perhaps, more radically, a *new book* or even an entirely *new library*.
[61] See in this sense, on the origins of genocide and crimes against humanity: SANDS, P., *East West Street* (2016).

Although the expression 'crimes against humanity' had already been coined in 1915 with regard to the *Armenian massacres*,[62] only with Nuremberg violence perpetrated by a state against its own population assumed legal significance under the umbrella-notion of crimes against humanity. This complemented the legal acknowledgment of the criminal nature of certain violations of the *jus in bello* as well as the developing recognition of the unlawfulness of any military aggression.[63] In the aftermath of WWI, the *Paris Commission on the responsibility* found that the Central Empires had not only scientifically and methodically planned the war and in its context perpetrated 'outrages of every description [...] on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity'.[64] There was, in a way, a developing core of conducts which, if not already explicitly legally proscribed were certainly perceived as wrong.[65] This was the *milieu* of the post-WWII trials.

---

[62] BERGSMO ET AL., vol. 1 (2014) *supra* note 49, p. viii; LEOTTA, C.D., *Il genocidio nel diritto penale internazionale. Dagli scritti di Raphael Lemkin allo Statuto di Roma* (2013), pp. 35-9; MARCHESI, A., 'Metz Yeghern and the Origin of International Norms on the Punishment of Crimes', in Lattanzi, F., Pistoia, E. (eds.), *The Armenian Massacres of 1915–1916 a Hundred Years Later*, Studies in the History of Law and Justice 15, Cham (2018), pp. 143-60; JUROVICS, Y., Le crime contre l'humanité, définition et context, *Les Cahiers de la Justice* 1(2011), pp. 45-64.

[63] In this sense, in 1919, during the *Paris Peace Conference*, the Commission on the Responsibility of the authors of the war and Enforcement of Penalties had been 'charged to inquire into and report upon [...] breaches of the laws and customs of war committed [...] on land, on sea, and in the air during the present war' [i.e., war crimes] and 'the responsibility of the *authors* of the war'. 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities', *The American Journal of International Law* 14(1)(1920), p. 95. Emphasis added.

[64] '(1) Murders and massacres; systematic terrorism. (2) Putting hostages to death. (3) Torture of civilians. (4) Deliberate starvation of civilians. (5) Rape. (6) Abduction of girls and women for the purpose of enforced prostitution. (7) Deportation of civilians. (8) Internment of civilians under inhuman conditions. (9) Forced labour of civilians in connection with the military operations of the enemy. (10) Usurpation of sovereignty during military occupation. (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory. (12) Attempts to denationalize the inhabitants of occupied territory. (13) Pillage. (14) Confiscation of property. (15) Exaction of illegitimate or of exorbitant contributions and requisitions. (16) Debasement of the currency and issue of spurious currency. (17) Imposition of collective penalties. (18) Wanton devastation and destruction of property. (19) Deliberate bombardment of undefended places. (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments. (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew. (22) Destruction of fishing boats and of relief ships. (23) Deliberate bombardment of hospitals. (24) Attack on and destruction of hospital ships. (25) Breach of other rules relating to the Red Cross. (26) Use of deleterious and asphyxiating gases. (27) Use of explosive or expanding bullets, and other inhuman appliances. (28) Directions to give no quarter. (29) Ill-treatment of wounded and prisoners of war. (30) Employment-of prisoners of war on unauthorized works. (31) Misuse of flags of truce. (32) Poisoning of wells.' *Ibid*., pp. 114-5

[65] *e.g.* DONNEDIEU DE VABRES, who distinguished between *'crimes interétatiques'* (referring to offences against the peace and security of mankind - Nuremberg Principles) and what he called 'classic criminal international law' ('every crime in which there was an international element, and should regulate what law should apply to crimes committed abroad or by foreigners, and whether extradition should be allowed or not, for extradition was really a part of criminal international law'). INTERNATIONAL LAW COMMISSION, 'Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur', *Yearbook of the International Law Commission*, vol. II (1950), para. 29, pp. 257-8. Similarly, SPIROPOULOS, *ibid*., paras. 35-6 p. 259.

The *great novelty of Nuremberg*, in addition to the recognition of personal criminal liability for those conducts and the codification of those, somewhat still nebulous, ideas, was the *criminalisation of those conducts directed exclusively against the civilians* 'because it was feared that under the traditional formulation of war crimes, many of the acts of the Nazis would go unpunished'.[66]

The London Agreement (also referred to as the *London Declaration*),[67] which created the International Military Tribunal of Nuremberg,[68] included within the jurisdiction of the tribunal three crimes: Crimes against peace,[69] war crimes[70] and crimes against humanity.[71] *Genocide had been left out of the Nuremberg Charter*[72] *but not from the Nuremberg trials as such* since Lemkin's insistence succeeded in having the new crime mentioned and charged in the trial against Wilhelm Goering and the other Nazi leaders.[73] *A star was born*. One year later, UNGA resolution 95(1)(1946)[74] affirmed the principles of international law recognised by the Charter *and* the

---

[66] VAN LINGEN, K., 'Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944–1947', *ibid.*, p. 477. INTERNATIONAL LAW COMMISSION, 'Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries', *Yearbook of the International Law Commission*, Vol. II (1950), para. 123 p. 377.

[67] UN, *Agreement for the prosecution and punishment of the major war criminals of the European Axis* ('London Agreement'), 8 August 1945, 82 U.N.T.C. 280. See AMBOS, *supra* note 49, p. 4.

[68] The first in its kind, as underlined by the French jurist and judge Donnedieu de Vabres. DONNEDIEU DE VABRES, H., Le procès de Nuremberg devant les principes modernes du droit pénal international, *Recueil des cours* 477 (1947), p. 6; METTRAUX, G., 'Trial at Nuremberg', in Schabas, W, Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law* (2011), pp. 5-16. On the development of ICL from Nuremberg to the ICC see BADINTER, R., De Nuremberg a la Haye, *Revue internationale de droit pénal* 75(2004), pp. 699-707.

[69] Art. 6(a): 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. JACKSON, R. H., *Opening Statement At The International Military Tribunal* (21 November 1945), para. 17 'aggressive war, which the nations of the world had renounced. It was war in violation of treaties, by which the peace of the world had sought to be safeguarded'.

[70] Art. 6(b): 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'

[71] Art. 6(c): 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

[72] SANDS, *supra* note 59, pp. 186-9.

[73] LEOTTA, *supra* note 60 pp. 117-21; SMEULERS, A. GRÜNFELD, F., 'Chapter Five. Genocide", in Smeulers, A. Grünfeld, F. (eds.), *International Crimes and Other Gross Human Rights Violations*. Leiden (2011), p. 162; HARRIS, W.R., KING, H.T., FERENCZ, B.B., 'Nuremberg and Genocide: Historical Perspectives', *Studies in Transnational Legal Policy* 40(1)(2009), pp. 9-56.

[74] UN General Assembly, *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946, A/RES/95.

judgment[75] coherently to its propulsive duty to encourage and foster the progressive development of international law. The same year UNGA declaration 96(1)[76] solemnly proclaimed 'that genocide is a crime under international law which the civilised world condemns', reiterating its condemnation of genocide in the almost *verbatim* Convention on the Prevention and Punishment of the Crime of Genocide (1948).[77]

Moving forward, the Cold War froze the development of international criminal law for the subsequent four decades. Here and there, treaties - usually referred to as 'suppression conventions'- were adopted, but the *momentum* of WWII was lost, and these initiatives, far from constituting an organic project of progressive codification of international criminal law, were rhapsodic responses to contingent emergencies.[78]

Since the mid-1980s, there has been a significant proliferation of conventions seeking to address crimes at the international level,[79] such as the Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963),[80] the Convention for the Suppression of Unlawful Seizure of Aircraft (1970),[81] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971),[82] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973),[83] the

---

[75] Clearly endorsing a dynamic view of law as a living creation seething to adapt to the continuosly new challenges brought by the society.

[76] UN General Assembly, *The Crime of Genocide*, 11 December 1946, A/RES/96.

[77] Hereinafter, 1948 Genocide Convention or more simply Genocide Convention. AMBOS, *supra* note 49, p. 10.

[78] In a certain way the 1948 Genocide Convention itself was a reaction against the barbarity perpetrated by the Nazis. As explained by Bassiouni, 'ICL has not evolved in a linear, cohesive, consistent or logical fashion. Instead it has developed in bits and pieces through different experiences […] these institutions have emerged as a consequence of particularly atrocious events' (the so called 'reactive nature of ICL'). BASSIOUNI, *supra* note 41, pp. 23, 583; DRUMBL, M., 'A hard look at the soft theory of international criminal law' in Sadat, L.N., Scharf, M.P. (eds.), *The Theory and Practice of International Criminal Law: essays in honour of M. Cherif Bassiouni* (2008), p. 2. Famously, the SUA had been inspired by the hijacking of the *Achille Lauro* in 1985 and the Apartheid convention was a reaction against the discriminatory racial policies of the South African Government between 1948 and 1990. Similarly the plethora of conventions dealing with terrorism were triggered by various attacks. See: DUGARD, J., 'Convention On The Suppression And Punishment Of The Crime Of Apartheid, introductory note', *United Nations Audiovisual Library of International Law* (2008); GALANI, S. 'Terrorist Hostage-Taking and the Anti-terrorism Conventions', in *Hostages and Human Rights: Towards a Victim-Centred Approach,* Cambridge (2021), pp. 43-8; DOMÍNGUEZ-MATÉS, R., 'Chapter V. From The Achille Lauro To The Present Day: An Assessment Of The International Response To Preventing And Suppressing Terrorism At Sea', in Fernández-Sánchez, P.A. (ed.) *International Legal Dimension of Terrorism*. Leiden (2009), pp. 213-37.

[79] CONDORELLI, *supra* note 52 para. 9, pp. 243-4.

[80] INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention on Offences and Certain Acts Commited on Board Aircraft*, 14 September 1963.

[81] UN, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, UN Treaty Series 1973.

[82] INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

[83] UNGA, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, A/RES/3166.

International Convention against the Taking of Hostages (1979),[84] the Convention on the Physical Protection of Nuclear Material (1979),[85] the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988),[86] the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988),[87] the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988),[88] the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991),[89] the International Convention for the Suppression of Terrorist Bombings (1997),[90] the International Convention for the Suppression of the Financing of Terrorism (1999),[91] the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000)[92] and the United Nations Convention against Corruption (2003),[93] the International Convention for the Suppression of Acts of Nuclear Terrorism (2005),[94] the Amendment to the Convention on the Physical Protection of Nuclear Material (2005),[95] the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005),[96] the Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005),[97] the Convention on the

[84] UNGA, *Drafting of an international convention against the taking of hostages.*, 15 December 1976, A/RES/31/103.
[85] UNGA, *Convention on the Physical Protection of Nuclear Material*, 26 October 1979, No. 24631.
[86] UN, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, UN Treaty Series 1990.
[87] UN ECONOMIC AND SOCIAL COUNCIL (ECOSOC), *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988.
[88] UN GENERAL ASSEMBLY, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, UNTS 1678, I-29004.
[89] UNGA, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991.
[90] UNGA, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517.
[91] UNGA, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349.
[92] UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263.
[93] UNGA, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422. See CASSESE, A. ET. AL., *Cassese's International Criminal Law*, third edition, Oxford (2013), pp. 18-9; ROSE, C., *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems*, Oxford (2015), pp. 99-106 ff. See also: ROSE, C., KUBICIEL, M., LANDWEHR, O. (eds.), *The United Nations Convention Against Corruption: A Commentary*, Oxford (2019).
[94] UNGA, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, A/59/766.
[95] INTERNATIONAL ATOMIC ENERGY AGENCY, *Amendment to the Convenand tion on the Physical Protection of Nuclear Material*, 8 July 2005.
[96] IMO, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005.
[97] IMO, *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 14 October 2005.

Suppression of Unlawful Acts Relating to International Civil Aviation,[98] the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)[99] and the Protocol to the Convention on Offences and Certain other Acts Committed on Board Aircraft (2014).[100]

The *gravitational centre* of this nebula lies in the *United Nations Convention against Transnational Organized Crime* (2000)[101] and its corollary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000),[102] Protocol against the Smuggling of Migrants by Land, Sea and Air (2004),[103] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2005),[104] collectively referred to as Palermo Protocols.[105]

In parallel to this development, in 1974, the UNGA had adopted its Resolution on the definition of Aggression, later used as a basis for the codification of the crime in the Rome Statute,[106] before the long hiatus of the Cold War. This paralysis lasted until the early 1990s when the dissolution of the communist regimes of the Soviet Union and Yugoslavia[107] ended the Cold War[108] and unleashed the *hounds of Hell*. To these violences, the international community responded by establishing the two *ad hoc* tribunals[109] and paving the road which ultimately led to the creation of the ICC.

---

[98] INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

[99] INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010 (Doc 9959).

[100] INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), *Convention on Offences and Certain Acts Commited on Board Aircraft*, 14 September 1963.

[101] Hereinafter, UNCTOC. BOISTER, N., 'Chapter 7. The UN Convention against Transnational Organised Crime 2000', in Hauck, P., Peterke, S. (eds.), *International Law and Transnational Organised Crime*, Oxford (2016), p. 147: 'In Resolution 67/189 of 20 December 2012 the UN General Assembly […] affirmed the centrality of the UNTOC in the fight against transnational organised crime'.

[102] *Infra* para. 4.3.

[103] *Id.*

[104] *Infra* para. 3.2.

[105] See: BOISTER, N., *supra* note 105, pp. 126-49 and in particular pp. 126-7; SCHLOENHARDT, A., 'Chapter Three Convention Against Transnational Organised Crime', in *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region*, Leiden (2009), pp. 33-54; VAN DER WILT, H., 'Expanding Criminal Responsibility in Transnational and International Organised Crime', *Groningen Journal of International Law* 4(1)(2016), p. 5.

[106] FERENCZ, B. Les promesses de Nuremberg. *Les Cahiers de la Justice*, 3(2012), pp. 7-12.

[107] Together with the Rwandan massacres.

[108] Or perhaps, ended the (first) Cold War or put a temporary stop to it. I will leave these considerations to historians.

[109] COSTI, M., FRONZA, E., 'Il diritto penale internazionale: nascita ed evoluzione', in Amati, E., et al. (eds.), *Introduzione al Diritto Penale Internazionale, terza edizione* (2016), p. 9; SCHARF, M.P., DAY, M., 'The ad hoc international criminal tribunals: Launching a new era of accountability', in Schabas, W., Bernaz, N (eds.), *Routledge Handbook of International Criminal Law* (2011), pp. 51-66.

The long path to Rome has remote origins. In 1947, the UNGA requested the newly constituted ILC to codify the Nuremberg Principles.[110] It would have been a great occasion to provide for a definition of international crimes beyond some suggestive expressions devoid of any particular legal meaning.

Regrettably, likely to avoid any potential controversy arising from the respect of the principle *nullum crimen sine lege*[111] in the Nuremberg Trials, the UNGA (and the ILC) simply asked the Commission to formulate 'the principles of international law recognised in the charter of the Nürnberg Tribunal and in the judgment of the Tribunal', axiomatically implying that somewhere, somehow the conducts thereby referred were criminalised: '[s]ince the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them.'[112]

No definition equally appeared in the *Draft Code of Offences against the Peace and Security of Mankind* (1954).[113] In the Draft, the Commission seemed to distinguish between 'Nuremberg-crimes' and the traditional *crimina juris gentium*,[114] yet it did not indicate what is the supposed difference between these two categories, nor it provides any definition of them.

The second phase of the ILC study was not more successful in this regard, agnostically stating that '[t]he Commission *decided not to propose a general definition* of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact

---

[110] UNGA Res. 177 (II), *Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal*, 21 november 1947 A/RES/177(II).

[111] As recalled by Otto Kranzbühler, defence counsel for Admiral Dönitz, 'Nuremberg was conceived, and can only be understood as, a *revolutionary event* in the development of international law. If one were to tackle the criticism of the venture with the idea that no ex post facto laws may be applied, or similar conservative conceptions, one need not speak about Nuremberg at all. Law in the conventional sense of the term had been knowingly disregarded at Nuremberg'. KRANZBÜHLER , O. 'Nuremberg eighteen years afterwards', *DePaul Law Review* 14(2) (1965), p. 335. Emphasis added. On the problem of legality and the Nuremberg Trials: OVERY, R., 'The Nuremberg trials: International law in the making', in Sands, P. (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge (2003), pp. 15 ff., and in particular pp. 21-3. See also: SELLARS, K. 'Innovation and orthodoxy at Nuremberg', in *'Crimes against Peace' and International Law*, Cambridge (2013), pp. 113-39; TAYLOR, T., 'The Nuremberg War Crimes Trials', *International Conciliation* 27 (1949), pp. 336-44.

[112] INTERNATIONAL LAW COMMISSION, *supra* note 69, p. 374, para. 96.

[113] INTERNATIONAL LAW COMMISSION, Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954).

[114] INTERNATIONAL LAW COMMISSION, *Report by J. Spiropoulos* (1950), *supra* note 93 para. 36 p. 259. 'topics as piracy (delicta juris gentium), suppression of traffic in dangerous drugs (opium), in women and children (white slave traffic), suppression of slavery, of counterfeiting currency, protection of submarine cables, etc., do not fall within the scope of the draft code [offences against the peace and security of mankind] with which we are concerned here.'

contours of the concept of crimes against peace, war crimes and crimes against humanity, as identified in Article 6 of the Charter of the Nuremberg Tribunal.'[115]

As explained by the Special Rapporteur, 'many penal codes contain no general definition of the concept of the crime. They *merely enumerate* the acts regarded as crimes, on the basis of the criterion of *seriousness*',[116] Yet the essence of seriousness itself remains quite a mystery.

Widening the scope of this analysis, international crimes have also been examined by the ILC from the viewpoint of state responsibility, taking up the suggestion formulated by Professor Ago in the late 1930s.[117]

Article 19 of the 1976 *Draft Articles on State Responsibility* sought to distinguish between violations of unqualified international obligations and international crimes defined in paragraph 2 as 'breach […] of an international obligation so essential for the protection of *fundamental interests of the international community* that it is recognised as a crime by that community as a whole'.[118] Paragraph 3 contained a non-exhaustive list of crimes divided into four categories of progressively diminishing gravity: 'an international crime may result, *inter alia*, from: (a) a serious breach of an international *obligation of essential importance for the maintenance of international peace and security*, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an *international obligation of essential importance for safeguarding the human being*, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.'[119] The text is not a '*shining example of limpidity and precision*'[120] and suffers, as recognised by Crawford, of *circularity*.[121]

---

[115] ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission*, vol. II, Part Two (1996), art. 1 comment 4, p. 17.
[116] ILC, Twelfth report on the draft Code of Crimes against the Peace and Security of Mankind / by Doudou Thiam, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II part 2 (1994), p. 76.
[117] although the notion of international crime of state was later replaced by the international wrongful acts. Article 19. Yearbook of the International Law Commission, vol. II part two (1976), para. 74, p. 72. See: PELLET, A., 'Can a State Commit a Crime? Definitely, Yes!', *European Journal of International Law* 10(2)(1999), p. 425; BASSIOUNI, *supra* note 52.
[118] ILC, *Yearbook of the International Law Commission*, vol. II part 2 (1980), p. 32.
[119] *Ibid.*
[120] ABI SAAB, G., 'The Uses of Article 19', *European Journal of International Law* 10(2)(1999), p. 340.
[121] *Ibid.*, p. 341.

Still, notwithstanding its undeniable shortcomings -including the choice of examples and the decision itself to provide a list of examples- the insistence on *the relevance of the interests* threatened by the crimes offers a guide to reconstructing the notion of international crimes.

Notably, in this sense, the *First Report on the draft code of offences against the peace and security of mankind by the Special Rapporteur Thiam* (1983)[122] suggested a tripartite categorization of crimes: international crimes *stricto sensu,* international crimes *lato sensu* and those of uncertain classification. The first category referred to crimes exclusively defined by international law without any reference to internal law and which are, therefore, '*international by their nature*'. This class included 'crimes that assail *sacred values or principles* of civilisation […] [as well as] [crimes which adversely affect a common heritage of mankind, such as the environment, may also be placed in this category.' Differently put, the first Thiam's category identifies international crime on the basis of the vulnerated *rechtsgüter*, which may be either material or moral.

On the contrary, according to this classification, *lato sensu* international crimes (those which 'ha[d] *consequences and effects capable of transcending frontiers,*[123]*)* were not as a rule crimes under international law.' In this context, international law merely delineated the *cooperation between the authorities* of the involved states necessary to punish the crime, *i.e.* they served an exquisitely *utilitarian* purpose subservient to domestic interventions.

Between these opposite poles, however, rested a third foggier category[124] relating to 'cases in which a *combination of circumstances has caused the offence to be transferred from the realm of internal law to that of international law.'* This heterogeneous group of offences encompassed both international crimes *stricto sensu* (though subject of conventions, *e.g.* apartheid and slavery) or offences involving states (either in the sense of co-authorship, complicity or tolerance of the crime).[125]

Essentially, Thiam drew a line between *crimes which at their core have an absolute condemnation of the violation of primary interests -a condemnation that goes beyond any geographical*

---

[122] Even though, as previously recalled, 'the ILC did not explicitly adopt a theoretical framework setting out preconditions for an international crime or the policy that should guide international criminalisation when the project was finally completed in 1994'. JALLOH, *supra* note 43, p. 278.
[123] Emphasis added.
[124] In this sense, STAIANO, F., *Transnational Organized Crime: Challenging International Law Principles on State Jurisdiction*, Cheltenham (2022), p. 8: 'A recurring observation in such definitional efforts concerns the hybrid character of transnational crimes, and consequently of transnational criminal law. Transnational crimes are often described as neither purely national crimes nor core international crimes, or as an in-between category of crimes that is not entirely ascribable either to international criminal law or to domestic criminal law.'
[125] *Ibid.*, para. 34 p. 142.

consideration- whose discipline is entirely contained and codified by international law (customary or treaty), and those other crimes which are *international only due to their geographical dimension* ('transboundarism') or to the fact[126] that there is an international legal framework or at least there are international legal sources dealing with them: the so-called *transnational crimes*.[127]

Transnational crimes were originally known as 'business crime' or 'white-collar crime', usually referring to deleterious practices such as corruption and other forms of abuses within the productive machinery of societies.[128] The term had been popularised by the 1985 Milan Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in which 'it […] becom[e] […] evident that the escalating activities of organised crime were posing a serious threat on a global scale. It was recognised, in particular, as a new dimension of criminality that organised crime had acquired an unprecedented geographical extension and international coordination, as well as an effective diversification into all profitable criminal activities'.[129]

Rather than establishing a new juridical category, the term 'transnational crime' indicated the *transboundary dimension* of the crimes,[130] with UNCTOC reflecting a similarly tautological understanding of the phenomenon.[131]

---

[126] Often connected to the first element and the challenges arising from the repression of such phenomena.

[127] On similar lines, Werle, Cryer and Ambos combine considerations such as the protected interest, the source, the direct or indirect criminalisation to conclude that the core crimes are undoubtedly international. See WERLE, *supra* note 42, pp. 25-9, 36-8; CRYER, R., 'Introduction', in Cryer, R. et al, *An Introduction to International Criminal Law and Procedure*, Cambridge (2014), pp. 3-8; AMBOS, K., *Treaties on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford (2014), pp. 222-8. On a similar position see also FOUCHARD, I., *Crimes Internationaux entre internationalisation du droit pénal et pénalisation du droit international*, Bruxelles (2014), pp. 23-40.

[128] UNDOC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006), Introduction, pp. IX ff.

[129] *Id.*

[130] MADSEN, F.G., 'The Historical Evolution of the International Cooperation against Transnational Organised Crime: An Overview', in Hauck, P., Peterke, S. (eds.), *International Law and Transnational Organised Crime* (2016), pp. 16-7.

[131] As the definition contained in Art. 3 is only marginally more articulate: '[that] is transnational in nature and involves an organised criminal group. 2. For […] an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State, but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organised 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'. ROTH, M.P., *supra* note 94, pp. 5-7; WOODIWISS, M., 'Transnational organised crime: the global reach of an American concept', in Edwards, A., Gill, P. (eds.), *Transnational organised crime: perspectives on global security* (2004), pp. 13-27: 'Today, no consensus definition of the term "organized crime" exists. Nevertheless, existing legal definitions share two fundamental concepts, namely the activity constituting the crime and a set of persons constituting a type of organization'. STROBEL, K., 'Chapter 2 The Status Quo of Organized Crime in International Criminal Law', in *Organized Crime and International Criminal Law*, Leiden (2021), p. 6.

Still, even accepting that the notion of transnational crimes was not originally meant to indicate a specific class of crimes as opposed to the international one, it has risen to that status in the legal discourse.

In the next paragraphs, three main arguments will be brought against the international v transnational dichotomy and the jurisdictional consequences connected to it: a) gravity and state-centrism;[132] b) Statutes or not, that is (not) the question; c) the deep interconnectedness, ancillarity and symbiosis between the so-called inter- and transnational crimes.

5.2.1.1 **Gravity and state-centrism**

As seen in the Introduction, an often-cited characteristic of international crimes is their exceptional malignancy, their absolute subversion of any moral or legal order and an open attack against the most sacred *rechtsgüters* of the international community,[133] in a word, their *gravity and seriousness*. Alas, the notions of gravity and seriousness are quite evanescent despite the evocative formulas sought to describe them.[134]

In this definitory desert, indications of the potential contents and meaning of gravity can be found in the ICC OTP *Policy Paper* (2016), according to which various elements, both quantitative and qualitative, objective and subjective, converge to delineate the seriousness of a given crime, including 'the scale, nature, manner of commission, and impact of the crimes'.[135]

The *scale* of the crime is comparatively straightforward. It seeks to grasp how much harm has been inflicted by a given offence upon 'the victims and their families, and their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).' In this sense, it may partially overlap with the *impact*, as this encompasses

---

[132] See in this sense GUILFOYLE, D., 's.VIII Boundaries, Ch.34 Transnational Crimes', in Heller, K.J. et al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford (2020), pp. 800-2.

[133] AMBOS, *supra* note 129, p. 316. Emphasis added.

[134] DEGUZMAN, M. M., How serious are international crimes the gravity problem in international criminal law, *Columbia Journal of Transnational Law*, 51(1)(2012).

[135] ICC, *Office Of The Prosecutor Policy Paper On Case Selection And Prioritisation, 15 September 2016*, para. 37, p. 13 POPALZAI, G., THOBANI, H., The Complexities of the Gravity Threshold in the International Criminal Court: A Practical Necessity or an Insidious Pitfall?, *Max Planck Yearbook of United Nations Law Online* 20(1)(2017), p. 152. See also, *ad abundantiam*, the formula proposed by the ILC with regard to state responsibility: 'For an internationally wrongful act to constitute an international crime, two conditions must be satisfied. There must be a breach of an international obligation considered by the international community as *essential to the protection of its interests*, and the breach must be *serious*'. ILC, Tuesday, 6 July 1976, at 10 a.m., *United Nations Yearbook of the International Law Commission* 1(1976), para. 43 p. 252. Emphasis added.

the social, economic and environmental damage inflicted on the affected communities,' and both the scale and the impact can, to a degree, be expressed in numbers.[136]

Equally related to the scale and impact is the *manner* of a crime: how powerful was it, how pervasive, how engineered it was. How capable of vulnerate certain *rechtsgüters,* such as dignity, the right to life or existence as a group, freedom *et similia* (the *nature* of the crime). Needless to say, increasing levels of organization, systematicity, wealth and hardware availability, manpower and so on, the greater the destructive potential of the crime.[137]

Apropos of the organizational element of crime, according to some authors, a characterising feature of international crimes is the existence of *a nexus between the crimes and some state policy*,[138]

[136] *e.g.* an incident of navigation damaging the coral reef of an island across an area of X square miles - which could also fall under the manner of the crime- as in the case of the *M/V Wakashio* (*infra* para.), the depletion of marine livestock (*e.g.* the amount of catch of Y type of fish) and the quantifiable resulting impoverishment of the communities previously exploiting the depleted resource, the injuries and deaths caused by the smuggling or trafficking of an obnoxious commodity as drugs and weapons. In this sense, beyond a comparatively small number of states from the Global North, no reliable statistics on drug-related deaths and injuries exist. Still, the hecatomb-scale numbers of drug-related deaths are quite eloquent: United States (2021): 107,622; Canada (2016-21): 32,632; Australia (2020): 2,220; China (2014): 49,000 estimated drug-related deaths – probably grossly underestimated; England and Wales (2020): 4,561; Scotland (2020): 1,339; Northern Ireland (2020): 218; New Zealand (2019): 307; Serbia (2019): 57; Ukraine (2019): 421. Total deaths: over 198.000 (roughly the size of Brescia in 2021 - 196,000). PENNINGTON INSTITUTE, International Overdose Awareness Day, Facts & Stats Worldwide https://www.overdoseday.com/facts-stats/.

[137] *Ibid.*, pp. 13-4. See also the similar formula proposed by the ILC with regard to state responsibility: 'For an internationally wrongful act to constitute an international crime, two conditions must be satisfied. There must be a breach of an international obligation considered by the international community as *essential to the protection of its interests*, and the breach must be *serious*'. ILC, Tuesday, 6 July 1976, at 10 a.m., *United Nations Yearbook of the International Law Commission* 1(1976), para. 43 p. 252. Emphasis added.

[138] CASSESE, *supra*, note 133. According to him, piracy falls outside this definition as they do (unlabelled) offences such as 'illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, smuggling of nuclear and other potentially deadly materials', slave trade and traffic in persons, for the reason that these offences are not criminalised by customary law, and they are mostly committed by non-state actors for private goals and purposes. According to Pemberton et al., the special iniquity of state-related crimes lies in the dystopic and subversive character of state action: as states are understood as guardians of the rights and safety of their citizens when states degenerate 'cancerously' and attack those whom they had been created to protect, this betrayal carries an exceptional disvalue. See PEMBERTON, A., LETSCHERT, R.M., DE BROUWER, A., HAVEMAN, R.H., Coherence in International Criminal Justice: A Victimological Perspective. *International Criminal Law Review* 15(2)(2015), pp. 344 ff.

mirroring the traditional Western dualism between the public and the private spheres,[139] (also referred to as the *private-public divide)*[140] as well as betraying its historical legacy.[141]

Yet, this state-centrism fails to acknowledge the reality that abhorrent crimes are not only perpetrated by state-related individuals or according to state-related purposes, but oftentimes involve private actors (individuals and corporate entities) acting beyond or irrespectively of any state control.[142]

Whereas for Hobbes the *Leviathan*, the Commonwealth, the *civitas*, the state, should have been '"a mortal god," to which we owe under the "immortal God," our peace and defence',[143] states, however powerful, can hardly be compared to mortal gods, to almighty entities.[144] Corporate actors[145] and criminal organizations (*e.g.* the various mafias, terrorist groups *etc.*) can be as powerful (and even more powerful) than states, as dangerous as states.

---

[139] CHINKIN, C., A Critique of the Public/Private Dimension, *European Journal of International Law* 10(1999), p. 389.

[140] already expressed in CORPUS JURIS CIVILIS, *Digestum* 1.1.1.2, Ulpianus 1 inst.: '*Huius studii duae sunt positiones, publicum et privatum. publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus constitit. privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.'* Along the same lines, also Bantekas accepts the dualism of international crimes (the core crimes) and transnational crimes (the so-called treaty crimes), yet the problem is not of sources but criminalisation, *i.e* who (or rather, in which system we find the rules) criminalises the conduct beyond the issue of the source (whether customary or conventional), and, in this sense, international crimes are only those whose discipline lies entirely in international law, as opposed to the transnational crimes which require a filter of domestic criminalisation. BANTEKAS, I., *International Criminal Law*, fourth edition, Oxford (2010), pp. 8-12.

[141] The *proto*-genocide of the Armenians, the Shoah and the crimes perpetrated during WWII, the atrocities perpetrated by the Khmer Rouge and the various dictatorships, the apartheid *etc.* have all been carried out by state authorities. Still, in their nefarious endeavours, they have not acted alone. On the contrary, in their pursuit of evil they have benefitted -or rather, *male*fitted- from the assistance and cooperation of accomplice individuals and groups, as it shall be seen. See ZYSSET A., International crimes through the lens of global constitutionalism. *Global Constitutionalism* 12(1)(2023), p. 60.

[142] *Ex multis* RODENHAUSER, T., Beyond state crimes: non-state entities and crimes against humanity, *Leiden Journal of International Law* 27(4)(2014), pp. 913-28. PARMENTIER, S., WEITEKAMP, E., 'Punishing perpetrators or seeking truth for victims: Serbian opinions on dealing with war crimes', in Dawn, R., Meernik, J.D., and Thordis Ingadottir, T. (eds.), *The Realities of International Criminal Justice*, Leiden (2013), p. 44: 'international crimes as a relatively new concept differs from the older concept of state crimes in two ways: on the one hand, state crimes constitute a wider category than international crimes, as they also involve behaviour that is not traditionally regarded as violent, such as instances of treason, espionage or corruption; on the other hand, state crimes are to be seen as narrower than international crimes, as the former are committed by institutions or persons entrusted with state powers, while the latter crimes can also be committed by non-state actors, such as guerrilla groups or private individuals'.

[143] HOBBES, T., *Leviathan,* quoted from Hobbes T., Morley H., Hobbes's Leviathan. Harrington's Oceana. Famous pamphlets (a.d. 1644 to a.d.1795), London (1889), Chapter XVII, p. 84.

[144] The limits of state control will be in particular discussed in Chapters II and IV with regard to the effective control and jurisdiction exercised by flag states over the vessels flying their flags, highlighting how minuscule, impecunious and scarcely populated states could never exercise the necessary controls over ships owned and managed by world-wide corporate entities with almost limitless financial and human resources.

[145] For instance, the Forbes Global 2000 company list (2023 edition) comprises entities which, collectively taken 'account for $50.8 trillion in sales, $4.4 trillion in profits, $231 trillion in assets and $74 trillion in market value,' just

To understand the magnitude of transnational organised crime, suffice it to mention that, according to the UNODC, in 2009, the proceeds of trafficking drugs, counterfeiting, human trafficking, trafficking in oil, wildlife, timber, fish, art and cultural property, gold, human organs and small and light weapons were around 1.5% of the global GDP.[146]

With exclusive reference to the crimes more usually associated with the sea, the overall proceeds (not necessarily realised at sea) amounted to: a) drugs: 320 billion $ (50% of the total); b) human trafficking: 31.6 billion $ (5%); c) oil trafficking: 10.8 billion $ (2%); d) fish: 4.2-9.5 billion $ (1.1%); e) Small arms and light weapons: 0.3-1.0 billion $ (0.1%).[147]

The lack of prosecutions of 'entrepreneurial villains who have exploited a situation of conflict in order to advance their own perverse personal agendas', as Schabas puts it,[148] does not necessarily mean that such involvement of private entities does not exist nor that they could and should not be prosecuted.[149]

From the Nuremberg's *Industrialists* cases,[150] there is plenty of evidence of the *unholy alliance* between business and state violence, of how private entities and individuals contribute to the

to give a sense of the scale of non-state actors. MURPHY, A., TUCKER, H., The Global2000, *Forbes*, 8 june 2023 https://www.forbes.com/lists/global2000/?sh=257422915ac0.

[146] UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes, Research report*, October 2011, p. 9.

[147] *Ibid.* p. 36.

[148] SCHABAS, W., State Policy as an Element of International Crimes, *Journal of Criminal Law and Criminology* 98(3)(2008), p. 955.

[149] See WOUTERS, J., VANDEKERCKHOVE, H., 'A Different Type of Aid: Funders of Wars as Aiders and Abettors under International Criminal Law', in Jørgensen, N. (ed.), *The International Criminal Responsibility of War's Funders and Profiteers*, Cambridge (2020), pp. 281-303; AUSSERLADSCHEIDER JONAS, L., *Individual Criminal Responsibility for the Financing of Entities Involved in Core Crimes*, Leiden (2022); BRYK, L., SAAGE-MAAß, M., Criminal Liability for Arms Exports under the ICC Statute. A Case Study of Arms Exports from Europe to Saudi-led Coalition Members Used in the War in Yemen, Journal of International Criminal Justice 17 (2019), pp. 1117-37; LUPI, S., Is the time right to make 'provision of weapons' an international crime?, *Cambridge International Law Journal* 11(1)(2022), pp. 75–95 .

[150] IMT NUREMBERG, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946-April 1949*, Volumes 6-7, Washington (1953). REID, H., The Zyklon B Legacy and the Case for Investigating Arms Dealers Responsible for International Crimes in Myanmar, *New Zealand Journal of Public and International Law* 18(1)(2020), pp. 29-48.

perpetration of international crimes, despite the lack of prosecutions of international crimes funders and profiteers[151] in front of the ICC and the *ad hoc* tribunals.[152]

Still, non-state actors are being increasingly investigated over their involvement in international crimes, from the Dutch *Kouwenhoven*[153] and *Van Anraat* cases[154] to a French group suspected of having sold technological devices used in the repression of anti-regime dissent in Libya and Egypt (*Affaire Amesys*), *potentially amounting to crimes against humanity,*[155] to the allegations moved against *BNP Paribas* of having financed the purchase of weapons used in the *Rwandan Genocide*.[156]

---

[151] As noticed by Sluiter and Yau, there is potentially a logical fallacy, as weapons can (theoretically, should) be used according to the *jus in bello* and not only to perpetrate crimes. See SLUITER, G., YAU, S., 'Aiding and Abetting and Causation in the Commission of International Crimes: The Cases of Dutch Businessmen van Anraat and Kouwenhoven', in Jørgensen, N. (Ed.), *The International Criminal Responsibility of War's Funders and Profiteers,* Cambridge (2020), p. 322: 'Under a strict causation approach, the selling of weapons in a situation of armed conflict would not necessarily contribute to the commission of war crimes, because weapons supplied by the accused can also be used in legitimate acts of war. In order to establish causation, one would have expected these two matters to have received proper attention.'

[152] PALMER, N., HAMILTON, T., Legal Humility and Perceptions of Power in International Criminal Justice, *International Criminal Law Review* 23 (2022), pp. 435-40.

[153] 'S-HERTOGENBOSCH COURT OF APPEAL, *Ruling of the three judge panel at the Court of Appeal in 's-Hertogenbosch, rendered, after referral of the case by the Supreme Court following the appeal lodged against the judgement of the District Court in The Hague of June 7, 2006, case no. 09-750001-05, in the criminal case against Guus Kouwenhoven*, 21 april 2017.

[154] ECHR, *Frans Cornelis Adrianus van Anraat. v. The Netherlands, case no. 65389/09, Decision as to Admissibility,* 6 July 2010. See also ZWANENBURG, M., DEN DEKKER, G., Prosecutor v. Frans van Anraat - Case No. 07/10742.2009 Nederlandse Jurisprudentie 481, *American Journal of International Law* 104(1)(2010), p. 87: 'Van Anraat was a Dutch trader in chemicals. From 1985 to 1988, he sold tons of thiodiglycol (TDG), a chemical used to produce mustard gas employed in the attacks on Kurdish villages in Iraq and villages in Iran in 1987-1988, to the regime of Saddam Hussein. In 1989, van Anraat was arrested by Italian police in Milan on a warrant from the U.S. government. When he was released from custody, he fled to Iraq where he lived in Baghdad for fourteen years. After the invasion of Iraq in 2003, he returned to the Netherlands and was arrested on December 7, 2004.' RAPP, S. 'The Relationship between Economic and Atrocity Crimes: Challenges and Opportunities', in Jørgensen, N. (ed.), *The International Criminal Responsibility of War's Funders and Profiteers,* Cambridge (2020), pp. 506-23. Howden, D., Crimes against humanity: Anatomy of an arms dealer, *The Independent* 19 May 2006 https://www.independent.co.uk/news/world/africa/crimes-against-humanity-anatomy-of-an-arms-dealer-478792.html; HUISMAN, W., VAN SLIEDREGT, E., Rogue Traders. Dutch Businessmen, International Crimes and Corporate Complicity, *Journal of International Criminal Justice* 8 (2010), pp. 803-28. VIANO, E., Unholy Alliances and their Threat: The Convergence of Terrorism, Organized Crime and Corruption. *International Annals of Criminology*, 58(1)(2020), pp. 91-110.

[155] The French corporation Amesys is suspected of having sold to Ghaddafi (and afterwards, Al Sisi) internet surveillance devices, contributing to the widespread and brutal repressions (likely amounting to torture, CAHs or war crimes perpetrated during NIACs) of dissent by the Libyan and Egyptian regimes. See: Vente de matériel de surveillance à la Libye et à l'Egypte: des dirigeants français mis en examen pour «complicité d'acte de torture», *Le Monde*, 22 juin 2021 https://www.lemonde.fr/international/article/2021/06/22/vente-de-materiel-de-surveillance-a-tripoli-et-au-caire-quatre-dirigeants-francais-mis-en-examen_6085157_3210.html; FÉDÉRATION INTERNATIONALE POUR LES DROITS HUMAINS, Surveillance et torture en Libye: la Cour d'appel de Paris confirme la mise en examen d'Amesys et de ses dirigeants, et annule celle de deux salariés, *Nos Impacts,* 21 november 2022 https://www.fidh.org/fr/nos-impacts/surveillance-torture-libye-cour-appel-paris-mise-en-examen-amesys.

[156] ARNOLD, M., BNP Paribas under investigation over role in Rwanda genocide, *Financial Times,* 25 September 2017 https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2.

With specific regard to the topic of this Dissertation, *crime-at-sea,* in his 2019 address to the UNSC the Executive Director of the United Nations Office on Drugs and Crime illustrated how 'the smuggling of migrants and terrorist materials and attacks on shipping in the Gulf of Aden; cocaine trafficking in the Atlantic; heroin trafficking in the Indian Ocean; piracy and armed robbery at sea in the Gulf of Guinea; kidnap for ransom in the Sulu and Celebes Seas; illegal fishing in the Atlantic, Indian and Pacific oceans; and migrant smuggling in the Mediterranean. Those crimes pose an immediate danger to people's lives and safety, undermine human rights, hinder sustainable development and, as the Council has recognized, threaten international peace and security'.[157]

Even accepting that international crimes (*e.g.* genocide) have a higher level of malice, that they represent a unique abyss of evil and turpitude,[158] the scale, complexity and pervasiveness of certain commonly called transnational crimes hardly makes them lesser forms of international wrongdoing.[159]

5.2.1.2 **Statutes or not, that is (not) the question**

Seeking to identify a criterion -*de minimis*- to identify international crimes, part of the literature tends to identify international crimes with 'those offences over which international courts or tribunals have been given jurisdiction under general international law', *i.e.* only the so-called core crimes.[160] As explained by Wharton, '*the current subject matter jurisdiction of the Rome Statute is very much an artefact of history,* in particular, the Second World War and the subsequent Nuremberg and Tokyo trials, which occurred nearly seventy years ago.'[161]

---

[157] UNITED NATIONS *supra* note 457, p. 2.

[158] Paraphrasing Jackson: 'The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated'. JACKSON, *supra* note 72, para. 2.

[159] In this sense BRAGA DA SILVA, R., 'Synergies between Core and Transnational Crimes: An Analysis from the Perspective of the Rome Statute'. *Melbourne Journal of International Law* 21(1)(2020), pp. 13-4: 'Those who adhere to the view that this collective dimension is what separates core from transnational crimes claim that transnational crimes fail to meet the threshold of scale and systematic occurrence of core crimes. According to this explanation, transnational crimes are 'ordinary domestic crimes' because they lack the collective dimension and the particular societal background that suggests macro-criminality. However, this is not necessarily true. Transnational organised crimes can have the same characteristics as core crimes. They can be numerically and organisationally more complex than core crimes'. *Contra:* BURCHARD, C., Torture in the Jurisprudence of the Ad Hoc Tribunals, *Journal of International Criminal Justice* 6(2)(2008), p. 181.

[160] CRYER, *supra* note 102, p. 4; WHARTON, S., Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute, *The Canadian Yearbook of International Law* 52(2014), p. 133.

[161] *Ibid.*

The mere fact that since Nuremberg all the tribunals have dealt with the same crimes does not mean that there are no other international crimes besides those under the jurisdiction of the ICTY, ICTR, ICC and so on. This appears to be a potential case of *illicit commutativity fallacy*[162] or perhaps a *false cause fallacy*:[163]

1- 'if the crimes XYZ are included in all the statutes of the international tribunals, then they are international crimes. If XYZ are international crimes, then they are necessarily included in the statutes of the international tribunals.' to use the perhaps clearer example of the rain and the umbrella, not necessarily every time it rains, I have my umbrella (I may have left it at home) and not necessarily if I have an umbrella, it means it is raining (I may have misread the weather forecast or the latter may have been wrong or there may be other probable causes).
2- International crimes are included in the statutes of the international tribunals; *ergo*, they are international *because* they are included in the statutes.

The ICC Statute has never been intended to be, nor should be interpreted as, the ultimate codification of international criminal law, as recognised *inter alia* under Articles 10[164] and 25(3)[165] of the Statute itself. As explained by Cassese, '[t]he value and scope of those enumerations was therefore only germane to the court's jurisdiction and did not purport to have a general reach.'[166]

A possible argument may be that the widespread adoption of the expression transnational crimes 'pragmatically rationalises' the choice made in the Rome Statute attributing normative value to its *ratione materiae* jurisdiction.

From a philosophical point of view, a common way to express identity is the *relational* one. Whereas in positive terms, A can be defined as an entity that has the characteristics of A (A=A). A, however, could also be *relationally defined as an entity different from B,C,D etc.* (A=*not*-B,C,D…). Following this reasoning ('ANY, definition depends on exclusion'),[167] Guilfoyle suggests that 'we know international criminal law *in part* through what it is not',[168] distinguishing between

---

[162] 'if it is raining, then I have my umbrella. If I have my umbrella, then it is raining'.
[163] '*post hoc ergo propter hoc*'. WOODS, J., WALTON, D., Post Hoc, Ergo Propter Hoc, *The Review of Metaphysics* 30(4)(1977), pp. 569–93.
[164] *pacta tertiis nec nocent nec prosunt*: 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'; CASSESE, *supra* note 46 p. 21.
[165] 'This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'.
[166] CASSESE, A., *supra* note 41, p. 17; BOAS, G., BISCHOFF, J.L., REID, N. L., *International Criminal Law Practitioner Library Series Volume III, Elements of Crimes under International Law* (2008), pp. 2-3.
[167] GUILFOYLE, *supra* note 298, p. 791.
[168] *Ibid.*

the four core crimes subject to the jurisdiction of the international criminal tribunals -with the notable exception of the *African Court of Justice and Human Rights*- and the other crimes 'lumped together as transnational crimes'. Back to our problem of identifying international crimes, if A = international crimes and A = crimes under the international criminal tribunals, and B = crimes *not* under international criminal tribunals, *then* (A=A; B=B) B≠A, *i.e.* B = *non*-A, *i.e.* B = *non*-international crimes, normatively codified in the formula B = transnational crimes.

Yet piracy too was not included in the statutes of the *ad hoc* tribunals and the ICC, an absence sometimes considered as evidence of its non-international character.[169]

The drafting history of the ICC statute offers an interesting point of view on this point, highlighting all the ambiguities and (not purely legal) rationale behind the *international v. transnational* dichotomy. Even more explicitly, the final text was the result of three main interlocked factors: 1) the unwillingness of states to bind themselves to the ICC jurisdiction limiting their sovereignty and interfering with their actions;[170] 2) the *uncertainty over the definition of the proposed crimes* to be included in the ICC jurisdiction, (with the exception of genocide);[171] 3) the *tyranny of time* and the need to reach a *workable compromise* to set up the Court (leaving any secondary unresolved issue, including the inclusion of non-core crimes- to be discussed and included in the statute at a later stage, mindful of the need to avoid overstretching its limited resources).[172]

---

[169] The lack of international tribunals having jurisdiction on the alleged international crime of piracy was already felt in 1932: *supra* note 96, p. 756: 'Indeed, many states by omitting from their criminal law provisions for prosecuting all pirates, repudiate tacitly the notion of a duty to prosecute. Since, then, pirates are not criminals by the law of nations, since *there is no international agency to capture them and no international tribunal to punish them* and no provision in the laws of many states for punishing foreigners whose piratical offence was committed outside the state's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation would give those terms.' In the same sense see: CRYER, R., 'Introduction', in Cryer, R. *et al*, *An Introduction to International Criminal Law and Procedure,* Cambridge (2014), p. 4; COCCO, G., Dal pirata *hostis humani generis* alla pirateria contemporanea. Verso un diritto penale universale?, *Rivista italiana di diritto e procedura penale* (2012), p. 413.

[170] Comparatively less relevant in the context of the dichotomy of crimes and henceforth not addressed in this Dissertation. On the reluctance of states *ex multis* BASSIOUNI, M. C., The perennial conflict between international criminal justice and realpolitik. *Georgia State University Law Review*, 22(3)(2006), pp. 557-60; STONE, J. H., International criminal court: the political problems of having it all, the practical problems of having too little. *Michigan State University-DCL Journal of International Law* 9(1)(2000), pp. 197-210.

[171] Codified by the UN Genocide Convention (1948). *Infra* Chapter I para. XYZ.

[172] See in this sense UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, Rome, Italy, 15 June - 17 July 1998, *Documents of the Committee of the Whole, Extract from Volume III of the Official Records of the United Nations Diplomatic, Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents), DOCUMENT A/CONF.183/C.1/L.59,* [incorporating document A/CONF.J83/C. 1/L59/Corr. I of] I July 1998], Bureau: proposal regarding part 2, [10 July 1998], Art. 5, p. 212.

During the negotiations leading to the creation of the ICC, the only firm point on which all states agreed was that genocide, war crimes and crimes against humanity were to be imperatively included in the subject-matter jurisdiction of the Court.

Paradoxically, this long path had originated on the other side of the Atlantic and, more specifically, in the *1989 request of the Government of Trinidad and Tobago to establish an international criminal court exercising jurisdiction over individuals and entities engaged in illicit trafficking in narcotic drugs and across national frontiers and other transnational criminal activities* which, since the UN Drug Convention lacked 'international mechanisms for prosecuting and punishing offenders who command the means to evade the jurisdiction of Domestic courts.'[173]

Starting from the 1994 ILC draft[174] up until the very last minute of the negotiations, drug trafficking and later terrorism had been, in an ironic way, the *elephants in the court(room)*.[175]

In this regard, in 1996, Yoshida identified three principal positions with regard to the debate inter/trans (*rectius,* core v. non-core). First, those in favour of a purely core-related international criminal court claimed that such a solution would have been the best 'to avoid any question of individual criminal responsibility resulting from a State not being a party to the relevant legal instrument, […] facilitate the acceptance of the jurisdiction of the court by States that were not parties to particular treaties, […] facilitate the functioning of the court by obviating the need for complex State consent requirements or jurisdictional mechanisms for different categories of crimes, […] avoid overburdening the limited financial and personnel resources of the court or trivializing its role and functions, and […] avoid jeopardizing the general acceptance of the court or delaying its establishment'.[176]

---

[173] UNGA, *Request for the inclusion of a supplementary item in the agenda of the 44th session : General Assembly : international criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs and across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes: letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General.*

[174] ILC, *Draft Statute for an International Criminal Court* (1994), Art. 20(e): 'Crimes within the jurisdiction of the Court. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: […] (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute *exceptionally serious crimes of international concern.*' Emphasis added.

[175] As explained by Christensen, the improvement of the relations between the USSR, China and the West after the hiatus of the cold war opened the path to the resurgence of international criminal justice. Notably, this notion was far broader than the insufferably restricted number of 'core' crimes which made it into the Rome Statute, yet the disasters in the Balkans and Rwanda and the experience of the ad hoc tribunals determined a restriction of its subject matter. CHRISTENSEN, M. J., Crafting and promoting international crimes: controversy among professionals of core-crimes and anti-corruption. *Leiden Journal of International Law* 30(2)(2017), p. 511.

[176] ICC, PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, 25 MARCH-12 APRIL 1996, *Proceedings Of The Preparatory Committee During The Period 25 March-12 April 1996, Draft Summary,*

Bureaucratic trifles rather than dogmatic labelling debates.[177] On the opposite side of the trench, fought those in favour of the inclusion of various treaty-based crimes 'which, having regard to the conduct alleged, constituted exceptionally serious crimes of international

Rapporteur: Mr. Jun Yoshida (Japan), Addendum, F. Article 20, subparagraph (e) - Treaty-based crimes, 1. Inclusion, para. 2.

[177] Or, quoting the representative from Azerbaijan, 'in drafting the Statute, a balance had to be struck between the so-called realistic approach and the so-called idealistic approach.' ICC, *Summary records of the meetings of the Committee of the Whole, 34th meeting, Monday, 13 July 1998, at 3.05 p.m.* […] A/CONF.183/C.1/SR.34, Agenda item 11 {continued), Consideration of the question concerning the finalization, and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.l and Corr.l andA/CONF.183/C.l/L.59andCorr.l), Para. 41, p. 330.

concern'.[178] Amongst these crimes, three in particular caught the attention of the negotiators: *terrorism, torture and illicit drug trafficking*.

Starting from terrorism, the *querelle* involved two starkly different arguments: on the one hand those favouring its inclusion highlighted the 'serious nature of such acts which shocked the conscience of humanity and the magnitude of the consequences thereof in terms of human suffering and property damage, the increasing frequency of international terrorist acts committed on an unprecedented scale, the resulting threat to international peace and security'.[179] Against this view, others lamented that there was no general definition of the crime, and elaborating such a definition would substantially delay the Court's establishment, especially since these crimes were often similar to common crimes under national law.

Back to Yoshida's report, the only partially interesting ripple in the bureaucratic idleness of states was to be found in a beautifully laconic sentence concerning drug trafficking: 'these crimes were *not of the same nature* as those listed in other paragraphs of article 20[180] [namely the so-called core-crimes, *ndr.*].' What nature? How? Why? Do people thrive with drugs and smugglers emanate the *suavest odor of sanctity*?

Fast forward to the *Rome Conference* (1998) and the final part of the negotiations of the ICC Statute, it is worth recalling some of the positions taken by states in that forum, showing, in a highly schematic but hopefully useful way, the various degrees of acceptance and/or rejection of non-core crimes under the Rome Statute at the beginning and at the end of the conference, as condensed in the tabulations below. *6th meeting, 18th June 1998*.[181]

INCLUSION: yes/no/not necessary/maybe (later or not yet)	**drug trafficking**	**Terrorism**	**attacks against the UN and other treaty crimes**
Pakistan **Cameroon**	Maybe	Maybe	Maybe
Israel		Maybe	
Morocco **Syria**[182]	No	No	No

[178] *Ibid.*
[179] *Id. E.g.* the first *Al-Qaeda* attacks.
[180]
[181] Only the states referring to treaty crimes are included in the tabulations.
[182] Para. 25 p. 172: 'Terrorism was not well defined, and to include it would cause confusion. Drug trafficking and

Iraq **United Kingdom** **Brazil** **Ethiopia** **Iran** **Slovakia**			
Belgium **Norway**[183] **Greece** **France** **Mexico** **Lebanon** **China** **Congo**	not yet	not yet	not yet
Japan **US**	not necessary	not necessary	not necessary
Tunisia		Yes	
Trinidad **Dominica** **Costa Rica** **Samoa** **Cuba** **Sri Lanka** **Thailand**	Yes	Yes	Yes
South Korea	Later	Maybe	Later
Sweden	not necessary/not yet	not necessary/not yet	Yes
Denmark	maybe/later	maybe/later	maybe/later
Ukraine	maybe/not necessary	maybe/not necessary	maybe/not necessary
Russia	not yet	maybe/not yet	not yet

crimes concerning drugs should be dealt with by national courts. Attacks on United Nations officials should not be a matter for an international court.'.

[183] *ibid.* para. 32: 'the crimes of terrorism, crimes against United Nations personnel, narcotic drugs trafficking or similar crimes not covered by the so-called core crimes were undoubtedly of international concern. However […] a revision clause should be included to provide for amending the list in the future.'

United Arab Emirates **Yemen** **Saudi Arabia**	No	Yes	No
Algeria	Yes	Yes	
India	Maybe	Yes	
New Zealand		Yes	Yes
Italy	not yet	not yet	Maybe
Turkey	Yes	Yes	
Oman **Bangladesh**		Maybe	

As shown in the table above, beyond the comparatively consolidated distinction between core and non-core crimes (with some perplexities concerning the crime of aggression) and the opportunity to entrust them to the nascent Court (the physiognomy of which was the battlefield of radically divergent views), the systematics of crime and the *inter- v. transnational dichotomy* were left fundamentally untouched with two partial (enigmatic) exceptions.

The first, more transparent hint to the *inter v. trans dichotomy* was offered by the Slovakian representative Tomka.[184] According to him 'treaty crimes were definitely of *international concern*, but nevertheless different in *nature* from the core crimes'.[185] It is sad that Tomka did not seek to define what he or his government meant by treaty crimes, crimes of international concern or core crimes.[186] In this sense, the question is, what natural element is different between treaty crimes and core crimes? The *travaux préparatoires* are silent on this point.

The second implicit reference to the *inter-trans* dichotomy can be found in a rather curious and criptic statement of Tunisia which, -supporting the inclusion of terrorism in the Rome Statute- claimed that terrorism 'was becoming more and more of a transnational crime.'[187] A rather ambiguous expression potentially revealing a *misapprehension* of the -criticised- conceptual difference between international and transnational crimes and perhaps the limits of such dichotomy. If terrorism was increasingly becoming a transnational crime, what was it before?

[184] Later ILC member and judge at the ICJ.
[185] ICC, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Italy 15 June - 17 July 1998*, Document: A/CONF.183/C.1/SR.6, 6th meeting of the Committee of the Whole, Thursday, 18 June 1998 Para. 37, p. 172. Emphasis added. Somehow similarly Senegal, *ibid.*, para. 90 p. 176.
[186] As highlighted by deGuzman, the 4th Preambular paragraph of the Rome Statute mentions 'the most serious crimes of concern to the international community as a whole', but does not specify the nature of the international community's concern. DEGUZMAN, M. M. Justifying extraterritorial war crimes trials. *Criminal Law and Philosophy*, 12(2)(2018), note 3, p. 291.
[187] *Ibid.*, para. 66, p. 174.

And, if terrorism is a *transnational* crime, why should it fall under the *International* Criminal Court jurisdiction? Is there any difference between international and transnational crimes or are those expressions referring to the same (or at least to cognate) crimes? I will leave the answers to these questions to the analysis in Chapter II.

34-35th meetings, 13 july 1998[188]

yes/no/not necessary/maybe (later or not yet)	**drug trafficking**	**Terrorism**	**other t. crime**
Sweden	agreement or later review	agreement or later review	agreement or later review
Trinidad	Yes	Yes	Yes
Jamaica	Yes	Yes	Yes
Netherlands	No	No	No
Spain	Later	Later	Later
Azerbaijan	Yes	Yes	Yes
Turkey	Yes	Yes	
Thailand		Yes	
Sri Lanka	Yes	Yes	
Ethiopia	Yes	Yes	Yes
Nicaragua	Later	Later	Later
Madagascar	Later	Later	Later
Bolivia	Later	Later	Later

Faced with the rather concrete risk of a fiasco due to the persistent -up to the very last minute of the Conference-[189] agreed on a fundamental nucleus of crimes, while leaving onto the shoulders of a future review conference all the issues that could not be solved in Rome, including the definition of the crime of aggression and the fate of the treaty crimes.[190] In this sense, an

[188] the last available day to reach a decision on the subject-matter jurisdiction of the Court.

[189] The magnitude of the task of the Rome Conference is well illustrated by Kirsch and Holmes: '[a]s the conference began its work in Rome on June 15, 1998, the task awaiting the negotiators was daunting. Despite the work accomplished by the Preparatory Committee (PrepCom), the draft statute that ultimately emerged from the PrepCom was riddled with some fourteen hundred square brackets, i.e., points of disagreement, surrounding partial and complete provisions, with any number of alternative texts. Within the time available, the conference could not have possibly resolved the outstanding issues systematically.' KIRSCH, P., HOLMES, J.T., Developments in international criminal law, *American Journal of International Law* 93(1)(1999), p. 3.

[190] See ICC, *DOCUMENT A/CONF.183/C.1/L.53, Bureau: discussion paper regarding part 2*, (6 July 1998), Art. 5 p. 211: 'one or more of the treaty crimes (terrorism, drug trafficking and crimes against United Nations personnel) may be inserted in the draft Statute if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July. If this is not possible, the Bureau will propose that the interest in addressing these crimes be

often-recited leitmotiv by those who opposed the inclusion within the ICC's jurisdiction of non-core crimes was the alleged sufficiency of the(ir) treaty regime pivoted on the principle *aut dedere aut judicare*: no need to bother The Hague with those crimes.[191]

Back to Rome, against the background frenzy of the Conference, seemingly contradicting Tomka's hint to a different nature of core and treaty crimes, a few states criticised the abandonment of treaty crimes from the ICC Statute claiming that '[t]o exclude terrorism and drug trafficking from the scope of the Statute would constitute a grave omission: *[t]he distinction between core crimes and treaty crimes was an artificial one: the infliction of indiscriminate violence on innocent civilians was legally unacceptable and morally reprehensible in times of war and peace alike*'.[192] Along similar lines the Bolivian delegate pushed for an evolutive reading of the categories of crime, since 'drug trafficking and terrorism, […] were *new threats to international and internal peace and security*'.[193]

In this sense, the Final Act of the Rome Conference offers some precious indications of possible -though perhaps unlikely- future developments of the ICC *ratione materiae* jurisdiction to include terrorism and drug trafficking, expressing concern over their destabilising effects.[194]

What better example of these destabilizing effects than the 9/11 attack that erupted just three-odd years after the end of the conference? In its highly emotional aftermath, Turkey declared that these massive attacks and the ensuing tragic outbreaks of violence spread to the four corners of the globe 'have proved once again that terrorism is among the most serious crimes

---

reflected in some other manner, for example, by a Protocol or review conference.' STOELTING, D., Status Report on the International Criminal Court, *Hofstra Law and Policy Symposium* 3(1999), p. 267.

[191] *Ex multis* SCHLOENHARDT, A., Transnational organised crime and the international criminal court developments and debates. *University of Queensland Law Journal* 24(1)(2005), pp. 94-5.

[192] UNITED NATIONS, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 1 7 July 1998, Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole,* para. 45, p. 339. Emphasis added.

[193] *ibid.*, Para. 38, p. 347. Emphasis added.

[194] ICC, *Final Act Of The United Nations Diplomatic Conference Of Plenipotentiaries On The Establishment Of An International Criminal Court, done at Rome On 17 July 1998, U.N. Doc. A/Conf.183/10, Annex I. Resolutions Adopted By The United Nations Diplomatic Conference Of Plenipotentiaries On The Establishment Of An International Criminal Court, Letter E*: 'terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community, […] the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States, Deeply alarmed at the persistence of these scourges, which pose serious threats to international peace and security, Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court, Affirming that the Statute of the International Criminal Court provides for a *review mechanism, which allows for an expansion in future of the jurisdiction of the Court,* Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.' Emphasis added.

against the peace, security and well-being of the world. International terrorism has emerged as the most urgent and compelling crime the world is confronted with.'[195]

If 9/11 had taken place before or during the Rome Conference, would it have made it into the Statute? Perhaps, though in the new age of conflict between the powers and comparatively small-scale wars scattered all across the globe inaugurated with 9/11, reaching any meaningful consensus to include non-core crimes -including terrorism-[196] has proven to be impossible[197] (only aggression, cited but undefined, could be codified in the Kampala Conference).[198]

Since the 1998 Rome Conference, a lot of water has transited under the ancient bridges of the *Urbs* and a lot of troubles have shaken the international community, from 9/11 and the wars connected with the so-called 'war against terror', the Arab spring and the ensuing conflicts, the refreezing of the (first) cold war between Russia and the West, the Russian-Georgian war, the war between Armenia and Azerbaijan, the Yemenite, Somalian and African conflicts, the ongoing Russo-Ukrainian war and the never-ending bloodshed in the Holy Land. Not to mention the stormy clouds of the potential conflicts between Venezuela and Guyana, Ethiopia and Eritrea, PRC and Taiwan and many other heating areas of the world. It is evident how, in such a turbulent conflict, finding an agreement between 123 states over the enlargement of the subject-matter jurisdiction of the Court over crimes patently calling forth vengeance by God and humanity (or risking annihilating it, as Ecocide)[199] is a fairly remote hypothesis.

---

[195] ICC, PREPARATORY COMMISSION, 01-56087 (E), *0156087*, New York, 24 September-5 October 2001, *Comments by Turkey with regard to the terrorist crimes*, 2 October 2001.

[196] STEPHENS, T., International criminal law and the response to international terrorism. *University of New South Wales Law Journal*, 27(2)(2004), pp. 478-9.

[197] Despite the Dutch and Trinidadian proposals to include terrorism and drug trafficking as crimes under the Rome Statute. See INTERNATIONAL CRIMINAL COURT, ICC-ASP/8/43/Add.1, Assembly of States Parties Distr.: General, 10 November 2009, Eighth session, The Hague 18-26 November 2009, *Report of the Bureau on the Review Conference, Addendum, Annex IV and VI*. 'The view was expressed that the agenda of the Review Conference (annex VII) should not be overburdened, particularly since the Statute left open the possibility for submitting proposals on amendments after the Conference. It was noted that the Court was still at an early stage of fulfilling its mandate; the inclusion of drug crimes or the crime of terrorism would overburden the Court and detract from focusing its limited human and financial resources on the most serious crimes agreed to in 1998. […] Furthermore, it was observed that both drugs crimes and the crime of terrorism raised significant political sensitivities that would lead to a second difficult negotiation process at the Review Conference, which was already likely to expend a significant amount of time and effort on the political issues surrounding the crime of aggression. Consequently, in accordance with this view, it might be feasible briefly to raise both issues at the Review Conference, but not to embark upon a detailed discussion on either one.' INTERNATIONAL CRIMINAL COURT ICC-ASP/8/43, Assembly of States Parties Distr.: General, 15 November 2009, Eighth session, The Hague, 18-26 November 2009, *Report of the Bureau on the Review Conference*, Paras. 16-7.

[198] BASSIOUNI, M.C., SCHABAS, W.A. (eds.), *The Legislative History of the International Criminal Court, Second Revised and Expanded Edition, Volume I*, Leiden (2016), pp. 176-7.

[199] Though, in this sense, an encouraging step towards the recognition of a crime of ecocide may be found in the adoption, by a very large majority, of an EU parliament resolution updating the existing framework by criminalizing

In conclusion, ICC *ratione materiae* jurisdiction or not, it is not the end of history nor of the international criminal justice project, as Preambular Paragraph 4 suggests.[200] It 'merely' means that the crimes under the Rome Statute are those on which it was reached an agreement during the Rome Conference[201] and those prosecutable by the *ad hoc* tribunals. At least from a strictly *positivist* perspective, they are 'an historical artefact'.[202] In this respect, it ought to acknowledge Guilfoyle's remark that this 'historical artefact' is not accidental but rather a manifestation of international law at work, a political and legal struggle between competing *rechtsgüters* and values the violation of which falls into reciprocally exclusionary categories.[203]

1.2.1.3 The deep interconnectedness, ancillarity and symbiosis between the so-called inter- and transnational crimes and a proposal for a unified category of crimes of international concern

The third and final argument against the taxonomical distinction (or at least, supporting the emergence of an alternative, unified classification of non-purely domestic crimes) between international and transnational crimes lies in the deep epistemological *interconnectedness, ancillarity and symbiosis* between those allegedly different classes of crimes, which adds to the ambiguous classification of specific offences[204] (in particular *terrorism and piracy*),[205] as it has already been seen and will be further highlighted in the course of this Chapter and more broadly this Dissertation.

The sea is a great magnifying glass for these overlaps and *co-consequentialities* between different criminal phenomena, as explained by the French delegate to the UNSC: 'some criminal groups know how to take advantage of maritime insecurity in order to engage in other forms of

---

the most serious environmental offences *comparable to ecocide* (Art. 21) of the EUROPEAN PARLIAMENT legislative resolution of 27 February 2024 on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC (COM(2021)0851 – C9-0466/2021 – 2021/0422(COD)) (Protection of the environment through criminal law).

[200] *Supra* note 166.

[201] See WAGNER, M., The ICC and its Jurisdiction – Myths, Misperceptions and Realities, *Max Planck Yearbook of United Nations Law* 7(2004), p. 414: 'The list of the treaty-based crimes for which no consensus had emerged until the Rome Conference contained apartheid, torture, a crime headed "Terrorism" and mercenarism, but also drug trafficking. The latter crime had been the impetus for restarting the negotiations about the legal basis for an international criminal adjudicative body […] in 1989'. BENEDETTI, F., BONNEAU, K., WASHBURN, J., *Negotiating the International Criminal Court*, Leiden (2013), p. 19.

[202] GUILFOYLE, *supra* note 298, p. 810.

[203] *Ibid*.

[204] JALLOH, *supra* note 43, pp. 277-8.

[205] According to Guilfoyle, piracy and torture, in particular, can be considered as *liminal crimes standing at the boundary of international and transnational criminal law*. *Ibid*., p. 802.

trafficking, including trafficking in migrants, as we have seen in the Mediterranean Sea. Drug trafficking on the high seas, whether of heroin from Afghanistan or cocaine produced in South America, fuels terrorist groups and destabilizes entire economies by fostering corruption. The plundering of fisheries resources is another harsh reality that destabilizes coastal regions and inflicts harmful environmental and socioeconomic consequences'.[206]

Whereas not every international crime is necessarily linked to transnational ones and vice-versa, it is not a rare occurrence that they share a common root or that in the intricate jungle of crime they cross their branches. For instance, trafficked humans engaged in IUU fishing while subject to any imaginable sort of abuse. Trafficking linked to human rights abuses or environmental degradation (as highlighted by the investigation over the murders of *Milan Hrovatin and Ilaria Alpi*) etc.

In these contexts, the so-called transnational element and the international element are inextricably linked within a common criminal operation, and to understand and address the phenomenon, it is argued that it would be helpful to adopt a unified approach, to blur the already uncertain boundaries of the trans v. international dichotomy.[207]

Following a *Bassiounian*[208] inspiration it will thus be suggested, *in primis,* a new, all-encompassing category including the crimes currently defined as international and transnational[209] (*crimes of international concern)* to replace the current, allegedly *artificial* and purposeless, dichotomy.

In essence, the criticism against the mainstream dichotomy is grounded on three cumulative tenets: 1) the *evanescent boundaries* between international and transnational crimes; 2) the *identity* of the *rechtsgüters* offended -*in concreto*- by inter and transnational crimes; 3) the *misconception of higher level of reprobation, malignity and seriousnes*s of international crimes compared to

---

[206] *Supra,* note 326, p., 7.

[207] See in this sense MÉGRET, F., 'The Unity of International Criminal Law: A Socio-Legal View', in Kevin Jon Heller, K.J. et al. (eds.), *The Oxford Handbook of International Criminal Law,* Oxford (2020), pp. 811-40. As O'Keefe puts it with a pinch of humour and pragmatism, after a lengthy and overall inconclusive analysis of the various proposed criteria, '*you know one [international crime] when you see it*'. O'Keefe, R., *International Criminal Law*, Oxford (2015), p. 56.

[208] *Infra,* Chapter I.

[209] As a preliminary *caveat,* the reference to international and/or transnational crimes in the Dissertation finds its rationale in the widespread and consolidated usage of these expressions, which will be used in a purely technical manner, as idiomatic formulas, thus avoiding more lengthy periphrases.

transnational crimes (particularly in the marine context),[210] which determines the illogicality of different treatment and regime of these crimes.

The idea is that by affecting the same *rechtsgüters* in a systematic and pervasive manner, crimes which may appear *prima facie* less shocking than their more *august cognates*, the impact of these crimes may be qualitatively and quantitatively comparable to the latter.

6. **Jurisdiction at sea: which approach?**

As it will be seen in the course of Chapter IV, in UNCLOS the provisions concerning jurisdiction (interestingly, undefined) are scattered all around the Convention referring to the various *functions* assumed by a certain state in the specific context,[211] from 'coastal state' to 'flag state' to 'sponsoring state' *etc.* Furthermore, as it will be seen in due course, the physical overlap of the various zones (*e.g.* the EEZ and the Continental shelf have the same extension and basically insist on the same 'segment' of the sea[212]) may give rise to the simultaneous applicability of different grounds of jurisdiction.

As Professor Gavouneli, rather enthusiastically, puts it, 'the interplay between the different labels, which each state may, simultaneously or not, assume provides a fascinating canvas of contrasting interests, joint actions and overlapping concerns'.[213]

Consequentially, she builds her analysis[214] around the *functions* exercised by the state (flag state, coastal state, port state) rather than the powers allowed to each state in a given zone. That is, in painfully brief terms, the functional approach.

The other approach to maritime jurisdiction, hinged on the description of the jurisdictional regime of the various maritime zones, from internal waters to the high seas and the

---

[210] One example of this idea can be found in the comparison between the deaths and injuries caused by genocides at sea and the deaths and injuries caused, for instance, by the obnoxious substances and weapons moved through the seas or the sale of which serves to finance criminal organizations involved in the most abhorrent crimes.

[211] *Ibid.* p. 33. Emphasis added.

[212] *Rectius*, the EEZ may extend up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Art. 57 UNCLOS). With regard to the continental shelf, on the other hand, 'a coastal state is […] entitled to a continental shelf consisting of (a) the seabed reaching 200 miles from the baselines, and in addition (b) any area of physical continental margin beyond it within the limits set by the Gardiner and Hedberg formulae in article 76(4), (c) subject to the 350 miles/2500 m isobath + 100 miles maximum limit set out in article 76(5). The limits established by UNCLOS […] allow the inclusion within national jurisdiction of substantially the whole of the physical continental margin'. CHURCHILL, R., LOWE, V., SANDER, A., *The law of the sea*, fourth edition, Manchester (2022), p. 232.

[213] *Ibid.* p. 34.

[214] particularly in Chapter 2.

area (zonal approach) is largely predominant in literature,[215] following UNCLOS structure itself[216] and in spite of the potential shortcomings deriving from the fragmentation of the regime of maritime jurisdiction.[217]

Amongst the most recent critics against the traditional zonal approach of the law of the sea, in recent years, several scholars have brought attention to the insufficiency of the zonal management of the sea.[218]

In particular, these authors argue that it is unsuited to grasp the dynamic complexity of the ecosystems, the interaction between the marine ecosystems and the reality that water and living creatures continuously move across the lines traced by humans. It is suggested that to improve the effective management of maritime resources, *a new, holistic approach* must be developed.[219]

De Lucia, more radically, has criticised the applicability of the land-formed paradigm of *dominium, imperium and jurisdictio* to the sea through formulas of 'liquid entitlements' or 'terraqueous territory'.[220]

---

[215] See, *ex multis* CHURCHILL, R., LOWE, V., SANDER, A., *supra* note 4; ROTHWELL, D.R., STEPHENS, T., *The International law of the sea*, Oxford (2016); SOHN, L.B. ET AL., *Law of the Sea in a nutshell*, 2nd edition, Saint Paul (2010), p. 11; TANAKA, Y., *International Law of the sea*, Cambridge (2019), p. 4: 'the *primary function of international law involves the spatial distribution of jurisdiction of States*, and the same applies to the law of the sea. The contemporary international law of the sea divides the ocean into multiple jurisdictional zones, […] In principle, the law of the sea provides the rights and obligations of a coastal State and third States according to these jurisdictional zones. […] This approach is sometimes called the zonal management approach.' Emphasis added.

[216] As required *inter alia* under the UNGA res. 2750 C (XXV) / 1970 setting the agenda for Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction set forth in General Assembly resolution 2467 A (XXIII).

[217] That is, it fails to develop an organic view of jurisdiction, which must instead be hermeneutically pieced together by the interpreter, crossing the instances of territorial jurisdiction with the other grounds. As explained by OXMAN, B.H., The Regime of Warships Under the United Nations Convention on the Law of the Sea, *Virginia Journal Of International Law* 24(4)(1984), pp. 810-11: 'The Convention is not organized by type of ship or, with some exceptions, by type of activity. Most of it is organized by zone. It sets forth legal rights and duties in the context of the regime for each zone. It presents the zones of coastal State sovereignty first, then the zones that may be regarded as intermediate in nature, followed by the full classic high seas regime and a new regime for the international seabed area.' See also KAYE, S., 'Chapter 1. A zonal Approach to Maritime Regulation and Enforcement', in Warner, R., Kaye, S. (eds.), *Routledge Handbook of Maritime Regulation and Enforcement*, Abingdon (2016), p. 13; BARNES, R., FREESTONE, D., ONG, D.M., 'Chapter 1. The law of the sea: progress and prospects', in Barnes, R., Freestone, D., Ong, D.M (eds.), *The law of the sea: progress and prospects*, Oxford (2006), pp. 3-4.

[218] An issue highlighted, *inter alia*, by many speakers during the workshop organized by the Netherlands Institute for the Law of the Sea (NILOS) and the Utrecht University Centre for Water, Oceans and Sustainability Law (UCWOSL) of Utrecht University In collaboration with the Centre for International Law (CIR) of the Ministry of Foreign Affairs of the Kingdom of the Netherlands ' *Filling the legal toolbox for working towards ocean sustainability: UNCLOS, UNCLOS 2.0 and/or what else?*', held in The Hague on the 17th and 18th November 2022.

[219] TANAKA, I., *A dual approach to ocean governance. The cases of zonal and integrated management in international law of the sea*, Farnham (2008), pp. 1-118.

[220] DE LUCIA, V., 'Ocean commons and an 'ethological' nomos of the sea, in De Lucia, V., Oude Elferink, A.G., Nguyen, L.N. (eds.), *International law and marine areas beyond national jurisdiction. reflections on justice, space, knowledge and power*, Leiden (2022), pp. 34-5.

According to him, 'this underlying logic of sovereign spatiality has […] made it difficult for international law to engage with the materiality of the oceans'.[221] What he proposes as an alternative to what he calls 'the cartographic understanding of ocean commons',[222] is 'an ethological *nomos* of the sea […] reflect[ing] a transient emergence of spatial assemblages which are mobile, unstable, the result of practices enacted by a multiplicity if agencies, that shifts in time and space through ocean mobilities. […] this […] may mean moving past the distinction between ocean commons and ocean spaces under national jurisdiction, as the notion of commons exceeds greatly the notion of delineated spaces that remain outside of sovereign control. All spaces are co-constituted, all are commons insofar as they are the result of a multiplicity of practices, processes, stories contributing to their co-constitution and offering emergent legalities.'[223]

As interesting as adopting such a perspective in discussing jurisdiction over crimes of international concern perpetrated at sea, applying these *non-anthropocentric* and land-based approaches to the problem of state jurisdiction over maritime crimes would nevertheless bring new challenges and further difficulties in relation to a topic which appears to those who engage with it, already riddled with questions and troubles.

For this reason, keeping in line with tradition and in observance of the *KISS* rule,[224] this Dissertation will discuss maritime jurisdiction with an emphasis on those aspects which appear to be more relevant for the sake of the *crimes of international concern* perpetrated at sea illustrated in Chapter I through the old lenses of the zonal approach.

7. UNCLOS: a peacetime constitution for the law of the sea. The choice not to dwell into the maritime *jus in bello*

As previously mentioned, UNCLOS is its essence a 'code of the human use of the oceans'. Still, not every use of the oceans is disciplined by UNCLOS, which, while containing a detailed articulation of the conditions necessary to preserve the peacefulness of the seas as a necessary

[221] *Ibid.* p. 37.
[222] *Id.* pp. 37-8.
[223] *Id.* pp. 42-3.
[224] Keep It Short and Simple.

precondition for the exploration and exploitation of the riches (living and non-living) of the seas and their subsoil, ignores the favourite hobby of humans: *war*.[225]

UNCLOS, in its essence, provides the *code of human, peace-time use of the ocean*.[226]

Already in its preamble, UNCLOS expresses the intention of creating 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans',[227] whilst affirming that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.[228]

During the Third Conference on the Law of the Sea (UNCLOS III), the question of the military uses of the sea was discussed, registering a fracture between the Western sea powers and the socialist and developing states favouring the demilitarisation of the oceans[229] as a result of which no consensus was achieved.[230]

Despite this lack of consensus on a radical demilitarisation of the seas, a compromise was reached over several provisions addressing military operations at sea. These range from the suspension of the right of passage in territorial waters of warships engaged in the non-peaceful activities listed in Article 19 UNCLOS, to Articles 87 and 88 providing, on the one hand, that 'the high seas shall be reserved for peaceful purposes,' while keeping the door open, thanks to the aside

---

[225] HEINTSCHEL VON HEINEGG, W., '10. The law of armed conflicts at sea', in Fleck, D. (ed.), The Handbook of International Humanitarian Law, third edition, Oxford (2013), para. 1010 p. 470.

[226] ROBERTSON, H.B., 'The "New" Law of the Sea and The Law of Armed Conflict at Sea', *Newport Paper* 3(1992), p. 2. See in the same sense VOHRAH, L.C., ASKIN, K.D., MUNDIS, D.A., 'Contemporary Law Regulating Armed Conflicts at Sea', in Ando, N., Mcwhinney, E., Wolfrum, R. (eds.), *Liber amicorum Judge Shigeru Oda*, volume 2, The Hague (2002), p. 1524.

[227] Preambular para. 4. Also para. 7: 'Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter'.

[228] *Ibid*. para. 8.

[229] 'The "peaceful purposes" language originally was derived from the text of UN General Assembly Resolution 2749(1970), which declared that the sea-bed beyond the limits of national jurisdiction was reserved exclusively for peaceful purposes. […]As the negotiations of the Convention continued, some developing States took the position that the text of Articles 88 and 301 would prohibit all military activities in the oceans. Ecuador, for example, argued that "the use of the ocean space for exclusively peaceful purposes must mean complete demilitarization and the exclusion from it of all military activities." Maritime States opposed such a strict interpretation of the "peaceful purposes" language, asserting that the test of whether an activity was considered "peaceful" was determined by the UN Charter and other obligations of international law'. PEDROZO, R., Military Activities in the Exclusive Economic Zone*: East Asia Focus. International Law Studies Series. US Naval War College*, 90(2014), p. 533.

[230] HEINTSCHEL VON HEINEGG, W., The United Nations Convention on the Law of the Sea and Maritime Security Operations, *German Yearbook of International Law*, 48(2005), p. 151.

'*inter alia'* included in the first paragraph of Article 87 (freedom of the high seas) to military uses falling short of non-peaceful measures.[231]

As significantly highlighted by Heintschel Von Heinegg, the same paragraph of Article 87 not only refers to other, non-enumerated, freedoms but also to uses derived from *other sources* ('the freedom of the high seas is exercised under the conditions laid down by this Convention and *by other rules of international law*').[232]

With regard to the interplay of the rules of the law of the sea and the *jus in bello,* in particular, it has been held that the two regimes would be simultaneously applicable, with UNCLOS providing the frame and lexicon applicable to maritime issues with the concrete picture being drawn by IHL as its *lex specialis*.[233] In other words, UNCLOS and the law of the sea remain the conceptual and semantic background of the discipline applicable to maritime armed conflicts (MACs) the law of which is found elsewhere as recognised by UNCLOS itself.[234]

With the substantive provisions of the law of MACs being found outside UNCLOS, as mentioned in the first Chapter, the discipline of the war crimes perpetrated at sea must be found elsewhere. That does not mean, however, that the conceptual framework of the law of the sea is irrelevant.

Ronzitti offers several examples of the practical impact of UNCLOS III on belligerents. For instance, the extension of the territorial sea up to twelve miles from the baseline limits the movement of the fleets, which are bound to respect the neutrality of the state to which such territorial sea belongs.[235] Also, the (then-) newly established continental shelf and EEZ influence

---

[231] Similar principles apply to the Area. As explained by Vöneky, the deep sea-bed and ocean floor are designated for peaceful purposes only. It is generally understood that this clause does not prohibit all military activity, but rather only aggressive activities as defined in Article 2(4) of the UN Charter. VONEKY, S., New shield for the environment: peacetime treaties as legal restraints of wartime damage. *Review of European, Comparative & International Environmental Law* 9(1)(2000), p. 26

[232] *Ibid.* p. 152. See also, in this sense, the seventh preambular paragraph of the Convention, *supra* note 15.

[233] Particularly the San Remo Manual as explained by HEINTSCHEL VON HEINEGG, *supra* note 12, paras. 1010-64, pp. 470-547. DEMEYERE, B. ET AL., The updated ICRC Commentary on the Second Geneva Convention: demystifying the law of armed conflict at sea, *International Review of the Red Cross* 98(2)(2016), pp. 407-8: 'In parallel to these IHL sources, GC II also interacts with other sources of international law regulating activities at sea. This includes the 1982 UNCLOS. The outbreak of an armed conflict at sea does not terminate or suspend the applicability of most provisions of UNCLOS; they remain in operation and apply simultaneously to GC II during an armed conflict. This complementarity is reflected in the updated Commentary on GC II. The term "warship", for example, used several times in GC II, must be interpreted based on the definition provided for in Article 29 of UNCLOS.' On the various regimes applicable to armed conflicts at sea see also KLEIN, N., *Maritime security and the law of the sea*, Oxford (2011), pp. 259-300.

[234] *Supra* note 20.

[235] RONZITTI, N., 'The crisis of the traditional law regulating international armed conflicts at sea and the need for its revision', in Ronzitti, N. (ed.), *The law of naval warfare. A collection of agreements and documents with commentaries*, Dordrecht (1988), pp. 13-4.

belligerent operations, limiting the options available to the countries at war. In the continental shelf, those activities interfering with the economic rights of coastal states are prohibited since the law protects the economic right of the coastal state (though neutral states can bear the damage caused by belligerents).[236]

Similarly, in the EEZ, Ronzitti concedes that even being generous, belligerent operations should be conducted in a way not to interfere with coastal states' rights (*i.e.* exploitation of natural resources and right to build artificial islands and other structures). However, the *due regard* clause of Article 87(2) during armed conflicts does not require the same standard applicable to peacetime but a lesser one.[237]

Finally, with regard to jurisdiction, as will be seen in the first Chapter regarding the Freedom Flotilla incident, states have invoked the customary principle of flag-state jurisdiction contained in Article 94 UNCLOS in their (unsuccessful) attempt to refer alleged war crimes to the ICC.[238]

In synthesis, while UNCLOS does not deal with armed conflicts nor attempts to discipline them, its principles and concepts are nevertheless relevant with regard to MACs. That being said, in this Dissertation, war crimes and, more generally, military issues will only be marginally and quickly touched as they fall outside the object of this Dissertation.

Conclusion: methodology and outline of the Dissertation

Drawing upon the previously illustrated points, combining a critical-positivist[239] methodology with a non-dogmatic, problem-based constructivist analysis, this Dissertation will be composed by three Sections.

The first (Introduction and Chapter I) illustrates the background of this Dissertation, the methodology, structure as well as the lens through which the problem of maritime jurisdiction over crimes of international concern is examined, *i.e.* the necessity of ending impunity emblematically encased in the Biblical quote of the title ('*non erit innocens malus*').

---

[236] RONZITTI, *supra* note 23, p. 29.
[237] *Ibid.* p. 31.
[238] *Infra* Chapter I, note 230.
[239] As explained by CASSESE, A., 'Introduction', in Cassese, A. (ed.), *Realizing Utopia: The Future of International Law*, Oxford (2012), pp. xvii-xviii: '[b]y definition, law must be as unambiguous as possible, so as to constitute a stable and safe set of standards of behaviour for all legal subjects. Members of the community need to know what is permitted and what is prohibited. However, *law should not be left to become obsolete either, by falling out of touch with reality. Evolving with changing historical, social, and political circumstances is a necessary precondition for any viable body of law*, lest it should become an empty corpus of antiquated prescriptions.'

Turning to Section II (the crimes and their jurisdiction), Chapter II provides a substantive overview of the actus reus and *mens rea* of the most relevant crimes of international concern, questioning their applicability to maritime criminal phenomena or, differently put, it will ask how should maritime crimes be labelled (*e.g.* crimes against migrants as genocide, slavery or crimes against humanity). In the subsequent Chapter III instead, after having illustrated the practical unfolding of crime-at-sea, I will criticise the traditional international v. transnational criminal dichotomy arguing the benefits of a simplified, all-encompassing classification of non-purely domestic crimes and the unification of their respective jurisdictional regimes, especially in light of the frequent ancillarity or interconnectedness of crimes belonging to different categories.

Finally, Section III (Chapters IV and V) will discuss the application of the general framework of maritime jurisdiction to maritime crimes of international concern (Chapter IV) to conclude with the analysis of a few critical *capita selecta* sketched in the previous Chapter (Chapter V).

In this context, following a seaward zonal (and admittedly, land-centric) approach, Chapter IV will question who -between the coastal state and the flag state-, in which circumstances and over which specific crimes has jurisdiction over crimes of international concern. Anticipating a critical point in the regime of the law of the sea and a potential source of tensions with the fight against impunity over crimes of international concern lies in the antiquity—or sometimes, more radically, obsolescence—of the law of the sea vis à vis the relative youth of international and transnational criminal law as well as the primary 'business-oriented focus' of UNCLOS.

Rejecting an abstract and static view of the law, particular care will be given in underlining the continuously evolving nature of law and its inseparability from the social reality it is called to order and defend. To this aim, ample references will be made to the history of law and occasionally to meta-legal considerations to orient the interpretation of the various rules discussed and suggest some potential desirable future development of the *jus positivum*.

A final *caveat*. During the elaboration of this Dissertation, several historically defining events having a direct bearing on it have taken place. From the war of aggression unleashed by Russia against Ukraine on the 24th February 2022 with its continuous reports of barbarities to the outbreaks of violence in the Holy Land and in the Middle-East and the recent threat against navigation triggered by the Houthis from Aqaba to the Indian Ocean and the voices concerning the maritime smuggling of North-Korean weapons into Russia and other crises of our blood-thirsty times, keeping the count in this Dissertation of all the daily developments is almost

impossible and hence some references to current or recent events may be either missing or in need of an update.

3. An overview of the fundamental postulate of this Dissertation: *non erit innocens malus*, *i.e.* every crime must be prosecuted and punished.

Before moving onto the substantive analysis of crime-at-sea it is necessary to address, at least synthetically, the dogmatic[240] and practical roots of *the jus puniendi (rectius, jus damnandi)*.

In general terms, all the theorised purposes of punishment -originally elaborated with respect to 'common' domestic crimes- follow a *deontic*[241]/*utilitarian*[242] dichotomy. the question is: moving from a 'common' criminal perspective to crimes of international concern, is this paradigm still valid? What are crimes of international concern ultimately punished for? Why should they be punished?

Examining the literature and the jurisprudence, *deterrence, rehabilitation and retribution* appear to struggle when applied to crimes of international concern.[243]

---

[240] see BERMAN, M.N., Punishment and Justification, *Ethics* 118(2)(2008), pp. 258-90; HÖRNLE, T., A Framework Theory of Punishment, *MPI-CSL Working Paper* 1 (2021); BOONIN, D., *The Problem of Punishment*, Cambridge (2008); ALTMAN, M. C., *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State*, Abingdon (2021); TADROS, V., 'Punishment and Duty', in *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford (2011); GROSS, H., *Crime and Punishment: A Concise Moral Critique,* Oxford (2012); TONRY, M., *Doing Justice, Preventing Crime,* Oxford (2020); ESCAMILLA-CASTILLO, M., The purposes of legal punishment, *Ratio Juris*, 23(4)(2010), pp. 460-78; KAUFMAN, W.R.P., *Honor and Revenge: A Theory of Punishment*, Dordrecht (2013); HONDERICH, T., *Punishment: The Supposed Justifications*. Harmondsworth (1971); CANTON, R., *Why Punish?: An Introduction to the Philosophy of Punishment*, London (2017); LACEY, N., *State Punishment: Political Principles and Community Values*, London (2002); EWING, A.C., *The Morality of Punishment: With Some Suggestions for a General Theory of Ethics*, Abingdon (2012); NADELHOFFER, T., *The Future of Punishment*, New York (2013); CARUSO, G.D., *Rejecting Retributivism: Free Will Punishment and Criminal Justice,* Cambridge (2021); TONRY, M.H., *Why Punish? How Much?: A Reader on Punishment*, New York (2010); . MATRAVERS, M,, *Justice and Punishment: The Rationale of Coercion*, Oxford (2000).

[241] also referred to as absolute or Kantian theories which can be reassumed in the formula 'punishment for punishment's sake': retributivism, desert theory, expressivism and communicative theory

[242] or consequentialist, which instead seek to obtain some societal good through the punishment of criminals: deterrence and rehabilitation.

[243] For a comprehensive critique of the justifications of punishment for international crimes, see SANDER, *supra* note 28, pp. 167-91. In a Marxist perspective, see TALLGREN, I., The sensibility and sense of international criminal law, *European Journal of International Criminal Law* 13(3)(2002), pp. 594-5. Acccording to her, in spite of its declared utilitarian purposes, ICL serves the symbolic functions of reinforcing and legitimizing the existent structures of power.

The first perplexity stems from the idea that the severity of *punishment (alone) deters a potential criminal* from perpetrating an international crime according to the model of the *homo oeconomicus*.[244]

When crimes are so deeply rooted in ideology, when propaganda brainwashes the fragile minds of the perpetrators of the crimes, when the expected rewards of the crime are -or are purported to be[245]- so much greater than any foreseeable consequence,[246] the paradigm of the *homo oeconomicus* no longer works. There is no balance of interests. Reason loses its voice in front of deliriously perceived imperatives.[247] In these cases, deterrence is disarmed.

Not only certain individuals may be impermeable to healthy moral principles (or, to put it differently, irrecuperable) but actually, their punishment may have a paradoxical effect, *i.e.* rather than triggering fear and compliance with the law, it may deflagrate anger and create *martyrs of perceived false justice*, thus fuelling the spreading of the criminal phenomenon, reinforcing their belief in their malignant cause.

Furthermore, deterrence is only a *myth* if the punishment remains on paper or in the pompous statements of politicians, that is, *if there is no adequate enforcement*. If law exists as a purposeless *paper tiger*, or, to decline it in criminal terms, a *paper guillotine* deprived of any utilitarian *deterrent* effect. More than the fear of losing a limb, the head, freedom or wealth in horrible ways, true deterrence is given by the *probability of getting caught and not remaining unpunished*.

More than ill-addressed sentencing clemency, however, *impunity* is the real problem.[248]

To be more precise, *impunity*, as it will be seen, is at the centre not only of the *deterrence theory* but also of the *deontic ones*. In criminal law, impunity represents the failure of the legal

---

[244] *Ex multis* BENTHAM, J., *Théorie des peines et des récompenses Rédigée en François, d'après les Manuscrits par M. Et. Dumont, de Géneve, tome prémiere*, Londres (1811), pp. 12-3; BERTACCINI, D., *Fondamenti Di Critica Della Pena E Del Penitenziario, Rielaborazione aggiornata dell'opera didattica di Massimo Pavarini, seconda edizione*, Bologna (2021), p. 30; NEWMAN, G., 'Punishment Philosophies and Practices around the World', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010), p. 76; NAGIN, D., CULLEN, F.T., JONSON, C.L. (eds.), *Deterrence Choice and Crime: Contemporary Perspectives*. New York (2018), p. 314.

[245] By downplaying the risks, overexaggerating the rewards, *etc.*

[246] These rewards may either be material or immaterial. Oftentimes it involves an *eschatological* perspective enticing the promise of heaven or, in the context of civil societies, of special honours for the person and/or his family and descendants.

[247] In this sense: DAMAŠKA, M., What Is the Point of International Criminal Justice?, *Chicago-Kent Law Review* 83(1)(2007), p. 344.

[248] See BECCARIA, C., *On Crimes and Punishments. 1st ed.* Indianapolis (1986), Chapter XXVII (Mildness of Punishment), p. 46; Chapter XXX (proceedings and limitations on criminal prosecution), p. 56.

system to impose punishment upon those deserving it, and it is a *red flag of its weakness, a miscarriage of justice and the triumph of unbridled evil*.[249]

Think of the *Shoah:* according to some scholars it could (at least partially) be explained by sense of impunity caused by inaction against the individuals involved in the *Armenian genocide*.[250]

Second, *rehabilitation*.

To show the wrong to an individual so that he can *internalise* what he has done, understand the gravity of their actions and the incompatibility of their behaviour with the most fundamental moral and legal principles upon which human society relies for its existence, it is necessary to have instruments capable of piercing into the conscience of the offenders.[251]

Conscience, however, can be obfuscated or radically distorted by multiple factors. Mental illness or sociopathy, for example, may deprive the criminal of any sense of good and wrong, of guilt and remorse. He (or she) may even find pleasure in their accomplished iniquities or may not feel anything at all. Ideology, propaganda, and indoctrination may similarly build *alternative, totally deviated, ethics* which, to all reasonable people appear as what they are, that is pure evil and madness, but for them, in their altered state, may convince them they are actually following 'morally imperatives'.[252]

Paradigmatically, during his trial, *Eichmann 'declared with great emphasis that he had lived his whole life according to Kant's moral precepts, and especially according to a Kantian definition of duty.* […] *Eichmann's unconscious distortion* agree[d] with what he himself called the version of Kant "for the household use of the little man." In this household use, all that is left of Kant's spirit is the demand that a man do more than obey the law, that he go beyond the mere call of obedience and identify his own will with the principle behind the law […] the will of the Führer.'[253]

---

[249] In this sense MÉGRET, F., The Anti-deterrence Hypothesis. What if International Criminal Justice Encouraged Crime?, *Journal of International Criminal Justice* 19 (2021), pp. 866-70.

[250] Putting it differently, having prosecuted the Ottoman authorities, it could have been possible to prevent the atrocities perpetrated by the Third Reich. MATAS, D., Prosecuting Crimes Against Humanity: The Lessons of World War I, *Fordham International Law Journal* 13(1)(3)(1989) p. 104. This idea is shared by CASSESE, A., Reflections on International Criminal Justice, *The Modern Law Review* 61(1)(1998), p. 2.

[251] A function described as the *paternalism* of punishment. MORRIS, H., A Paternalistic Theory of Punishment, *American Philosophical Quarterly* 18(4)(1981), pp. 263-71.

[252] See MÉGRET, *supra* note 40, pp. 873-4.

[253] ARENDT, H., *supra* note 27, Chapter VIII.

In general, there seems to be in the international criminal jurisprudence *a general lack of enthusiasm* for rehabilitation, as eloquently stated by the ICTR in *Nahimana*[254] and even more explicitly by the ICC in *Al Mahdi*.[255]

The third and final contentious problem -*deontic* rather than functional[256]- concerns *retribution*, or at least, the *adequacy challenge* in retribution: since punishment must be proportionate to the gravity of the crime, *how could and should the most horrendous crimes be punished?*

First, if we conceive retribution as the *just desert*, the *quantum poenae* becomes comparatively less relevant and, as a consequence, problematic as, it appears, the *real focus of this theory lies in punishment as a necessary consequence of crime rather than in its measure*.[257]

Second, in retribution, proportionality is understood in *ordinal* terms,[258] based on three elements: a) *parity*: the severity of the punishment must be comparable to the gravity of the crime; b) *rank-ordering*: 'punishments should be ordered to ensure that their relative severity reflects the gravity-ranking of the crimes involved'; c) *spacing*: 'the spacing between different penalties reflects the comparative gravity of the offences'.[259]

---

[254] ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) V. The Prosecutor* (Respondent) Case No. Ictr-99-52-A, In The Appeals Chamber, Judgement 28 november 2007, para. 1056 p. 329.

[255] ICC, *Situation In The Republic Of Mali In The Case Of The Prosecutor V. Ahmad Al Faqi Al Mahdi, Public Judgment and Sentence*, Trial Chamber VIII, ICC-01/12-01/15, 27 September 2016, para. 66, p. 32: 'the sentence reflects the culpability of the convicted person addresses the desire to ease that person's reintegration into society, although, in particular in the case of international criminal law, this goal cannot be considered to be primordial and should therefore not be given any undue weight'. In the same sense ICC, *Situation In Uganda In The Case Of The Prosecutor V. Dominic Ongwen*, Trial Chamber IX, Sentence No.: ICC-02/04-01/15, 6 May 2021, para. 60, p. 25; ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu And Narcisse Arido,* Public with public annex Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber VII ICC-01/05-01/13, 22 March 2017, para. 19, p. 8.

[256] As explained by Hermann, 'while the objective of retribution is often buttressed by a utilitarian defense, retribution is sought in its own right because the wicked are to be punished.' HERMANN, D. H., The evil christ crucified: the ritual function of punishment, *Wayne Law Review* 19(5)(1973), p. 1411.

[257] A similar idea can be found in the expressivist theories of punishment. As explained by STAHN, C., 'How Can We Justify International Criminal Justice?', in Blokker, N., Dam-de Jong, D., Prislan, V. (eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development. Liber Amicorum Nico Schrijver,* Leiden (2021), p. 408.

[258] see HOSKINS, Z., *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction*, New York (2019), pp. 81-101.

[259] For example, if the author of crime X -considered to be of extraordinary gravity in a given society, and which provides a maximum penalty of up to life sentences- judges were to impose, in spite of the full responsibility, magnitude etc. a 'mere' twenty-year imprisonment, or even worse, just five years in prison (instead of a life isolated from human society behind steel bars meditating on his or her actions), the punishment would lack any retributive function as it would be grossly disproportionate to the gravity of the crime. SANDER, *supra* note 28, p. 177.

At the same time, caution should be exercised against the *self-sabotaging* consequences of pursuing a truly proportionate (that is, equally atrocious) punishment for extraordinary crimes: if the retributive value of punishing exceptional international criminals were to be fully utilized, the severity of the punishment may need to be greater than usual. Next, torture or reciprocal group eliminationism could be included in truly proportionate sentences. It's an intimidating route to take. Surviving individuals would thus turn just as evil as their torturers.[260]

International criminal law cannot and does not rely on the usual set of *rationales* underpinning common offences, expressing on the contrary its specific, idiosyncratic *utilitarian* and *deontic* functions.

The *utilitarian* purpose of international criminal law is first and foremost *an expressivist one, i.e.* it 'consists in the establishment and consolidation of a legal order of common values'.[261] In this sense, *expressivism* (or *communicativism*) combines aspects of *retributionism* (particularly in the sense of the *just desert*), as the punishment is inflicted as a deserved consequence (*i.e.* retribution) for someone's offence, but also elements of prevention, both in the form of deterrence and re-education.[262]

Whereas Nuremberg's condemnation of Nazi atrocities has not deterred humans from exercising the darkest forms of evil against each other,[263] it has nevertheless fixed in the collective conscience the absolute hexecrability and unlawfulness of certain barbarities (the *expressive*[264] *function of punishment*).

As explained by Hart, under the expressive function of punishment (in general), 'punishment is justified as an "*emphatic denunciation* by the community of a crime" […] the aim

---

[260] DRUMBL, M., 'Quest for Purpose', in *Atrocity, Punishment, and International Law*, Cambridge (2007), p. 157.
[261] Chapter I, note 50. See also DUFF, R.A., *Punishment, Communication, and Community*, Oxford (2003).
[262] see LEE, A.Y.K., Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends, *Oxford Journal of Legal Studies* 37(1)(2017), p. 218. See also METZ, T., Censure theory and intuitions about punishment, *Law and Philosophy* 19(2000), pp. 491–512.
[263] IMT NUREMBERG, *Nazi Conspiracy And Aggression, Volume I,* Washington (1946), p. 145.
[264] or communicative or didactic or moralizing, as the terms are interchangeably employed. See: FRASE, R.S., Punishment Purposes, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform *Stanford Law Review* 58(1)(2005), p. 72. 'Expressivism also transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.' DRUMBL, *supra* note 39, p. 173. A systematic yet somewhat synthetic analysis of the purposes of sentencing in international criminal justice can be found in ICC, *Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence" - Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*, pp. 44-66.

of criminal legislation is *to set up types of behaviour*[265] (in this case conformity with a pre-existing moral law) as legal standards of behaviour and to *secure conformity* with them.'[266]

To put it differently, punishment brings into the spotlight antisocial and immoral behaviours the *stigmatisation*[267] of which serves to *moralise, educate, and civilise a society* made aware of the prohibition of certain behaviours.[268]

Interestingly, speaking of the *stigma* and dynamics of an expressivist paradigm of punishment, the literature has underlined the alleged inadequate stigmatizing power of imprisonment: a sanction expiated privately and remotely from the prying, judging eyes of society would have only a limited impact on collective imagination and narrative on crime and its perpetrators. If the goal of punishment was the genuine expression of moral condemnation of certain behaviours, other punitive formulas would allegedly offer a better service to justice.[269]

Yet the expressivist function of punishment is not solely aimed at the reprobation of certain acts of the offenders (a *normative* level).[270] On an institutional level, punishment reinforces the belief in the credibility and strength of its judicial authorities, *i.e.* their ability to bring justice,[271] to unleash the power of civilization in the *reaction to crime* and the rejection of any

---

[265] *E.g.* 'Symbolically, [CAHs] penalize acts that shock the conscience of humanity due to their flagrant disregard for human spirit, life, integrity and dignity'. KILLEAN, R., DOWDS, E., KRAMER, A., Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes against Humanity, *Leiden Journal of International Law*, 30(3)(2017), p. 704.

[266] HART, H.L.A., The Presidential Address: Prolegomenon to the Principles of Punishment, *Proceedings of the Aristotelian Society, 1959 - 1960, New Series* 60 (1959-60), pp. 7-8. Another definition is provided by KÖNIGS, P., The Expressivist Account of Punishment, Retribution, and the Emotions, *Ethical Theory and Moral Practice* 16(5)(2013), p. 1029; SIMMLER, M., The importance of placing blame: criminal law and the stabilization of norms, *Criminal Law Forum*, 31(2)(2020), p. 156.

[267] CRONIN-FURMAN, K., TAUB, A., 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in Mcdermott, Y., Schabas, W. (eds.), *The Ashgate Research Companion to International Criminal Law. Critical Perspectives*, London (2013), p. 435.

[268] AMBOS, K., *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford (2013), pp. 71-3.

[269] DUBBER, *supra* note 18, p. 705. See in this sense RODOGNO, R., Shame, Guilt, and Punishment, *Law and Philosophy* 28(5)(2009), pp. 429-64.

[270] RALSTON, J.H., FINNIN, S., 'Investigating International Crimes: A Review of International Law Enforcement Strategies Expediency v Effectivenes', in Blumenthal, D.A., McCormack, T.L.H. (eds.*), The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Leiden (2008), p. 50.

[271] TONRY, M., Purposes and Functions of Sentencing, *Crime and Justice* 34(1)(2006), pp. 37-9. A similar theory, the '*corrective justice*' theory, seeks 'to use [the offender] to decrease the level of criminality in the future. The state is not merely sacrificing him to limit the problem of future crime. Rather, it is forcing him to fulfill his own duty, owed to society as a whole, to repair his criminality contributions and restore the reliability of the criminal law system.' BRONSTHER, J., The corrective justice theory of punishment, *Virginia Law Review* 107(2)(2021), p. 233. See also the theory of *prudential penal harm*, *ibid.* pp. 240-2.

acquiescence to it, since[272] as Mill – in a quote unfailingly and wrongly attributed to Burke- put it, '*whoever does not help the right side is helping the wrong*'.[273]

Back to ICL, the expressive function of punishment[274] has been judicially recognised *ex multis* in *Bemba* where it was held that '*[r]etribution* is not to be understood as fulfilling a desire for revenge, but as an *expression of the international community's condemnation of the crimes.*'[275] As explained by Ferencz, the value of international criminal justice lies in its ability to spread certain values and strengthen legal and moral norms making it impossible to condone manifest wrongs.[276]

In this sense, beyond the legal horizon, punishment also acts as a *social medicine*.

The word is not casual. By *surgically* excising the *pharmakòs* (by killing or exiling him), the evil, the *póleis* sought to 'cleanse the community of sources of impurity that were hidden within [them].'[277] In this perspective, the ritual expulsion of the *pharmakòs* served, on the one hand, to reinforce the community, its attachment to common rules, it reassured the citizens: the evil is gone, and we, who are left, are good. On the other hand, the *sacrificial* nature of the killing pacified the gods, reassuring humans of their mercy: we have made a sacrifice to the gods. Now their blessing will fall upon us, and their fury will cease. Whatever our sin and whomever the sinner was, his tort has been repaid.[278]

This idea of a 'therapeutic' function of punishment gradually evolved as the paradigm changed from the 'excision' of the wrongdoer as a means to destroy the evil inside him (or her) to

---

[272] Furthermore, as argued by Howard, '[w]hen an agent commits a culpable criminal wrong, however, he demonstrates that he has failed to maintain his moral capacities to the requisite degree, and his government secures a moral permission to impose measures to fortify his sense of justice.' HOWARD, *supra* note 17, p. 46.

[273] MILL, J.S., *Inaugural Address Delivered to the University of St. Andrews, Feb. 1st 1867,* London (1867), p. 34.

[274] For a comprehensive analysis of the issue see STAHN, C., 'Remedial Expression: Expressive Punishment and Repair of Harm', *Justice as Message: Expressivist Foundations of International Criminal Justice,* Oxford (2020).

[275] ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo*, Public with annexes I and II Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber III, ICC-01/05-01/08, 21 June 2016, para. 11 p. 6. In the same judgment it also held that '[i]n this way, a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation. With respect to deterrence, a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence)'. Emphasis added. In the same sense ICC, *Al Mahdi*, *supra* note 44, para. 65.

[276] VERRIJN STUART, H., SIMONS, M., *The Prosecutor and the Judge. Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, Amsterdam (2009), pp. 43-4.

[277] EIDINOW, E., The Ancient Greek Pharmakos Rituals. A Study in Mistrust, *Numen* 69 (2022), p. 491.

[278] In this sense Koskenniemi argues that more than any purported deterrent function, more than any quest for truth or war against impunity, one of the key roles played by trials is *portraying themselves as historical hiatuses*. Regardless of what they concretely succeed to assess, regardless of how many offenders are sent to expiate their crimes, *they become historical and symbolic milestones for humanity*. KOSKENNIEMI, *supra* note 64, pp. 1-35. With regard to the prosecution of the barely-alive relics of the *Rouge Khmer* regime as a generational (or re-generational?) rite-of-passage, see DRUMBL, M., The Visualities and Aesthetics of Prosecuting Aged Defendants, *International Criminal Law Review* 22(2022), p. 11.

'various processes [by which] wickedness is cast out of the man',[279] an idea deeply influenced (in an *Eurocentric* perspective) by the Christian doctrine of *redemption*.[280]

Having synthetically illustrated the theoretical and practical justification of punishment (for crimes of international concern), or at least, the aims it purports to exercise and what society expects from it, it is now the turn to examine the *deontic* justifications of punishment, that is, punishing without concerns for the practical consequences of punishment.[281]

These deontic justifications are allegedly also amongst the most convincing- *rationales of universal jurisdiction* since, as it will be (not too) shortly seen, they both claim to rely on *categorical imperative* arguments.[282]

As previously seen, deontological (or absolute) theories of punishment postulate the axiomatic necessity of punishment as a *morally imperative response to a crime* (justice commands each crime to be punished).[283] Traditionally, the deontological theory of punishment has been reduced to the retributivist idea of the *Lex Talionis*: each loss and evil caused by a crime must be compensated or equalled by a similar loss of suffering by those who committed the crime. This theory, however, presents an insurmountable(?) problem: how do you equate the punishment to the crime? Is it always possible?

---

[279] ALEXANDER, J.P., The philosophy of punishment, *Journal of the American Institute of Criminal Law and Criminology*, 13(2)(1922), p. 237.

[280] SCHMOECKEL, M., Nemesis: a historical glimpse into the Christian reasons for punishment, *Tijdschrift voor Rechtsgeschiedenis* 81(2013), pp. 166 ff.

[281] According to Kant, '[t]he categorical imperative would be that which represented an *action as objectively necessary of itself, without reference to another end* […] if the action is represented as *in itself good,* hence as necessary in a will in itself conforming to reason, as its principle, *then it is categorical*.'; 'there is one imperative that, without being based upon and having as its conditions any other purpose to be attained by certain conduct, commands this conduct immediately. This imperative is categorical. *It has to do not with the matter of the action and what is to result from it, but with the form and the principle from which the action itself follows; and the essentially good in the action' consists in the disposition, let the result be what it may. This imperative may be called the imperative of morality.'* KANT, I., *Groundwork of the Metaphysics of Morals, translated and edited by Mary Gregor, with an introduction by Christine M. Korsgaard,* Cambridge (1997), para. 4:414, p. 25; para. 4.416, p. 27. Emphasis added.

[282] Against the Kantian idea of punishment: NORRIE, A., *Punishment, responsibility and justice. A relational critique*, Oxford (2000).

[283] KANT, I., *The Philosophy Of Law. An Exposition Of The Fundamental Principles Of Jurisprudence As The Science Of Right. Translated From The German By W. Hastie, B.D.,* Edinburgh (1887), pp. 29-38: 'According to these Categorical Imperatives, certain actions are allowed or disallowed as being morally possible or impossible; and certain of them or their opposites are morally necessary and obligatory. Hence, in reference to such actions, there arises the conception of a Duty whose observance or transgression is accompanied with a Pleasure or Pain of a peculiar kind, known as Moral Feeling. […] the juridical Effect or Consequence of a culpable act of Demerit is PUNISHMENT (*poena*)'.

According to the just desert theories,[284] the whole point of retribution lies on blame, *i.e.* the consequence of having chosen to behave contrary to the dictates of law and morality and without any justification to support this violation, which posits the *freedom of the agent to determine his or her courses of action*. The core question, however, is, whether *crimes of international concern* can be deemed to be *wrongs-deserving-punishment*-as-such (or, to borrow from Kant, *culpable acts of demerit)*.[285]

The two main principles underlying criminalisation and punishment can be traced back to the notions of *Rechtsgüter* (legal good) and *harm principle*.[286] The *rechtsgüter* theory seeks to limit the criminalising power of the state (and hence, also its repressive function) only to the *violations of some element*[287] considered to be *of fundamental importance* in a given society.[288] The *harm principle* instead seeks to *avoid any harm* to someone's interpersonal sphere, and allows the prohibition of all conducts *reasonably susceptible to endanger other individuals*. There are evident similarities between the *rechtsgüter v. harm dichotomy* and the *deontic v. consequentialist* rationales of punishment. Both the *rechtsgüter* and the *deontic* rely on *axiomatic or aprioristic* assertions (X is a *rechtsgüter* deserving to be protected/crimes must be punished), whilst the *harm and*

[284] Without going back to the *Shoah* or other equally *grandiose* crimes, even a single murder or rape or other similar crime, *e.g.* when committed with cruelty by an individual entirely moved by malignant intents to inflict the worst suffering or to destroy someone's life, identity *etc.*, can be so wrong to hardly be retributable. To use a metaphor: *even if you tried to fill the Marianne Trench with the Everest, you would still end up with an abyss*. It would be purposeless. It is thus quite evident that repaying (or attempting to) the absolute malignancy of each crime cannot be the rationale of punishment. As we have seen, in response to this critique, theorists have proposed a different kind of retribution: *just desert* (or dessert), *i.e.*, punishment as a necessary consequence of a perpetration of a crime (and with only partial concern for the *quantum poenae*). The concept has been excellently illustrated by Apt: '[t]he fundamental logic to retributivism is: if we do not condemn intentional bad acts, then there is no distinction within social behavior between bad and good acts. Morality is hollow without expressed approval for the good and emphatic disapprobation for the bad. This is especially true when the actor committed an offensive (criminal) act that he knew was (likely) wrong, and his act was not motivated by any counterposed moral concern'. APT, B.L., Do we know how to punish?, *New Criminal Law Review: An International and Interdisciplinary Journal* 19(3)(2016), p. 442. Emphasis added SCHMIDT, J.H. ET AL., *Handbook of Criminal Justice Administration*, Boca Raton (2000), p. 33; FRASE, R. S., *Just Sentencing: Principles and Procedures for a Workable System*, *Studies in Penal Theory and Philosophy*, Oxford (2012), p. 8. '.

[285] KANT, *ibid.*: 'when less is done than can be demanded by the Law, the result in Demerit'.

[286] AMBOS, K. The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles. *Criminal Law, Philosophy* 9(2015), pp. 302 ff.

[287] *E.g.* the good: a right, an interest, the notion tends to be evanescent.

[288] DUBBER, M.D., *The Dual Penal State. The Crisis of Criminal Law in Comparative-Historical Perspective*, Oxford (2018), pp. 45-6; DUBBER, M.D., *Foundational Texts in Modern Criminal Law*, Oxford (2014), p. 12; DUBBER, M.D., HÖRNLE, T., *Criminal Law. A Comparative Approach*, Oxford (2014), pp. 113-42.

consequentialists rely, quite literally, on the *harmful consequences of a particular behaviour*, that is, are not identified in advance.[289]

In practice, just like the theories of punishment, which often contaminate and merge, giving rise to hybrid or mixed theories, so do the *rechtsgüter* and harm theories.

As seen, the domestic legal systems identify a panoply of *rechtsgüter*(s) as deserving to be protected under criminal law reflecting their cultures and different moral beliefs (which may patently include, as it frequently happens, international crimes within their domestic legislations).[290]

Alongside these *potentially* relativistic[291] prohibitions, international law has identified a list of *norms* (some prohibitions and some rights) of *peremptory character* (*jus cogens*).[292] While their *peremptoriness* formally concerns (only) their relationship with the other sources of international law, with regard to which they operate as sorts of 'constitutional principles',[293] the *principia juris cogentis* also have an *expressivist* dimension, as they embed and 'constitutionalise' the fundamental *rechtsgüter* of the international community.[294]

As explained by the ILC in its *Commentary on the Identification and legal consequences of peremptory norms of general international law (jus cogens)*, there is a dual interaction between *jus*

---

[289] AMBOS, *ibid.* p. 314. To be more precise, if certain conducts are epistemologically linked to an increased danger (they are potentially more harmful) to the interpersonal sphere they can equally be punished. *e.g.* attempted murder *etc.*

[290] See *ex multis* JEßBERGER, F., MELONI, C., CRIPPA, M. (Eds.)., *Domesticating International Criminal Law: Reflections on the Italian and German Experiences* (1st ed.), London (2023).

[291] In the sense that they are not shared by humanity as a whole, contrary to international crimes, defined as 'those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules.' STL, *Interlocutory Decision On The Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-II-OIIIIAClRI76bls, 16 february 2011, para. 134, p. 83.

[292] TOMUSCHAT, C., THOUVENIN, J.-M., 'L'identification des regles fondamentales - un probleme resolu?', in Tomuschat, C., Thouvenin, J.-M. (eds.), *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Leiden (2006), p.18.

[293] Since they cannot be derogated and can only be modified by subsequent norms of the same character. On the theory of constitutionalization of the *jus cogens* which bounds universal society of states, see AMBOS,K., 'Chapter 3: Ius puniendi and individual criminal responsibility in international criminal law', in Mulgrew, R., Abels, D. (eds.), *Research Handbook on the International Penal System*, Cheltenham (2016), pp. 66-7: '[the] ius puniendi is derived from autonomous persons united in a world society: ubi societas ibi ius puniendi. It represents a value judgment expressing the legal and moral necessity to punish macro criminal conduct. Its law, ICL, can be considered a progress of civilization and, in this sense, an ethical project. The international crimes to be prevented and/or punished by this law concern the fundamental international values of our international order and world society; they may even amount to ius cogens crimes, i.e., crimes of a peremptory, non-derogable and overriding character. As a consequence, a State on whose territory such crimes have been committed cannot hide behind the curtain of a post Westphalian, Grotian sovereignty concept but must make sure that those responsible are held accountable; otherwise the international community or third States (universal jurisdiction) will have to take care of them.'

[294] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law* (jus cogens) 2022, conclusion 2.

cogens norms and the underlying values: '[t]he word "reflect" is meant to indicate that the fundamental value(s) in question provide, in part, a rationale for the peremptory status of the norm of general international law at issue. Further, the word "reflect" seeks to establish the idea that the norm in question gives effect to particular values. The word "protect" is meant to convey that a specific peremptory norm of general international law serves to protect the value(s) in question. Put differently, it indicates the idea that *underlying peremptory norms are particular values shared by the international community as a whole that the norms seek to protect.*'[295]

Whilst the Commission did not examine the consequences of crimes prohibited by peremptory norms of general international law,[296] it still identified a non-comprehensive list of *jus cogens* norms (both positive and negative), which *include either international crimes, either their rechtsgüter*, namely: 1) the prohibition of aggression or aggressive force; 2) the prohibition of genocide; 3) the prohibition of slavery; 4) the prohibition of apartheid and racial discrimination; 5) the prohibition of crimes against humanity; 6) the prohibition of torture; 7) the right to self-determination; and 8) the basic rules of international humanitarian law.[297]

Basically, except for piracy,[298] all the crimes commonly defined as international ones fall under the *jus cogens*. Either due to the values these crimes seek to protect or the modes by which these crimes endanger or harm this fundamental *rechtsgüter*, both law and ethics evidently provide the most *absolute, peremptory, categorically imperative condemnation of international crimes*. They are, according to this *deontic* view, a *malum absolutum,* which, due to their absoluteness, gravity and evil, demand to be punished.[299] With regard to these crimes, there is *no space for moral relativism or alternative reconstructions of right and wrong*.[300]

---

[295] *Ibid.*, para. 2, p. 18.

[296] ILC, *ibid*. conclusion 22, para. 3, p. 85.

[297] ILC, *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019*, A/CN.4/727, para. 60, p. 26.

[298] Infra, Chapter I.

[299] KANT, 'the juridical Effect or Consequence of a culpable act of Demerit is PUNISHMENT'. *Supra* note 105. In the same sense (although referring only to the crime of torture), ICTY, *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, 10 December 1998 para. 156 p. 60: 'one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that *every State is entitled to investigate, prosecute and punish* […]. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. […] It has been held that *international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish* the authors of such crimes.' emphasis added.

[300] Hence there can be no risk of moral absolutism as these principles are *per se* absolute. In this sense ORAKHELASHVILI, A., *Peremptory Norms in International Law*, Oxford (2006), p. 288.

Arguably, however, these reasons are not exclusive of the so-called international crimes, but extend also to transnational crimes for the same four arguments relied upon to question the dichotomy between international and transnational crimes more thoroughly developed in Chapter I: 1) except for the so-called core crimes, the categorisation of several crimes is disputed in the literature and case-law;[301] 2) transnational crimes are not *per se* less dangerous, harmful or even heinous than international crimes; 3) international and transnational crimes endanger or violate the same *rechtsgüters*; 4) transnational crimes are often *ancillary* to international crimes or are causally related to them.[302]

The different understanding of the -perceived different- scale and nefariousness of international and transnational crimes can arguably be explained as a consequence of the different perspectives from which the conducts are evaluated, *i.e.* whether they are *as monads or within their dynamic*.

Trading drugs and weapons may not appear *icto oculi* as a *malum in se*, as opposed to, for instance, forcibly transferring a civilian population, the harm caused by these crimes to essential *rechtsgüters* is remarkable.[303] To put it differently, *the context and consequences* of transnational crimes enable us to appreciate the true character of these crimes. Considering the actors involved and the impacts of these crimes, their maliciousness and moral abjection appear undeniable and, from a deontic perspective, non-less deserving to be punished. In Kantian terms, punishment is the morally imperative consequence of an *act of demerit or*, in legal jargon, of a crime. The evil of these crimes axiomatically needs to be crushed by the implacable sword of Justice.[304]

---

[301] VAN DER WILT, H., 'Chapter 1: Legal responses to transnational and international crimes: towards an integrative approach?', in Van der Wilt, H., Paulussen, C. (eds.*), Legal Responses to Transnational and International Crimes: Towards an Integrative Approach*, Cheltenham (2017), p. 5: ' the criterion of 'extreme seriousness' is censured as being arbitrary, especially since crimes may easily spill over from one category to the other. The dividing line between trafficking in human beings and slavery, for instance, is porous and the former may qualify as a crime against humanity, provided that the contextual elements are met.'

[302] '[t]ransnational crimes may breed conflicts that offer a rich environment for the commission of war crimes or even crimes against humanity. […] the interaction between transnational (organised) crime and international crime can take two forms […]. For one thing, *organised crime can facilitate international crimes* by providing valuable goods and services to terrorists, insurgents or state actors that engage in terrorism or war crimes. And secondly, *there may be a complete merger of both categories in the person of the perpetrator*, when state or non-state actors that fight each other engage in transnational crimes in order to finance their operations'. VAN DER WILT, *ibid*. p. 14. 'transnational offences and 'core crimes' are often intertwined in the sense that they facilitate each other. Both rebels and state officials engage in illicit drugs trade in order to finance their operations which entail the commission of core crimes.' *Ibid*.

[303] Terrorism and torture, on the contrary, are *prima facie* morally abject and patently deserving to be punished.

[304] 'In so far as international crimes are concerned, rules of international law define them and require their repression. The definition of a certain conduct of individuals as an international crime reflects a general interest in the international community which may be satisfied only by ensuring compliance with an obligation by all the

For certain crimes, the evil is so manifest not to require lengthy explanations: genocide is genocide, and no reasonable human can find it less than abominable.[305] Yet, the evil of these crimes is not unique. Perhaps with lesser fanfare, other crimes may be equally destructive and deserving to be annihilated, wherever, by whomever, against whomever they are perpetrated.

4. Impunity: *summum justitiae malum* - or the elephant in the court(room)

These *obligationes puniendi* (or at least, *judicandi*) can also be understood by looking at their opposite, impunity, from an integrated deontic and utilitarian perspective.

First, the *utilitarian* approach. According to it, impunity creates a sense of *invincibility and omnipotence*, neutralising any deterrent effect of a never-materialised punishment.[306] Even more radically, Kelsen denies the normativity of law in the absence of coercion.[307] If there will be no reaction for my actions, why shouldn't I have a certain behaviour? If punishment does not come (or comes too late), what should I fear? If society does not promptly react against certain conducts, isn't it a sign that, maybe, it is not so averse to them, that is, that there is no real commitment and support for the enforcement of a given norm? If so, does that norm really exists, or is it nothing more than an illusory statement?[308] Impunity devoids *deterrence* of any real

individuals concerned.'. GAJA, G., The Protection Of General Interests in the International Community, *General Course on Public International Law* 364 (2011), p. 153.

[305] 'Genocide *is a crime against morality* […] a feeling of 'just deserts' usually springs to mind when one thinks of punishing genocide.' CHERKASSKY, L., Genocide: Punishing a Moral Wrong, *International Criminal Law Review* 9(2009), *p.* 312. Emphasis added. Later the Author suggests that '[p]erhaps it is best to think of punishment as a combination of deterrence and defiance when it comes to genocide. *The message from the international community appears to be: "we will not tolerate such behaviour, and if it occurs, the culpable party will be called to account."* *Ibid.* p. 315.

[306] In this sense GRAVEN, J., Les crimes contre l'humanité, *Collected Courses of the Hague Academy of International Law* 76(1950), p. 585: 'Une loi sans juge est une loi morte; ou si l'on préfère, c'est une loi morale, ce n'est pas une loi pénale. La loi pénale est uniquement celle dont les normes sont armées d'une sanction qu'un pouvoir judiciaire […] est capable de prononcer définitivement, avec toutes les conséquences juridiques de la chose jugée et de la force exécutoire.' 'men without Law, by reason of the right which all have over all things, must destroy each other. That laws without punishments, and punishments without a supreme power to enforce them, are useless.' MAURICE, F.D., *Moral And Metaphysical Philosophy, Vol.* II, London (1890), p. 288.

[307] See on Kelsen's theory, VON BERNSTORFF, J., *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge (2010)

[308] In this sense HURD, J.C., *The Theory Of Our National Existence, As Shown By The Action Of The Government Of The United States Since 1861*, Boston (1881), p. 502: 'no statute ever was enforced without coercion. It is the basis of every law in the universe, God's law as well as man's law. A law is no law without coercion behind it.'

effect[309] and weakens also the *expressivist* function of punishment.[310] Impunity is the inversion of justice and its more pernicious ailment. To put it in Latin, the *summum justitiae malum* or, less solemnly, the *elephant in the (court)room*.

In a sense, it was Courtroom 600 in Nuremberg the birthplace of the crusade against impunity and the explicit recognition[311] of the absolute imperative of punishing those responsible for the most serious international crimes:[312] after Nuremberg, international criminal justice came to identify itself with the fight against impunity,[313] in which the criminal is considered a *hostis humani generis* (under the *enemy criminal law* theory).[314]

When in 1993, the UNSC adopted Resolution 827 establishing the ICTY -entrusted to the *formidable* Professor Cassese as its first President and father-, the idea was *that no peace could be achieved without justice*, that bringing (all) the offenders to justice -*i.e.* under its punitive sword-[315] was the only way to repristinate the lost innocence of humanity and prevent crimes as those committed in Yugoslavia from happening again.[316] To put it differently, impunity was felt as the *antonym* of justice and perhaps even peace.[317] This idea was also a guiding principle in the

---

[309] *Contra* ROTHE, D. L., COLLINS, V., The International Criminal Court: A Pipe Dream to End Impunity?, *International Criminal Law Review*, *13*(1)(2013), p. 196.

[310] CRONIN-FURMAN, K., TAUB, A., 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in Schabas, W.A., McDermott, Y., Hayes, N. (eds.), *The Ashgate Research Companion to International Criminal Law. Critical Perspectives*, Abingdon (2016), p. 447.

[311] ILC, *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, 1950, Principle I: *'[a]ny person* who commits an act which constitutes a crime under international law *is responsible therefore and liable to punishment'*.

[312] CASSESE, A., 'Volume I, s.1 The Path to Rome and Beyond, 1 From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford (2002), p. 6; AKIN, W.M., 'Nuremberg, Justice and the Beast of Impunity', in Reginbogin, H. R., Safferling, C. (eds.), *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference / Internationale Konferenz zum 60. Jahrestag*, Berlin (2006), pp. 257 ff.

[313] In this sense TRIFFTERER, O., BERGSMO, M., AMBOS, K., 'Preamble', in Triffterer, O., Ambos, K. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Baden-Baden (2016), para. 12, p. 9.

[314] WERKMEISTER, A., 'International Criminal Law as a Means to Fight the 'Hostes Humani Generis'? On the Dangers of the Concept of Enemy Criminal Law', in Fenwick, M., Wrbka, S. (eds.), *Legal Certainty in a Contemporary Context. Private and Criminal Law Perspectives*, Singapore (2016), p. 180. STOLK, *supra* note 159, p. 578.

[315] UNSC, *Resolution 827 (1993), Adopted by the Security Council at its 3217th meeting on 25 May 1993*, Distr. GENERAL S/RES/827 (1993) 25 May 1993, Preambular para. 4: 'Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them'. In this sense, the speeches made during the 83rd plenary meeting of the UNGA in 1993 manifest the absolute belief that the UNSC (and more generally, the international community) inaction, by fuelling the sense of impunity of the perpetrators of the crimes and emboldening them in the nefarious pursuance of their criminal plans. See UNGA, *General Assembly official records, 48th session: 83rd plenary meeting*, New York, Friday, 17 December 1993.

[316] *Ibid.* Preambular para. 7: [the establishment of the ICTY shall] 'contribute to ensuring that such violations are halted and effectively redressed'.

[317] ICTY, *Prosecutor v. Dusko Tadic aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 92: 'the primary purpose of the establishment of the International

establishment of the International Criminal Court,[318] as the Preamble of the Rome Statute recognises as its *final cause* and object of its criminal policy that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [it is d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, […] [and] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[319]

Interestingly, while Paragraph 4 strictly refers to the *core crimes* (genocide, aggression, war crimes and crimes against humanity: *the most serious*…), the last Paragraph opens the door of the duty to punish to *other* crimes not included in the jurisdiction *ratione materiae* of the Court.[320]

In other words, through this *constructively* ambiguous formulation, it is suggested that beyond the Rome Statute, there are *other (unspecified)* international crimes imperatively demanding to be punished, whether existing or in *statu nascendi,*[321] circumnavigating the paralysing puzzles of the *jurisdictional grounds* on which punishment should be imposed

---

Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed'; in the same sense, ICTY, *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, 15 July 1999, para. 190 p. 82: 'all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice.'

[318] In this sense TRINDADE, A.A.C., 'The Legal Personality of the Individual as Subject of International Law', in *International Law for Humankind*, Leiden (2020), p. 234: 'the decisions of the U.N. Security Council to create the ad hoc International Criminal Tribunals […] added to the subsequent establishment of the permanent International Criminal Court (pursuant to the 1998 Rome Statute), for judging those responsible for grave violations of human rights and of International Humanitarian Law, gave a new impetus to the struggle of the international community against impunity, – as a violation per se of human rights, – besides reaffirming the principle of the international penal responsibility of the individual for such violations, and seeking thus to prevent future crimes.' See on the genesis of the Rome Statute and the ICC, BENEDETTI, F., BONNEAU, K., WASHBURN, J., *Negotiating the International Criminal Court*, Leiden (2014), *pp.* 8, 18, 44, 82, 129.

[319] ICC Statute, preambular paras. 4-6. TRINDADE, *ibid.* p. 235. As highlighted by Kurosaki, though, 'the obligations to suppress international crimes enshrined in the above treaties are binding on states parties alone due to the pacta tertiis principle that treaties do not create obligations for non-parties. This limitation presents the most significant problem for the global fight against impunity. Despite widespread agreement that the core crimes are 'the most serious crimes of concern to the international community as a whole', *non-party states to the ICC Statute are not obliged to close the impunity gap, unless they consent to proceedings or are required to do so by a binding UN Security Council resolution'*. KUROSAKI, M., 'The Fight against Impunity for Core International Crimes: Reflections on the Contribution of Networked Experts to a Regime of Aggravated State Responsibility', in Cullen, H., Harrington, J., Renshaw, C. (eds.), *Experts, Networks and International Law,* Cambridge (2017), p. 258. Emphasis added. Hence, it is dubious, whether these duties apply to non-state parties under the *pacta tertiis* principle or rather, irrespectively of the ICC Statute, they are grounded on customary law.

[320] Infra Chapter I.

[321] Art. 10 ICC St: 'Nothing in this Part shall be interpreted as *limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*.'

(universal jurisdiction or more usual types of jurisdiction) and on *which crimes*, as their qualification is, to use a euphemism, unsettled.

In this context, one potential interpretation supported by eminent doctrine is that within the broad genus of international crimes, *transnational organised crimes should also participate to the 'crusade against impunity'*.

As it will be seen in the first Chapter, there are seemingly strong reasons to reject the dominant hierarchisation and classification between the various (*lato sensu*) international crimes and the somewhat *acrobatic* arguments in support of these theories, from the factors determining the gravity and heinousness of a crime and many others. It would allegedly make much more sense to *prune down* a bit the convoluted tree of non-ordinary/purely domestic crimes and simply define them as *crimes of international concern* equally deserving *not to be left unpunished*.

SECTION II: THE CRIMES AND THEIR JURISDICTIONAL REGIME

CHAPTER II. What are we talking about: the crimes. An overview of their legal definition and manifestation

Introduction

As the maritime zones artificially drawn onto the sea flow unbroken into each other, so do the crimes tainting the waves blur their lines in a *continuum* of evil.

A great example of this continuum and ancillary of different crimes is the phenomenon of piracy in the Horn of Africa. The causes of its outbreak have been traced back to the illegal, unreported, unregulated fishing[322] systematically perpetrated by foreign vessels in and off Somalian waters.[323] This practice -and the resulting devastation of the local marine ecosystem-[324] has robbed 'the Somali people of their livelihoods, marine resources, ecosystem and health', triggering the quest for other sources of revenue,[325] and piracy has happened to be quite a *lucrative*

[322] Hereinafter, IUU fishing. See also on this topic RICARD, P., Pêche / Exploitation durable des ressources halieutiques, *Répertoire de Droit Internationale* (2021).

[323] In fact, it is submitted that at first the then-pirates tried to patrol Somalian waters to counter illegal fishing and then it progressively evolved into its current features, where the primary business of pirates consist in attacking ships with the goal of looting their cargos and increasingly holding the crew as hostages to force shipping companies and states to pay the ransom. BARNES, R., ROSELLO, M., 'Fisheries and maritime security: understanding and enhancing the connection', in Evans, M.D., Galani, S. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?* (2020), pp. 48-9.

[324] Also contaminated by the dumping of *nuclear waste* and other pollutants allegedly carried out by (*inter alia*) Italian criminal organizations, as the '*Ndrangheta* and *Mafia* with the alleged complicity of undisclosed civilian and military servants at the highest levels of the Republican hierarchy. See in this sense, N. 1680/96 RGNR, *Declassified Document pursuant to the communication of the Prosecutor of the Tribunal pf Reggio Calabria to the President of the Chamber of Deputies, 17 september 2015*. PROCURA DELLA REPUBBLICA presso la Pretura Circondariale di Reggio Calabria, *N. 2114/94RGNR Reggio Calabria 23.07.96, Oggetto:- Trasmissione Atti Fascicolo Proc. 2114/94 RGNR al Sig.S. Procuratore della Repubblica, Doti. Alberto Cisterna, Reggio Calabria*, pp. 15-6. 'il Progetto dell'O.D.M. di effettuare l'interramento nei fondali oceanici di rifiuti radioattivi, mediante l'utilizzo di penetratori, anche se non emerge se lo smaltimento di scorie nucleari sia mai stato effettuato […] tentativi effettuati […] con paesi sottosviluppati con promesse in danaro e costruzioni di opere pubbliche di prima necessità, […] afferma, di ottenere mediante altri canali e amicizie internazionali il consenso per il seppellimento delle scorie radioattive nei fondali marini, anche dopo il parere negativo degli stati da lui interpellati'. While the quoted passages of the inquiry do not explicitly affirm that such dumpings effectively took place, either in Somalia or elsewhere, it certainly points -albeit in a highly suggestive and indirect way, towards a certain consolidated practice of disposing of asbestos, radioactive or chemically pollutant substances either on the African soil or in the surrounding oceanic subsoil. Also, KELBESSA, W., 'Environmental Injustice and Disposal of Hazardous Waste in Africa' in: Brinkmann, R. (ed.), *The Palgrave Handbook of Global Sustainability*, Cham (2023), p. 1963. According to current research, it has been suggested that the mysterious deaths of Ilaria Alpi and Milan Hrovatin in Somalia (1994) should be linked to the investigations on these very smuggling and dumping activities.

[325] DUBNER, B., VARGAS, L. M., 'On the Law of Pirate Fishing and Its Connection to Human Rights Violations and to Environmental Degradation A Multi-National Disaster', *Journal of Maritime Law and Commerce*, 48(2) (2017), p. 107.

one,[326] despite not being the most honourable.[327] However, the *nexus* between IUU fishing and piracy is not limited to Somalia. It equally affects piracy and armed robbery at sea worldwide, finding its ultimate roots in the poverty of the affected areas.[328]

Not only the roots of piracy can be linked to other crimes, but it is also claimed that some proceedings derived from it are employed to fuel other delicts, from terrorism to various forms of smuggling.[329]

With reference to terrorism (in particular *maritime* terrorism), there is plenty of evidence of its connection to piracy.[330] Amongst the most recent allegations of this nexus, the UNSC *Resolution* 2608 (2021) affirms 'the ongoing threat [posed by] resurgent piracy and armed robbery at sea', adding that piracy exacerbates instability 'by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism.'[331]

This very synthetic analysis may suffice to represent the absolute level of intricacy in maritime criminal affairs and the chains of causality linking different phenomena.[332] Nevertheless, there are still a couple of issues to be inquired about before leaving the domain of reality to enter the intricacies of the law.

---

[326] See the report by the FINANCIAL TASK FORCE at note 12.

[327] SUMAILA, U. R., BAWUMIA, M., 'Fisheries, ecosystem justice and piracy: A case study of Somalia', Fisheries Research (2014), pp. 159-60.

[328] 'The main reason behind maritime piracy is poverty'. THE FUND FOR PEACE, *Threat Convergence Transnational Security Threats in the Straits of Malacca* (2012), pp. 7-8. In this sense, a tragic example of the ongoing maritime *war between the poor* can be found in CASS. III PEN., 20 february 2024 n. 7449, in which the crew of a Tunisian fishing vessel allegedly 'taking advantage of the state of distress in which [some] migrants found themselves, inducing them to believe that they were willing to rescue and tow them, approached the two boats with a rope and took possession, with a sudden move, of the only engine of the boat. Then, after having abandoned [the migrants] on the high seas, taking advantage of their state of desperation, [the crew of the Tunisian fishing vessel] forced the migrants with moral violence (a real and absolute psychic coercion, since the migrants were left with no reasonable choice) to comply with their request to give them money, in exchange for the possibility of being towed and taken to the land.'

[329] Of humans, drugs, weapons etc. WORLD BANK, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa. A World Bank study* (2013), pp. 4 ff. In the strait of Malacca, piracy and armed robbery at sea have also been linked to drug trafficking and smuggling of human beings: UNODC, *Combating Transnational Organized Crime Committed at Sea Issue Paper* (2013), pp. 21-2; NORTON-TAYLOR, R., Sea trafficking report reveals how ships move guns and drugs, *The Guardian*, 30 January 2012 https://www.theguardian.com/world/2012/jan/30/sea-trafficking-report-guns-drugs.

[330] *Ex multis*: MØLLER, B., *Piracy, Maritime Terrorism And Naval Strategy*, Danish Institute For International Studies Report n. 2 (2009), pp. 23-9. Harmen Van der Wilt also highlights the links between narco-trafficking and terrorism in what has been called *narco-terrorism*. VAN DER WILT, H., 'Legal responses to transnational and international crimes: towards an integrative approach?' in Van der Wilt, H., Paulussen, C. (eds.), *Legal responses to transnational and international crimes: towards an integrative approach* (2017), p. 13.

[331] *Supra* note 3. See also: FINANCIAL ACTION TASK FORCE, *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011), in particular para. 18 pp. 9-10 and paras. 65-82 pp. 27-33.

[332] See: UNODC, *supra* note 10 p. 4. More in general, on the linkages between various forms of criminality and between transnational crimes and international crimes see: VAN DER WILT, *supra* note 14, pp. 13-6.

The first attention-deserving issue is that of the *fishing industry*. *Over* and *IUU* fishing are not just linked to the systematic plunder of biological resources at sea,[333] but perhaps even more shockingly, to widespread and systematic human rights abuses.[334] Furthermore, vessels used to fish, once they have carried their former swimming cargo to its destination, may move back to their port of origins with other, *more fishy* -pun intended- commodities. For instance, in the parliamentary inquiry of the Italian Chamber of Deputies concerning the murder of *Ilaria Alpi* and *Milan Hrovatin*, it is mentioned that vessels belonging to the Somalian company *Shifco* may have been used to trafficking arms and weapons into the African state,[335] contributing to the neverending circle of violence in the latter.

Back to human right abuses in relation to fisheries, quoting from an article from the *New York Times*, '…the sick cast overboard, the defiant beheaded, the insubordinate sealed for days below deck in a dark, fetid fishing hold'[336]. These are the inhuman conditions inflicted upon fishers in many world areas, particularly in Thailand[337] and Indonesia, Cambodia, Vietnam and the surrounding countries condemned to forced labour and slavery on often unseaworthy vessels.[338]

Slavery and sea. History inextricably links these two terms, but even in our age sees the seas are the liquid prisons of many. Modern slavery, as the *inhuman exploitation of workers*, has

---

[333] As they may also take place in freshwater bodies, as previously seen. ENVIRONMENTAL JUSTICE FOUNDATION, *Blood And Water: Human rights abuse in the global seafood industry* (2019), pp. 8-9; TANAKA, Y., '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* 22 (2020), pp. 392-3, 397 ff. BARNES, R., ROSELLO, M., *supra* note 7 p. 54

[334] LEWIS, S.G. *ET AL*., 'Human Rights and the Sustainability of Fisheries', in Levin, P.S., Poe, M.R. (eds.) *Conservation for the Anthropocene Ocean: Interdisciplinary Science in Support of Nature and People* (2017), pp. 381 ff. See also: ENVIRONMENTAL JUSTICE FOUNDATION, *supra* note 14.

[335] See *ex multis* ATTI PARLAMENTARI XIV LEGISLATURA, CAMERA DEI DEPUTATI, DOC. XXII-BIS N.1-BIS, COMMISSIONE PARLAMENTARE D'INCHIESTA SULLA MORTE DI ILARIA ALPI E MIRAN HROVATIN […], *Relazione di minoranza (presentata da:Mauro Bulgarelli) Presentata alla Commissione in data 23 febbraio 2006 Comunicata al Presidente della Camera il 28 febbraio 2006*, pp. 31-48 https://leg14.camera.it/_dati/leg14/lavori/documentiparlamentari/indiceetesti/022bis/001bis/INTERO.pdf.

[336] URBINA, I., 'The Outlaw Ocean. 'Sea Slaves': The Human Misery That Feeds Pets and Livestock', *The New York Times*, 27 july 2015.

[337] DOW, S., ''Such brutality': tricked into slavery in the Thai fishing industry', *The Guardian*, 21 september 2019. See also: HUMAN RIGHTS WATCH, *Hidden Chains Rights Abuses and Forced Labor in Thailand's Fishing Industry* (2018); GREENPEACE, *Turn The Tide: Human Rights Abuses and Illegal Fishing in Thailand's Overseas Fishing Industry* (2018).

[338] URBINA, I., 'Lawless Ocean: The Link Between Human Rights Abuses and Overfishing', *Yale Environment 360*, 20 november 2019.

often been called,[339] and massive human rights abuses are also linked to human trafficking and maritime migrations.[340]

Oftentimes *modern slavery* is the result of (*maritime) migrations and human smuggling*. Desperate individuals seeking to improve their miserable conditions, convinced by fraud and false promises to move abroad, work on vessels, help their families.[341] That is the common incipit of many tragedies, and this problem is not limited to some remote lands. Still, it concerns even developed, highly civilised progressive countries like Ireland and the United Kingdom.[342] Physical violence, withholding of wages, overwork, and debt burdens as workers owe fees to brokers for securing their jobs, no chance to bring their cases to a judge to seek judicial help.[343]

The magnitude of migrations at sea and the related tragedies echo through the media almost daily and reality speaks for itself with unrestrained brutality[344]. Nevertheless, while the images are eloquent, it is worth classifying the accidents to grasp the exact scale and peculiarities of the phenomenon.

First, the deaths. According to the 2018 UNDOC report, based on data offered by the IOM in 2017, for instance, the total number of deaths due to drowning or presumed drowning in the context of maritime routes amounts to 3,597 or the 58% of the total.[345] Many have also died by the hands of the Libyan coastguard, which, instead of saving the lives of people in distress in

---

[339] See: KOJIMA, C., 'Modern Slavery and the Law of the Sea: Proposal for a Functional Approach', *Korean Journal of International and Comparative Law* 9 (2021), pp. 6-11.

[340] HUMAN RIGHTS WATCH, *supra* note 17, pp. 17-25.

[341] A similar fate is also shared by many women lured into prostitution in Central Asia and elsewhere. See CURLEY, M., SIU-LUN, W., *Security and Migration in Asia: The Dynamics of Securitisation*, London (2008), p. 90 ff.

[342] ENVIRONMENTAL JUSTICE FOUNDATION, *supra* note 14, p. 10.

[343] ""the young, inexperienced Indonesian was a favourite punching bag, particularly when catches were poor. He claims one senior crew member was "a furious person. He hurt people, he always cursed his people, bad mouthing us and slapping our heads for no reason at all. There were instances when he got mad and threw our laundry and toiletries in the ocean." The crew were assaulted with fishing hooks, he alleges, adding that on one occasion the Indonesian teenager was slapped hard in the face with a thick sandal. Arif had seemed lonely the night he died and was found lifeless when colleagues tried to wake him in the morning.' SMITH, N., CAI, L., LOVEARD, D., 'Death on the high seas: Taiwanese rights groups demand end to modern slavery on fishing boats', *The Telegraph*, 14 January 2021.

[344] See for intance the recent Rohingya crisis. In 2020 hundreds of thousands Rohingya were trying to flee Myanmar due to political-religious persecutions, seeking refuge in Bangladesh and other South-Eastern Asian Countries. After having been prevented from disembarking due to Covid19-related border restrictions, they were pushed back into the sea by state authorities in Thailand, Malaysia and Indonesia, resulting in hundreds of deaths. Eventually they were confined, in atrocious conditions, on Bhasan Char Island, a remote and unstable silt island off the coast of Bangladesh were they have been basically imprisoned. The dystopian intersection of migratory crisis and Covid, which has plagued our recent history, has pushed the already tragic conditions of migrants, seafarers, fishers to unheard limits of inhumanness. JAGHAI-BAJULAIYE, S., *Joint Submission to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children*, 1 june 2020, paras. 6-7.

[345] UNODC, *Global Study on Smuggling of Migrants* (2018), p. 9.

precariously navigating boats, fired upon them.[346] However, even for those who survive, it is still a voyage of uncertainty and pain. Overcrowded, unseaworthy vessels,[347] lack of food,[348] violence and other inhuman conditions.[349] If possible, the recent Covid-19 pandemic has worsened the already disastrous conditions of fishers, workers, migrants and asylum seekers.[350]

Migrations at sea and human trafficking have also been linked (in various forms and degrees) to *other* crimes, terrorism *in primis*.

For instance, the terrorists responsible for the attacks in the Basilica of *Notre-Dame-de-l'Assomption* in 2020 in Nice,[351] the 2016 Christmas Market in Berlin[352] and, more recently, the killer of two Swedes in Brussels (2023)[353] had come to Europe by sea, landing in Lampedusa alongside genuine refugees and honest migrants. Whilst terrorists and criminals, in general, constitute a *minimal fraction* of the human waves moving across the seas, there is solid evidence of the linkages between migration routes by sea, various forms of trafficking and terrorism.[354] Referring to the latter, in the Mediterranean area, in particular, this can primarily be linked to the collapse of Libyan institutions[355] and the substantial void of authority to enforce law and order: the ideal context for the viral proliferation of criminal activities.

As it will be seen in the next Paragraph, however, whereas the sea is an incredible prism enabling us to see with exceptional sharpness the complexities and interconnectedness between

---

[346] See, for instance, TONDO, L., 'The most unsafe passage to Europe has claimed 18,000 victims. Who speaks for them?', *The Guardian*, 2 december 2021.

[347] *Ex multis*: 'Rescuers pull 394 migrants from dangerously overcrowded boat off Tunisia', *Reuters*, 2 August 2021.

[348] RUHALA, E., 'Horror at Sea: Adrift for Months, Starving Asylum Seekers Threw 98 Bodies Overboard', *The Time*, 19 february 2013; Cass. I pen., 7 may 2019 n. 19314. Every day, perusing the newspapers, TV news and webpages from all over the world, countless records of overcrowded, hardly fit for navigation, vessels with humans abandoned without basic supplies can be found.

[349] As reckoned *e.g.* in CASS. I PEN., 13 August *2021 n. 31652*.

[350] *Supra*, note 28. During the September 2020 crew change crisis, 400,000 seafarers were left stranded at sea around the world: 'UN launches key initiative to protect seafarers' human rights amid COVID-19 crisis', *UN News*, 6 may 2021; 'More action needed for seafarers, 'collateral victims' of measures to curb COVID-19', *UN News*, 6 october 2020; 'Starving Rohingya refugees rescued off Bangladesh after two months at sea', *BBC News*, 16 april 2020.

[351] BURKE, J., TONDO, L., 'Suspect in Nice terror attack phoned his family hours before rampage', *The Guardian*, 30 october 2020.; SARZANINI, F., 'Attentato a Nizza, il killer era in Italia il 9 ottobre. Dopo lo sbarco a Lampedusa portato a Bari e identificato', *Il Corriere della Sera*, 29 october 2020.

[352] PARAVICINI, G., 'Suspected Berlin attacker spent 4 years in Italian jails', *Politico*, 21 december 2016; ARGOUBY, M., NASR, J., SCHERER, S., 'Berlin attack suspect emerged from jail with 'totally different mentality', *Reuters*, 22 december 2016.

[353] BETTIZA, S., Brussels shooting: Gunman who killed two Swedes had escaped Tunisian prison, *BBC News* 24 october 2023 https://www.bbc.com/news/world-europe-67195715.

[354] See: BERTOLOTTI, C., 'Libya: the businesses of human trafficking and the smuggling of oil, drug and weapons. A structural threat to Europe', *Osservatorio Strategico* 19(5)(2017), pp. 55-62; YUHAS, A., 'Nato commander: Isis 'spreading like cancer' among refugees'', *The Guardian*, 1 march 2016.

[355] *Ibid.* In many respects, as seen in Chapter IV, similar to the proliferation of piracy and Jihadi terrorism in Somalia and the waters surrounding it.

international and transnational crimes, the issue of their boundaries and the alleged merit of their dichotomy is not a purely maritime concern but rather appears to be a general taxonomical problem with remarkable jurisdictional consequences.

A final *caveat*. Given the centrality of piracy in the discourses on the criminal juris gentium and the sea and its prototypical role in the analysis of maritime jurisdiction, piracy will be systematically analysed in a dedicated section in Chapter III.

1. Crimes against peace and their maritime relevance

Crimes against peace,[356] to use the old *Nuremberger*[357] terminology, or its more modern version, the crime of aggression[358] are currently defined in two international instruments: Article 8bis ICC St.[359] and Article 28(M) of the Malabo Protocol of the African Court of Justice and Human Rights.[360]

---

[356] *Supra*, note 72.

[357] 'A native or inhabitant of Nuremberg.' https://www.lexico.com/definition/nuremberger.

[358] Hereinafter, CoA. Interestingly (in a punning way), Art. 5(2) of the UNGA Res. 3314/1974 holds that 'A war of aggression is a crime against international peace'. It is reasonable to consider both expressions valid and synonymous. DINSTEIN, Y., 'The Crime of Aggression under Customary International Law', in Sadat, L. (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge (2018), p. 291. For a general overview of the crimes against peace/crimes of aggression, see: SAYAPIN, S., *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State,* The Hague (2014); BASSIOUNI, M.C., FERENCZ, B. B. 'The Crime Against Peace and Aggression: From Its Origins to the ICC', in Bassiouni M.C. (ed.), *International Criminal Law, Volume 1: Sources, Subjects and Contents, Third Edition*, Leiden (2008), pp. 205-65; AMBOS, K., *supra* note 151, pp. 184-221; STRAPATSAS, N., 'Aggression', in Schabas, W, Bernaz, N., *supra* note 74, pp. 155-69; KREß, C., BARRIGA, S. (eds.), *The Crime of Aggression: A Commentary*, Cambridge (2017); HEINSCH, R. 'The Crime of Aggression after Kampala: Success or Burden for the Future', *Goettingen Journal of International Law* 2(2)(2010), pp. 713-744; FERENCZ, D. M., 'The Crime of Aggression: Some Personal Reflections on Kampala', *Leiden Journal of International Law*, 23(4)(2010), pp. 905-8; AMBOS, K., 'The Crime of Aggression after Kampala', *German Yearbook of International Law* 53(2010), pp. 463-510; CLARK, R. S., 'The Crime of Aggression and the International Criminal Court', in Doria, J., Gasser, H-P., Bassiouni, M. C. (eds.), *The Legal Regime of the International Criminal Court*, Leiden (2009), pp. 661-99; GILLETT, M., 'The Anatomy of an International Crime: Aggression at the International Criminal Court', *International Criminal Law Review* 13 (2013), pp. 829–64; CASSESE, A., On Some Problematical Aspects of the Crime of Aggression, *Leiden Journal of International Law*, 20 (2007), pp. 841–49; WILMSHURST, E., '30. The Crime of Aggression: Custom, Treaty and Prospects for International Prosecution', in Buffard, I. et al. (eds.), *International Law between Universalism and Fragmentation*, Leiden (2008), pp. 603-26; WILMSHURST, E., '13. Aggression', in Cryer, R. *et al, supra* note 151, pp. 307-28; O'KEEFE, R., *supra* note 141, pp. 154-9; WERLE, *supra* note 42, pp. 384-403.

[359] See: ZIMMERMANN, A., FREIBURG, E., 'Article 8bis' in Triffterer, O., Ambos, K (eds.), *The Rome Statute of the International Criminal Court: a commentary, Third Edition*, Oxford (2016), pp. 580-618.

[360] Which, for the issues relating to the maritime crime of aggression does not derogate from the ICC formulation and will not, therefore, be considered in the present Dissertation. See: SAYAPIN, S., 'The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights', in Jalloh, C., K. Clarke, K., Nmehielle, V. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge *(2019)*, pp. 314-335; AMBOS, K., 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)', in Werle, G., Wormbaum, M. (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol,* The Hague (2017), pp. 21-55.

Article 8bis ICC St.[361] defines CoA as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[362] Paragraph 2 clarifies the meaning of the *chapeau,* holding that '"act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974'.[363]

'To further qualify the conducts suitable to be subsumed in the combined definition of Paragraphs 1 and 2, the text provides a list of the conducts susceptible to constitute the crime of aggression, notably including two sea-based or sea-related forms of aggression: (c) *The blockade of the ports or coasts of a State by the armed forces of another State;*[364] (d) An attack by the armed forces of a State on the land, *sea* or air forces, or *marine and air fleets*[365] of another State;'.

A *blockade* can be defined as 'belligerent operations to prevent vessels from entering or exiting ports or coastal areas belonging to another nation'.[366] A potential source of ambiguity

---

361 Introduced in the 2010 Review Conference of the Rome Statute (Kampala Conference) filling the substantial gap left by the Drafting Conference due to the difficulty to reach an agreement on the definition and jurisdiction applicable to the crime: 'the crime of aggression was included under the ICC's jurisdiction by Article 5(1)(d) of the Statute, but the detail, where the devil lay, was left to another day'. MCDOUGALL, C., 'The Crime of Aggression under the Rome Statute of the International Criminal Court: An Introduction', in *The Crime of Aggression under the Rome Statute of the International Criminal Court,* Cambridge (2021), p. 11. Artt. 15 bis and ter established a complex jurisdictional mechanism relating to the crime of aggression. MCDOUGALL, C., 'The Court's Jurisdiction Over the Crime of Aggression', in *The Crime of Aggression under the Rome Statute of the International Criminal Court,* Cambridge (2021), pp. 260-1. See also: KEMP, G., 'The Crime of Aggression under the Rome Statute of the ICC' in *Individual Criminal Liability for the International Crime of Aggression*, Cambridge (2015), pp. 177-88; MANCINI, M., A brand new definition for the crime of aggression: the Kampala outcome, *Nordic Journal of International Law*, 81(2)(2012), pp. 227-48; ZIMMERMANN, A., Amending the amendment provisions of the Rome Statute: the Kampala compromise on the crime of aggression and the law of treaties, *Journal of International Criminal Justice* 10(1)(2012), pp. 209-28; WONG, M. S., The Activation of the International Criminal Court's Jurisdiction over the Crime of Aggression: International Institutional Law and Dispute Settlement Perspectives, *International Community Law Review* 22(2)(2020), pp. 197-234.

362 Para. 1.

363 UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314, available at: https://www.refworld.org/docid/3b00f1c57c.html [accessed 30 January 2022], which provides the definition of the act of aggression *verbatim* reproduced in the ICC St. MAY, L., *Aggression and Crimes against Peace*, Cambridge (2008), p. 218 ff.; BARRIGA, S., '43. The Crime of Aggression', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2014), p. 331; AMBOS, *supra* note 151, p. 188.

364 Emphasis added.

365 Emphasis added.

366 ZIMMERMANN, FREIBURG, *supra* note 167 Para. 128 p. 611. See also: VON HEINEGG, W. H., Naval Blockade, *International Law Studies Series. US Naval War College*, 75 (2000), pp. 203-30. The prohibition of naval blockade can

comes from the fact that while *any blockade may constitute an act of aggression but not necessarily any blockade is an act of aggression*: under certain conditions it could also be a war crime. It is a matter of perspectives or, to be more precise, of the *rechtsgüter* vulnerated by a blockade.

Blockades (in general) constitute an infringement of the fundamental principle of the freedom of navigation[367] and, according to the Commentary to the Rome Statute, 'any blockade may constitute an act of aggression, even if it abided by the limitations set out in international humanitarian law'.[368] To meet the threshold of the crime, however, the blockade must not be limited to prohibiting access to a single port, *but it must concern the entire coast of the affected state to rise to the gravity required* by the crime.

Blockade, as a method of naval warfare, is as old as war is (or at least, naval war),[369] and if compliant with the rules of the *jus in bello,* the blockade might constitute a legitimate instrument of naval warfare.[370]

Furthermore, when international peace and security are threatened, under Article 42 UN Charter, the UNSC may undertake (any) action, either by air, sea or land, which may be deemed to be *necessary* to maintain or restore international peace and security, including blockades and other maritime operations carried by UN member states.[371]

In any case, 'a blockade is illegal if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival;[372] or (b) the damage to the civilian

already be found in the Conference for the Reduction and Limitation of Armaments (1933) and has subsequently acquired customary status. SELLARS, K., *'Crimes against Peace' and International Law,* Cambridge (2013), p. 35 ff.

[367] KRASKA, J., 'Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?', in Schmitt, M.N. et al. (eds.), *Yearbook of International Humanitarian Law Volume 13,* The Hague (2010), p. 373. *Infra,* Chapter III.

[368] ZIMMERMANN, FREIBURG, *supra* note 167, para. 128 p. 612.

[369] For a comprehensive account of the legal, economic, and political dimensions of blockades, see DAVIS, L. E., ENGERMAN, S. L., *Naval Blockades in Peace and War: An Economic History since 1750*, Cambridge (2012); VEGO, M., *Maritime Strategy and Sea Control: Theory and Practice,* London (2016).

[370] INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, Doswald-Beck, L. (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Part IV Methods And Means Of Warfare At Sea, Section II Methods of warfare Blockade, Cambridge (1995), paras. 93-104 pp. 26-7. See: GILLETT, M., *supra* note 166, p. 843; SANGER, A., 'Chapter 14 The Contemporary Law of Blockade and the Gaza Freedom Flotilla', in Schmitt, M.N. et al. (eds.), *Yearbook of International Humanitarian Law Volume 13*, The Hague (2010), p. 409.

[371] *Ibid. Infra* para. 3.1.

[372] In the context of the ongoing war of aggression between Russia and Ukraine, the blockage of the ports of Mariupol and the other Ukrainian cities facing the Sea of Azov resulted in the trapping of foreign vessels and in a major loss in the export (and hence, the availability) of Ukrainian grain has been considered by some authors as an act of aggression pursuant to Art. 3(c) of the UNGA Res. 3314/1973. GRZEBYK, P., Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law, *Polish Yearbook of International Law* 41(2021), p. 149. With regard to the impact of the blockade and the availability of grain or, to put it differently, the risk of food shortages and famine, there are perplexities as to whether this may constitute a war crime since, it is alleged, grain is still available, only more expansive (and not as a direct consequence

population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade. […] A blockade may not continue to be enforced where it inflicts disproportionate damage on the civilian population. The usual meaning of "damage to the civilian population" in the law of armed conflict refers to deaths, injuries and property damage.'[373]

With regard to the specific situation in the Gaza Strip, for instance, while, on the one hand, the OHCHR recognised that a blockade is a legitimate means of warfare in the context of international armed conflicts when disproportionate damage arises out of its use, 'the blockade was unlawful, with all the consequences that flowed from this.'[374]

That said, the other case of maritime CoA *sub* Article 8bis ICC St. is when an attack is carried against every branch of the armed forces, expressly including naval forces. As underlined by the Commentary to the Rome Statute, the 'term 'fleets' was chosen carefully to indicate that an attack on commercial fishing vessels or civilian aircraft would not amount to an act of aggression'.[375]

This apparently uncontroversial definition hides, however, a problem that applies in fact to all the elements of this crime and likely any other crime, *which is when an act abstractly compatible with the actus reus of a crime reaches a scale or level of sufficient gravity to integrate a crime,*[376] which is, in other words, the old (unresolved) criminal problem of *offensiveness*.

---

of the blockade). See CHEHTMAN, A., RIVERA-LÓPEZ, E., "Inside" and "Outside": Assessing the Russian Blockade Against Ukraine, in Krieger, H., Kalmanovitz, P., Lieblich, E., Evdokimos Pantazopoulos, S. (eds) *Yearbook of International Humanitarian Law* 25(2022), pp. 157-73. Similarly, Fink, while contending the existence of a blockade *stricto sensu*, highlights that the question of the export of foodstuffs from blockaded ports and littorals foodstuffs falls outside the existing rules of blockade (addressing instead the import necessary for the survival of the blockaded population). FINK, M., Naval Blockade and the Russia–Ukraine Conflict, *Netherlands International Law Review* 69(2022), p. 431.

[373] HUMAN RIGHTS COUNCIL, Fifteenth session, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 27 September 2010; available at https://www.ohchr.org/FR/Pages/Home.aspx, paras. 51-2.

[374] *Ibid*. para. 53

[375] ZIMMERMANN, A., FREIBURG, E, *supra* note 167, para. 132 p. 613.

[376] *Infra* para. 3.1 with regard to the 2010 incident between the IDF (Israel Defence Forces) and the 'Freedom Flotilla'. On the issue of gravity thresholds of international crimes (admittedly with a particular focus on the admissibility challenge and the prosecutorial strategy of the ICC but perhaps indicative of a more general tendency), see: LONGOBARDO, M., Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes, *Questions of International Law*, Zoom-in 33(2016), pp. 21-41, and the rich doctrine thereby referred to; STEGMILLER, I., 'Interpretative gravity under the Rome Statute: Identifying common gravity criteria', in Stahn, C.,El Zeidy, M. (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge (2011), pp. 603-41; MURPHY, R., Gravity Issues And The International Criminal Court, *Criminal Law Forum* (2006), pp. 281-315; ADEM, H., 'Chapter 5 Case Selection and Crimes Under the Rome Statute', in Adem, H., *Palestine and the International Criminal Court*, International Criminal Justice Series 21, The Hague (2019), pp.

Despite the absence of post-Nuremberg jurisprudence on the gravity[377] threshold of the CoA, some of the underlying issues have been indirectly touched by the ICJ in the US-Iran Oil Platform Case (2003)[378] concerning 'the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988'.[379]

It is relevant to refer to this case because the attack against the Iranian platforms had been *launched by ships* (four US destroyers) in retaliation to alleged Iranian *attacks against other* (US) *vessels*.[380] Asked to declare 'whether that attack [on the *Sea Isle City*], either in itself or in combination with the rest of the "series of [. . .] attacks" cited by the United States can be categorised as an "armed attack" on the United States justifying self-defence',[381] these episodes were, in the Court's judgment, 'not [...] of the kind [...] qualified as a "most grave" form of the use of force'.[382]

Regardless of the factual circumstances of the time and the specific case, it is worth noticing that the ICJ '*does not exclude the possibility that the mining of a single military vessel might*

111-85; AMBOS, K., 'Gravity and Complementarity *stricto sensu*', in Ambos, K., *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court,* Berlin Heidelberg (2010), pp. 44-51; EL ZEIDY, M. M., The Gravity Threshold Under The Statute Of The International Criminal Court, *Criminal Law Forum* (19)(2008), pp. 35-57; DEGUZMAN, M.M., Gravity and the Legitimacy of the International Criminal Court, *Fordham International Law Journal*, 32(5)(2009), pp. 1400-65.

[377] More radically, since Nuremberg's time no judgment has dealt with individual's responsibility for the crime of aggression.

[378] Hereinafter, ICJ. ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C. J. Reports 2003, para. 1, p. 166. Hereinafter, *Oil Platforms* (case).

[379] 'On 16 October 1987, the Kuwaiti tanker Sea Isle City, reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked Iranian offshore oil production installations, claiming to be acting in self-defence. United States naval forces launched an attack against the Reshadat ["Rostam"] and Resalat ["Rakhsh"] complexes; the R-7 and R-4 platforms belonging to the Reshadat complex were destroyed in the attack. On 14 April 1988, the warship USS Samuel B. Roberts struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States, again asserting the right of self-defence, employed its naval forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes'. *Ibid.*, para. 25, pp. 175-6

[380] *Ibid.* paras. 52 ff.

[381] *Ibid.* para. 64 p. 191.

[382] First, the US did not have *locus standi* for the Sea Isle City since they were not the vessel's flag state and, secondly, the evidence of the Iranian provenance of the mines was deemed to be feable and inconclusive. *Ibid.* See: LAURSEN, A., The Judgment by the International Court of Justice in the Oil Platforms Case, *Nordic Journal of International Law* 73(1)(2004), pp. 154-5; GREEN, J., The Oil Platforms Case: An Error In Judgment?, *Journal of Conflict & Security Law* 9(3)(2004), pp. 361-3; ORAKHELASHVILI, A., Legal Stability and Claims of Change: The International Court's Treatment of Jus ad Bellum and Jus in Bello, *Nordic Journal of International Law* 75(3-4)(2010), pp. 388, 391.

be sufficient to bring into play the "inherent right of self-defence',[383] or, in other words, that that act constitutes an unlawful act of aggression.

Unfortunately, no further elaboration or comment was given on the issue. It would have certainly helped to clarify when an *attack against naval forces is of a sufficient gravity* to be considered an act of aggression and, in perspective, potentially a *crime* of aggression.[384]

One last comment is warranted on the point. As observed by Green, the reference to the accumulation of events suggests that *not only major uses of force* might amount to an armed attack (or, to remain in the linguistic dominion of this paragraph, a crime of aggression or a crime against peace), but that a *consistent, systematic, coordinated number of small scale events* that would be otherwise unsuitable to meet the definition, might constitute -theoretically- an armed attack.[385]

Whether this idea will also be upheld with regard to the crime (and not the mere act) of aggression is unclear.[386] It must be hoped that such clarification never comes into being due to the absence of any such act, and that the doubts will remain as an intellectual testament to peace.

2. War crimes at sea: Nuremberg, Tokyo and the *Freedom Flotilla* incident

In the endless catalogue of atrocities perpetrated during WWII, the seas were not immune from carnages and violence of every sort.[387] Fairly common were the indiscriminate submarine

---

[383] Emphasis added. *Ibid*. para. 72 p. 195. LAURSEN, *ibid*., pp. 141 and 150.

[384] Keeping in mind that the threshold for the existence of a crime does not necessarily coincide with the threshold for the admissibility of a case to the ICC. On the problem of the sufficient gravity of an armed attack *quoad* the existence of an act of aggression, see GREEN, J., *supra* note 190, p. 379; HEINSCH, R., The Crime of Aggression after Kampala: Success or Burden for the Future, *Goettingen Journal of International Law*, 2(2)(2010), p. 726. 'The fourth condition required by Article 8bis (1) is that the act of aggression as defined in paragraph 2 "by its character, gravity and scale, constitutes a manifest violation" of the Charter of the United Nations. This incorporates a threshold for the use of force which can be found neither in the UN Charter nor in Resolution 3314 on the Definition of Aggression between States. In a way, it is similar to the approach the International Court of Justice took in the Nicaragua and Oil Platforms cases concerning the requirement that there be a certain level of armed attack before force as self-defence was justified. One could also find similar language in the recent Case Concerning Armed Activities on the Territory of the Congo. But the term "manifest violation" in the context of aggression as such is new, and the meaning is not completely clear. Therefore, the qualifier has been criticized by a couple of commentators, especially for its vagueness. Since there is no comparable precedent in the history of the prosecution of the crime of aggression, it has been stated that reducing the crime to only manifest violations could have severe effects on the prohibition of the use of force because this would give a carte blanche to all incidents of aggression which are not manifest. Also, it is not clear what kind of "manifest" violations one should envisage'.

[385] *Ibid*. p. 381.

[386] On the problem of gravity with regard to the crime of aggression under the ICC St. See: SCHEFFER, D., The Complex Crime of Aggression under the Rome Statute, *Leiden Journal of International Law* 23(2010), pp. 898-901.

[387] Even before WWII, however, with regard to the sinking off the Irish coast of the neutral passenger steamer *Lusitania* by a German submarine during WWI, the US District Court for the Southern District of New York held that 'the German government would authorize or permit so shocking a breach of international law and so foul an

attack against all kind of ships[388] and the deliberate killing of shipwrecked enemies and neutrals (*e.g.* the sinking of the *Athenia,* an unarmed British passenger liner sunk on 3 September 1939, while outward bound to America).[389] Prisoners of war and civilian internees were often subject to massacres. Aboard the Japanese aircraft carrier *Nitta Maru,*[390] for instance, American prisoners of war were beheaded. In the Andaman Islands, civilian internees were placed aboard ship, taken to sea, and forced into the water. In what is currently named Banda Aceh, Dutch prisoners of war were placed in sloops, towed to sea, shot and thrown into the sea whereas others in Tarakan (Borneo) were taken aboard a Japanese light cruiser to the spot where a Japanese destroyer had been fired upon by them, decapitated and thrown into the sea.[391] Similarly, in Crimea over 144.000 peaceful citizens were taken at sea and thereupon exterminated by drowning[392] and a panoply of other abuses were inflicted upon the prisoners at sea.[393]

Despite the post-war efforts to strengthen respect for human rights and outlaw conducts directed against civilians or enemies *hors de combat*[394] or, with regard to active opponents, impose

---

offense, not only against an enemy, but as well against peaceful citizens of a then friendly nation. […] The cause of the sinking of the Lusitania was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists. As Lord Mersey said: 'The whole blame for the cruel destruction of life in this catastrophe must rest solely with those who plotted and with those who committed the crime.'' US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, *The Lusitania, Gertrude Adams and ors v Cunard SS Co, Ltd, Trial judgment*, 251 F 715 (SDNY 1918), ILDC 1581 (US 1918), 23rd August 1918, paras. 91-2. See also *ibid.* paras. 54, 68, 76.

[388] *Ibid.* p. 312. For the similar Japanese practice, see IMFTE, *infra* note 198, pp. 1072 ff.

[389] *Ibid.* pp. 316-7.

[390] A Japanese aircraft carrier.

[391] INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (Hereinafter, Tokyo Tribunal or IMTFE or Tokyo), *Judgment Of The International Military Tribunal For The Far East* (1948), pp. 1036 And 1041.

[392] INTERNATIONAL MILITARY TRIBUNAL NUREMBERG (hereinafter, IMT or Nuremberg Tribunal), *United States v Göring et al.* (1946), in Trial Of The Major War Criminals Before The International Military Tribunal Nuremberg 14 November 1945 -1 October 1946, Nuremberg (1947), p. 49.

[393] Also systematic abuses against the prisoners of war were perpetrated: 'The Japanese practices in the movement of Prisoners of war by sea was in line with equally unlawful and inhumane methods of movement by land, The prisoners were crowded into holds and coal bunkers of ships with inadequate sanitary facilities and insufficient ventilation, and were given no Medical service, They were forced to remain below decks during long voyages and to subsist on meager rations of food and water, These prison ships were unmarked and subjected to Allied attacks in which thousands of prisoners perished', *ibid.* p. 1068-72. See on the topic: COHEN, D., TOTANI, Y., *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence*, Cambridge (2018); FELTON, M., *Slaughter at sea: the story of Japan's naval war crimes*, Annapolis (2007); DITTRICH, V. E., ET AL. (eds.), *The Tokyo Tribunal: Perspectives on Law, History and Memory*, Brussels, (2020).

[394] With the four Geneva Conventions. With specific regard to maritime incidents see the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. These provisions are integrated by Geneva Protocol I, whose articles 8-34 address the safeguards for sick and shipwrecked victims of war. PILLOUD C., DE PREUX, J., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva (1987), p. 145, para. 444. See: DEMEYERE, B., HENCKAERTS, J-M., HIEMSTRA, H., NOHLE, E., The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea, *International Law Studies* 94(2018).

principles of proportionality and prohibition of means likely to cause unjustifiable sufferings,[395] war seems to have retained (at least in some concerns) its brutality.[396]

In recent years an incident of alleged war crimes has gained particular public attention for various reasons, both legal and political.[397] It was in fact, *the first case* (or, more correctly, situation) concerning *war crimes at sea in front of an international tribunal since Nuremberg and Tokyo*.

On 31 May 2010, a flotilla of six vessels carrying people and humanitarian supplies to Gaza was boarded and taken over by Israeli Defense Forces[398] some seventy-two nautical miles from land.[399] The flotilla had been directed to change course by the Israeli forces enforcing Gaza's

---

[395] On the modern IHL principles (in addition to the ICRC manual, *supra* note 196), see *ex multis*: MARAUHN, T., DE VRIES, B. (Eds.), *Legal restraints on the use of military force: collected essays by Michael Bothe*, Leiden (2020); SAUL, B., AKANDE, D.(eds.), *The Oxford guide to international humanitarian law,* Oxford (2020); BOHRER, Z., DILL, J., DUFFY, H., *Law applicable to armed conflict,* Cambridge (2020); SÀSSOLI, M., NAGLER, P.S. (eds.), *International humanitarian law : rules, controversies, and solutions to problems arising in warfare,* Cheltenham (2019); CASEY-MASLEN, S., HAINES, S., *Hague law interpreted : the conduct of hostilities under the law of armed conflict,* Oxford (2018); CRYER, R., HENDERSON, C. (eds.) *Law on the use of force and armed conflict. Volume III, Foundations of the law of armed conflict*, Cheltenham (2017); SOLIS, G.D., *The law of armed conflict : international humanitarian law in war*, Cambridge (2016); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *International legal protection of human rights in armed conflict*, New York (2011); PAPANICOLOPULU, I., SCOVAZZI, T. (eds.), *Conflitti armati e situazioni di emergenza: la risposta del diritto internazionale : relazioni al ciclo di Conferenze tenuto nell'Universita di Milano-Bicocca (marzo-aprile 2006)*, Milano (2007). Also very important: CASSESE, A., The Prohibition of indiscriminate means of warfare, in Akkerman, R. J., Van Krieken, P. J., Pannenborg, C. O. (eds.), *Declarations on principles-A Quest for Universal Peace, Liber Amicorum Discipulorumque Prof. Dr. Bert V. A. Röling*, Leyden (1977), pp. 171-94; RÖLING, B.V.A., 'Aspects of the criminal responsibility for the violations of the law of war', in Cassese, A. (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli (1979), pp. 199-231 and CASSESE, A., 'A tentative appraisal of the old and the new humanitarian law of armed conflict', *ibid.*, pp. 461-501; RONZITTI, N., *Diritto Internazionale dei Conflitti Armati*, seconda edizione, Torino (2001); KOLB, R., GAGGIOLI, G. (eds.), *Research Handbook on human rights and humanitarian law*, Cheltenham (2013).

[396] the efforts to civilise maritime warfare (*supra* note 221), and to provide a comprehensive code of conduct on the war at sea culminated in the 1994 adoption of the (non-binding) *Sanremo Manual* which sought to codify the law of marine warfare. Supra *note* 176. See on the Manual: VON HEINEGG, W. H., How to Update the San Remo Manual on International Law Applicable to Armed Conflicts at Sea', *Israel Yearbook on Human Rights,* 36 (2006), pp. 119-48. See also on the law of marine warfare: RONZITTI, N., 'Le droit humanitaire applicable aux conflits armés en mer', in *Collected Courses of the Hague Academy of International Law* 242 (1993).

[397] See, amongst the many doctrinal contributions on the *Freedom Flotilla* (2010) incident and the subsequent ICC proceedings: KRASKA, J., Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?, *Yearbook of International Humanitarian Law Volume 13*, The Hague (2010), pp. 367-95; AKANDE, D., Court between A Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC, EJIL:Talk May 15 2013 (2013): https://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/; MELONI, C., The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity, *QIL, Zoom-in* 33 (2016), pp. 3-20; LONGOBARDO, M., Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes, *QIL, Zoom-in* 33 (2016), pp. 21-41; KREß, C., 'The Law of Naval Warfare and International Criminal Law: Germany's Federal Prosecutor on The Gaza Flotilla Incident', *Israel Yearbook On Human Rights* , Leiden (2019), pp. 1-38; BUCHAN, R., The International Law Of Naval Blockade And Israel's Interception Of The Mavi Marmara, *Netherlands International Law Review* 18 (2011), pp. 209-41.

[398] hereinafter, IDF.

[399] The precise coordinates were 32°38'28.07" N 33°34'2.17" E.

blockade.[400] During the scuffles between the boarding IDF and the activists present on the ships, on board the Comorian vessel *Mavi Marmara* nine passengers lost their lives, and many others were wounded.[401] At the time of the incident, according to *Vesselfinder*'s data,[402] there were twenty-four ships within a radius of 10 nautical miles (around 18.6 kilometres)[403] from the *Mavi Marmara*.[404] Of the seven-hundred activists embarked on the six watercrafts composing the flotilla, five-hundred-eighty-one were on board the *Mavi Marmara*.[405]

On 14 May 2003, the Government of the Comoros Islands, acting in its capacity of flag-state of the *Mavi Marmara* thus referred the situation to the Prosecutor of the International Criminal Court.

On 6 November 2014, the Prosecutor decided not to open an investigation due to an alleged (and rightfully criticised) lack of 'a reasonable basis to proceed with an investigation' under article 17(1)(d) ICC St. (sufficient gravity).[406] A 'battle'[407] ensued for the following five years between, on the one side, the OTP and on the other the Comoros Islands and the Office of Public Counsel for Victims (OPCV), focusing particularly on prosecutorial independence and the power of the Trial Chambers to review the decisions of the Prosecutor.[408]

In the 2014 decision, the Prosecutor 'concluded that the potential case(s) that would likely arise from an investigation of the *Flotilla* incident would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility',[409] relying in her decision on

---

[400] Imposed by Israel in summer 2007 as a consequence of the *Hamas* gain of control over the Gaza Strip in the aftermath of the conflict between *Hamas* and *Al Fatah* and the Palestinian authority. See: GUILFOYLE, D., The Mavi Marmara Incident And Blockade In Armed Conflict, *The British Yearbook of International Law* 81(1)(2011), p. 172.
[401] PALMER, G. ET AL. *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (July 2011), p. 1.
[402] TOMOV, A. (VesselFinder Limited), Re: Vesselfinder.com historical data request from Giampaolo Guizzardi Righetti g.guizzardirighet@campus.unimib.it, received by Giampaolo Guizzardi Righetti, 09/01/2024 at 16.53.
[403] Putting it differently, 24 ships were spread across roughly 346 square kilometres.
[404] *Supra* note X.
[405] LEWIS, O., Timeline - Main events in the Gaza flotilla affair, *Reuters* 1 june 2010 https://www.reuters.com/article/uk-israel-flotilla-timeline/timeline-main-events-in-the-gaza-flotilla-affair-idUKTRE65046720100601/; BAYOUMI M. *Midnight on the Mavi Marmara: The Attack on the Gaza Freedom Flotilla and How It Changed the Course of the Israel*. New York (2010).
[406] OFFICE OF THE PROSECUTOR (hereinafter, OTP), Situation on Registered Vessels of Comoros, Greece and Cambodia, *Article 53(1) Report*, 6 November 2014, para. 3.
[407] Term used by KREß, *supra,* note 206, p. 1.
[408] INTERNATIONAL CRIMINAL COURT, Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia, *Judgment On The Appeal Of The Prosecutor Against Pre-Trial Chamber I's 'Decision On The "Application For Judicial Review By The Government Of The Union Of The Comoros"'*, No. ICC-01/13 OA 2, Date: 2 September 2019. For the procedural history of the situation, see paras. 6-25.
[409] OTP, *supra* note 209, para. 24 pp. 7-8. See: LONGOBARDO, M., *supra* note 205, pp. 22 ff.

the particularly limited number of vessels and victims (the sole issues referred)[410] and forgetting about a key element of the case: the sea.

Except for mighty naval reviews, military convoys, and more innocent regattas, the seas (particularly the high seas) are not typically overcrowded places, as magniloquently illustrated by the almost complete lack of accounts of maritime genocides.

Up until the Comorian referral to the ICC, whereas alleged WCs and CaHs crimes had been almost routinely judged by international and domestic legal authorities, this sizeable *cahier d'horreur* was quintessentially *land-centric* beyond the venerable -yet dated- nucleus of the jurisprudence of *Tokyo* and *Nuremberg*:[411] *si maritima licet componere terris*…!

Moving beyond the specific case (pardon, situation) of the *Freedom Flotilla* incident and the admissibility thresholds of the ICC, the deeper question -with no obvious answer- is whether and how should the maritime variable of crimes be treated in the context of the gravity assessment[412] and, more broadly, in the jurisprudence dealing with crimes-at-sea.

Perhaps it may be possible to delicately move the gravity assessment from an absolutist and abstract paradigm (gravity *as such*) to a more nuanced, contextualised and fact-based formula (gravity in *X context*).

Extending the method beyond the gravity inquiry, it may be helpful to acknowledge, at the very least, the existence of the marine element and to ponder on the potential *land-centric* bias influencing our vision.

3. Denying humanity: genocide, CaH, slavery and torture

After having referred to the crimes against humanity perpetrated in Libya by the Gaddafi and his regime, it is now time to provide a normative overview of crimes against humanity and

---

[410] *Ibid*. para. 25. 'events occurring on three vessels in the flotilla and does not extend to any events that occurred after passengers were taken off those vessels. As such, the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims'. ICC, Pre-Chamber I, Situation On The Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia, *Public Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, ICC-01/13,16 July 2015. In the same sense, *ex multis*, MELONI, C., The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity, *Questions of International Law* 33(2016), pp. 11-7.

[411] Up until now the bloodiest and most widespread conflicts ever seen in human history.

[412] Particularly since, as noticed by Longobardo, 'the ICC Statute does not provide a definition of gravity, nor does it contain any clue afs to when a case is of sufficient gravity.' LONGOBARDO, s*upra*, note 205, pp. 25-6. In the same sense also ROSCINI, M., Gravity in the statute of the International Criminal Court and cyber conduct that constitutes, instigates or facilitates international crimes, *Criminal Law Forum* 30(2019), p. 255.

genocide, having particular regard for their manifestation at sea. For the sole purposes of this study, genocide will be considered amongst the crimes against humanity, while torture (one of the conducts which can fall under the definition of CAH) will be considered as a separate crime which, if the contextual elements of the WC or the CAH are met, might also be a WC or a CAH.[413] The goal is to offer a compact overview of the crimes in order to later discuss the jurisdiction applicable to them.

3.1 Genocide: the 'crime of crimes' never(?) perpetrated at sea

'By "genocide" we mean the destruction of a nation or an ethnic group. […] generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. […] a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. […] genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.'[414]

Under Article 6 ICC St.,[415] genocide consists of 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group'.[416]

---

[413] As noticed by WILMSHURST, E., '14. Transnational Crimes, Terrorism and Torture', in Cryer, R. et al, *supra* note 151 p. 351, '[a]lthough the 'core' part of the CAT definition (the intentional infliction of severe pain or suffering) is also a constituent element of torture as a crime against humanity ad as a war crime, in some other aspects the definitions differ. Perpetrators are not limited to persons acting in an official capacity, and the list of prohibited purposes is extended -indeed, a requirement of purpose is omitted altogether for the prosecution of crimes against humanity before the ICC'. *Infra* para.

[414] LEMKIN, R., *supra* note 63, p. 79.

[415] taking almost *verbatim* the definition contained in Art. 2 of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide.

[416] the exact contours of customary definition of the crime, however, appear to be slightly unclear. Gaeta, P., 'Chapter 7. Genocide', in Schabas, W., Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Abingdon (2011), p. 109: 'Article II of the Genocide Convention can certainly be commended for having provided a legal definition to the 'crime without a name'. Nonetheless, the exhaustive enumeration of the protected groups and the prohibited acts has rendered more difficult the evolution of a parallel, and potentially wider, definition of the crime of genocide through customary international law'. SCHABAS, W., 'article 6. Genocide', in Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Munich, Oxford, Baden Baden (2016), pp. 127-143.

At the heart of the crime of genocide is the obliteration of the *social existence of the group*, an existence that is not merely biological or material and that can be denied by various means.[417] What matters for genocide is the individual *within a group and due to his belonging to a certain group*.[418]

The *actus reus* (a relatively straightforward and unproblematic issue)[419] of the crime of genocide, mirrors and addresses these lines of aggression against the existence of the various groups.[420] The various conducts appear to be quite elastic, covering virtually any hypothesis of material -biological- destruction of the group.[421]

---

[417] BOAS, G., BISCHOFF, J., REID, N. 'Genocide', in Boas, G., Bischoff, J., Reid, N. (eds.), *International Criminal Law Practitioner Library*, Cambridge (2009), p. 142. SANDS, P., *supra* note 64, p. 157: 'In his view [Lemkin's], the minorities treaties were inadequate, so he imagined new rules to protect 'the life of the peoples'. AMBOS, *supra* note 151, pp. 3-4; WERLE, *supra* note 43, pp. 192-3.

[418] See: ICTR, *Prosecutor v Nahimana et al.* (Media case) (ICTR-99-52-A), Appeal Judgement, 28 november 2007, para. 496, p. 156: 'the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group'. The ICTY and ICTR both adopted an identical formulation of the crime of genocide in their statutes: 'Genocide. 1. The International Tribunal for [...] shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group'. Also the crime is included in Article 28B of the Malabo Protocol of the African Court of Justice and Human Rights (not into force): 'For the purposes of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a). Killing members of the group; (b). Causing serious bodily or mental harm to members of the group; (c). Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d). Imposing measures intended to prevent births within the group; (e). Forcibly transferring children of the group to another group; (f). Acts of rape or any other form of sexual violence'. See AMBOS, K., 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)', in Werle, G., Vormbaum, M., (eds.), *The African Criminal Court*, International Criminal Justice Series 10, The Hague (2017), pp. 31-55; On the crime of Genocide, see *ex multis*: KREß, C., The Crime of Genocide under International Law, *International Criminal Law Review* 6(4)(2006), pp. 461-502; WERLE, G., 'Genocide', in Werle, *supra* note 43, pp. 186-213; SNEH, I.,'40 History of Genocide', in Natarajan, M., (ed.), *Introduction to International Criminal Justice*, Boston (2005), pp. 271—278; SCHABAS, W., Genocide in International Law: The Crime of Crimes, Cambridge (2009); WHITNEY R. HARRIS, W. R., KING, H. T., FERENCZ, B.J., Nuremberg and Genocide: Historical Perspectives, *Studies in Transnational Legal Policy* 40(1)(2009), pp. 9-56, AMBOS, K., 'Genocide', in Ambos, K., *supra* note 151, pp. 1-46; BRAMMERTZ, S., Reflections on Genocide, Studies in Transnational Legal Policy , 40(1)(2009), pp. 57-68; DRUMBL, M. A., 'The crime of Genocide', in Brown, B.S., *supra* note 57, pp. 37-62; BANTEKAS, I., *supra* note 150, pp. 203-21; O'KEEFE, *supra* note 161, pp. 145-54; WILMSHURST, E., '10 Genocide', in Cryer *et al.*, *supra* note 151, pp. 205-28; LEOTTA, C. D., *Il genocidio nel diritto penale internazionale. Dagli scritti di Raphael Lemkin allo Statuto di Roma*, Torino (2013); TSILONIS V., 'The Crime of Genocide and the International Criminal Court's Jurisdiction', in Tsilonis, V., *The Jurisdiction of the International Criminal Court*, Cham (2019); BOAS, G., BISCHOFF, J., REID, *supra* note 262, pp. 138-212. On the history of the crime of genocide see also the already quoted novel from SANDS, *East West Street* (*supra*, note 64).

[419] CASSESE, A. ET AL., *supra* note 107, p. 115.

[420] SCHABAS, *supra* note 264, pp. 173-6.

[421] including torture, rape, psychological traumas, starving to death, sterilization. *Supra* note 264. See: BANTEKAS, supra note 150, pp. 215-17. See for instance ICTR, *Prosecutor v Seromba Athanase* (ICTR-2001-66-A), Appeal judgment, 12 march 2008, para. 46 p. 18 'The quintessential examples of serious bodily harm are torture, rape, and

What is not elastic is the mental element, the mens rea. This is the characterising element of the crime of genocide: its specific intent or *dolus specialis*.[422]

Each individual perpetrator must share that intent to destroy (as a whole or in part) the group when committing the prohibited acts, in addition to having the intention to commit the acts themselves.[423] The perpetrator must, in particular, recognise the victim as a member of the group and act with the intention of destroying the said group.[424]

In fact, all the troubles (or at least, a great deal of them) arise from the identification of the group and the inclusion of the group amongst those whose persecution amounts to genocide. In other words, not every act aimed at the destruction of a group can be qualified as genocide,[425] but only national, ethnic, racial and religious groups are protected under the prohibition of genocide.[426] Unfortunately, there is no agreed definition of what the various groups are and how can a group be designated and identified.[427] As Professor Schabas observes in his monography, 'there is a debate about whether groups should be defined objectively, on the basis of criteria that anyone can apply, or subjectively, where only the perpetrators decide who is a member of a group and even what are relevant groups'.[428] While the characteristics of these groups have been widely

---

non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs. Relatedly, serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat". Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings'.

[422] LEOTTA, *supra* note 264 pp. 351 ff; O'KEEFE, *supra* note 151, p. 150; BOAS, BISCHOFF, REID, *supra* note 264 p. 160.

[423] WILMSHURST, *supra* note 264, pp. 220-22.

[424] AMBOS, *supra* note 151, pp. 18-9.

[425] KREB, C., The International Court of Justice and the Elements of the Crime of Genocide, *The European Journal of International Law* 18(4)(2007), p. 624: 'In rejecting a negative concept of 'protected group ' that is implicitly purely subjective, the Genocide judgment guards against the transformation of genocide into an unspecific crime of group destruction based on a discriminatory motive.'

[426] WERLE, supra note p. 193; O'KEEFE, supra note 161, p. 150; WILMSHURST, *ibid.*, pp. 210-2; BANTEKAS, *supra* note 150, p. 212; CASSESE, *supra* note 107, p. 115; KREB, *supra* note 266, p. 473. s

[427] In the *Akayesu* trial judgment, though, the Court sought to provide a definition of the groups. ICTR, *The Prosecutor V Jean-Paul Akayesu,* Trial Chamber I, 2 September 1998, Case No. ICTR-96-4-T (paras. 511-7): 'On reading through the travaux préparatoires of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner'. Since then, *Akayesu* has been regarded as an authority with regard to the definition of groups for the purposes of establishing the existence of genocide. See for instance the *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (n 6) para. 115. KREB, C., '27. The ICC's First Encounter with the Crime of Genocide. The Case against Al Bashir', in Stahn, C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford (2015) p. 671.

[428] SCHABAS, *supra* note 264, p. 40; In the same sense, AMBOS, *ibid.*, p. 5.

explored in the literature and case-law,[429] their meticulous discussion falls outside the scope of this Dissertation.[430]

In recent years, many, including political and religious authorities, have referred to the hecatomb of migrants and refugees who perished at sea as genocide.[431]

The exceptional imaginative power of the Lemkinian intuition is both a blessing and a curse. The blessing is evident: having found a name for absolute evil,[432] yet the curse is equally patent, as a great deal of iniquities are routinely referred to as genocide. In a sense, it is possible to theorise the parallel existences of two genocides: the genocide of lawyers and scholars and the genocide of the broader society. In the latter there seems to be quite a confusion over the term

---

[429] ICC, Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3, 4 March 2009, para. 135 p. 47. KREB, supra note 276, p. 684; AMBOS, *ibid.,* p. 6; ICC, *Akayesu, supra* note 276, para. 516.

[430] Since -in the almost absolute absence of historical evidence of maritime genocides- this analysis would not only require disproportionate time and energies but would likely be a purely speculative discussion reporting what has been thoroughly exposed elsewhere. See Schabas, *supra* note 266, p. 135: 'political, economic and social groups were quite intentionally excluded, because the drafters did not believe they should be protected by the terms of the Convention. During the drafting of the Rome Statute, there were unsuccessful efforts to enlarge the definition along these lines'. SCHABAS, *supra* note 266, p. 135: 'political, economic and social groups were quite intentionally excluded, because the drafters did not believe they should be protected by the terms of the Convention. During the drafting of the Rome Statute, there were unsuccessful efforts to enlarge the definition along these lines'. See also ZAHAR, A., SLUITER, G., 'Genocide Law: an education in sentimentalism', in Zahar, A., Sluiter, G., *International Criminal Law: a critical introduction*, Oxford (2008), pp. 158-62.

[431] HAYDEN, S., 'Mayor of Palermo accuses EU of 'genocide' against refugees', *The Irish Times*, 23 december 2019. https://www.irishtimes.com/news/world/europe/mayor-of-palermo-accuses-eu-of-genocide-against-refugees-1.4123029: 'At this moment there is another genocide in Libya and in the Mediterranean Sea. It's a genocide and we will not be able to say to our grandson or granddaughter that we did not know'.; MOORE, S., On immigration, the language of genocide has entered the mainstream, *The Guardian*, 20 April 2015 https://www.theguardian.com/commentisfree/2015/apr/20/immigration-language-of-genocide-british-politics; AL ARABIYA NEWS, 'Migrant boat tragedy slammed as 'genocide', 20 april 2015https://english.alarabiya.net/News/middle-east/2015/04/20/Migrant-boat-tragedy-slammed-as-genocide-: 'Malta's Prime Minister on Sunday slammed the human traffickers who he accused of risking people's lives by putting them on unstable ships in unpredictable waters after more than 700 migrants were feared dead in the latest Mediterranean boat tragedy. It's "genocide -- nothing less than genocide, really," Prime Minister Joseph Muscat told CNN. "Gangs of criminals are putting people on a boat, sometimes even at gunpoint … they're putting them on the road to death, really, and nothing else," Muscat adds'; LO CASTRO, R., 'Migranti: parroco che accolse Papa a Lampedusa, 'nel Mediterraneo genocidio'', Adnkronos, 24 april 2021 https://www.adnkronos.com/migranti-parroco-che-accolse-papa-a-lampedusa-nel-mediterraneo-genocidio_13FobFak2SMKPTFqtgiP5E; CAPORALE, A., 'Migranti: la conta dei morti nell'Olocausto mediterraneo', *Il Fatto Quotidiano*, 26 august 2014, https://www.ilfattoquotidiano.it/2014/08/26/migranti-la-conta-dei-morti-nellolocausto-mediterraneo/1099199/, referring to an 'indiscriminate genocide' (*genocidio indiscriminato)*, ignoring that genocide is the culmination of discrimination: it discriminates between those who are enabled to survive and those who are not.

[432] BECHKY, P., Lemkin's Situation: Toward a Rhetorical Understanding of "Genocide", *Brooklyn Law Review* 77(2)(2012), pp. 553-4.

and its meaning. 'for a meaningful segment of the public, genocide is different -and worse- than other atrocities. It is the "crime of crimes".[433]

As observed by Leila Sadat, '[s]everal experts underscored the difficulties of rallying international attention and support for preventing and punishing crimes against humanity. Many noted that unless a crime was described as genocide, its commission somehow seemed less of a problem and required no international response'.[434]

Genocide, in its essence, is 'only' the crime of trying to *destroy in all or in part a national, ethnic, racial or religious group*. Genocide, however, is not alone. As Sadat mentions and as it will be shown, conducts falling short of having the genocidal *dolus specialis* or targeting different groups are not ignored by international law nor are less severely condemned by law and moral conscience since many of them (if committed in a widespread and systematic manner against civilians) might quite likely fall within the CaH.

With regard to migrants and refugees at sea, even assuming that there is the intent to obliterate and erase them as a group, it is hard to identify which of the four categories of victims of genocide would they belong to. Also, *genocide by whom? What is the concrete actus reus of the alleged genocide and who would be its author?* Can the *actus reus* be found in the actions by migrant smugglers and human traffickers carrying their human cargo through dangerous waters in precarious conditions with the more than likely -almost certain sometimes- risk that some or all humans on board may perish[435] or should it rather be conceived as a *states-organised policy* consisting in the denial of safer ways to reach the destination sought by these desperate humans, by leaving them in the throes of waves and the mercy of humanitarian missions or even, in certain parts of the globe, pushing migrants back from their coasts?[436]

---

[433] For an articulate criticism of the concept of crime of crimes, see: MURRAY, A. R., Does International Criminal Law Still Require Crime of Crimes: Comparative Review of Genocide and Crimes against Humanity, *Goettingen Journal of International Law* 3(2)(2011), pp. 589-616.

[434] SADAT, L.N., *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, Whitney R. Harris World Law Institute Crimes Against Humanity Initiative (2010), https://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/02/CompHistoryFinal01-06-11.pdf, para. 24, p. 8.

[435] As suggested by the Maltese Prime Minister Muscat, *supra* note 307.

[436] Primarily in East Asia, where the Rohingya crisis -caused by the Myanmar persecution of the muslim minority- resulting in Rohingya's exodus to the nearby states (Bangladesh, India, Thailand, Malaysia etc.) saw extensive practice of refoulement and pushbacks of migranys, both on land and sea. See, *ex multis*, BELFORD, A., MUNAWIR, R., Migrants in 'maritime ping-pong' as Asian nations turn them back, *Reuters*, 16 May 2015 https://www.reuters.com/article/uk-asia-migrants-idUKKBN0O105O20150516. In the Mediterranean Area, the recent Covid-19 global Pandemic saw dozen of thousands of migrants pushback by European states resulting in some 2000 deaths (not all on the seas). TONDO, L., Revealed: 2,000 refugee deaths linked to illegal EU pushbacks, *The Guardian*, 5 May 2021 https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-

With regard to the targeted groups, for example, in the Mediterranean area, it is true that the majority of migrants are Muslims, African or middle-eastern, but it seems quite a vague and hardly cohesive group. If we refer to nationality, however, we will stumble across a mosaic of nationalities, from Syria to Senegal, from Algeria to Afghanistan. Which nationality should be taken into account? Every? None? The same happens when we consider ethnicity. With regard to religion, it is true that Islam is by far the predominant religion, but also many Christians perish at sea. If we instead considered *migrants as such* as a group -which can in fact be true- it would fall outside the scope of genocide. On the contrary, the pushback of the *Muslim Rohingyas*, abandoned on the high seas by the *Buddhist Thai authorities*, for example,[437] if proven to be *motivated by religious motives* -as it might *prima facie* appear- may reasonably fall under the scope of genocide.

This is not to say that migrants are not victims of atrocious crimes, but only that, in many cases, genocide is not the name to be given to their suffering.[438] Historically, however, at least *one* example of genocide at sea might be found.

In 1915, during the Armenian Genocide,[439] 'Riza Nur, […] at Trebizond, put on tenders 15,000 women and children, towed them out into the sea and dumped them overboard',[440] causing their death. Lord Bryce reports that '[a]ll was done by the will of the Government, and done not

---

deaths-linked-to-eu-pushbacks. Before the Pandemic in the ECHR *Hirsi case* 'the Grand Chamber of the European Court of Human Rights (Court) held that Italy's "push back" operations interdicting intending migrants and refugees at sea and returning them to Libya amounted to a violation of the prohibition of torture and other inhuman or degrading treatment under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention),the prohibition of collective expulsions under Article 4 of Protocol 4 to the Convention, and the right to an effective remedy under Article 13 of the Convention.' PAPANICOLOPULU, I., Hirsi Jamaa v. Italy. *The American Journal of International Law*, 107(2)(2013), p. 417. See: ECHR, *Case Of Hirsi Jamaa And Others V. Italy*, Application no. 27765/09, Judgment, 23 February 2012.

[437] See BELFORD, MUNAWIR, *ibid*.: 'One of those boats was towed away from the Thai coast by Thailand's navy on Saturday, only to be intercepted off the Malaysian coast. A Reuters journalist on a speedboat taken from southern Thailand's coast said that the people aboard had little shelter from the blazing sun. Some of the women were crying, and some passengers waved their arms and shouted. The International Organization for Migration has criticised Southeast Asian governments for playing "maritime ping-pong" with the migrants and endangering their lives. U.S. Secretary of State John Kerry on Friday urged Thailand to considering sheltering the homeless Rohingya and called on its neighbours not to send the migrants back out to sea.'

[438] The offences falling short of genocide due to the non-inclusion within the relevant groups may, in many cases, fall into the crime of persecution. AMBOS, K., *supra* note 151, p. 9.

[439] On the legal qualification of the Armenian Genocide, see: LATTANZI, F., PISTOIA, E. (eds.), *The Armenian Massacres of 1915–1916 a Hundred Years Later: Open Questions and Tentative Answers in International Law*, Cham (2018); SHAMSEY, J., 80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide. Journal of Transnational Law & Policy 11(2)(2002), pp. 327-384; DADRIAN, V. N., 'Armenians in Ottoman Turkey and the Armenian Genocide', in Shelton, D.L. (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Farmington Hills (2005), pp. 67-76.

[440] *Lausanne Treaty, Turkey and* Armenia (1926), p. 149.

from any religious fanaticism, but simply because *they wished, for reasons purely political, to get rid of a non-Moslem element which impaired the homogeneity of the Empire*, and constituted an element that might not always submit to oppression.'[441] 'The whole Armenian population of each town or village was cleared out, by a house-to-house search.'[442] 'They hunted out all the Christians, gathered them together, and drove a great crowd of them down the streets of Trebizond, [...] to the edge of the sea. There they were all put on board sailing boats, carried out some distance on the Black Sea, and there thrown overboard and drowned. *Nearly the whole Armenian population of Trebizond from 8,000 to 10,000 were destroyed [...] three-fourths or four-fifths of the whole nation has been wiped out'*.[443]

Another source adds different details that help to understand the wider context of the deliberate drownings, ticking every box of the definition of genocide, including the only recognised form of cultural genocide: 'the children torn away from their families or from the Christian schools, and handed over by force to Moslem families, or else placed by hundreds on board ship in nothing but their shirts, and then capsized and drowned in the Black Sea.'[444]

Whilst technically it is impossible to refer to the Armenian annihilation as genocide since the crime had yet to emerge, it is equally undeniable that both the *mens rea* and the *actus reus* of crime of the crimes were present in the atrocities committed against the Armenians: there was the *dolus specialis*, there was a biological elimination of the group, and the group itself was a religious, ethnic and national minority. The darkest of crimes on the innocent waters of the Black Sea.

The second part of the paragraph will provide a definition of CaH and their constitutive element and the potential overlaps with the crime of genocide with particular regard to the crimes perpetrated at sea of which the mistreatments and death of migrants are one of the most dire emergencies. In particular, in the subsequent subparagraph will be analysed the enslavement and trafficking in human beings and the torture and other inhuman and degrading treatments.

3.2 Crimes against humanity

[441] HORNE, C. *Great Events of the Great War*, New York (1923), p. 155.
[442] *Ibid.* p. 156.
[443] *Ibid.* p. 157-8
[444] GRANT, A.J., TEMPERLEY, H., *Europe in the nineteenth and twentieth centuries (1789-1932)*, London (1932), p. 576. See also LATTANZI, F., 'The Armenian Massacres as the Murder of a Nation?', in Lattanzi, F., Pistoia, E., *supra* note 289, p. 49.

Crimes against humanity is a label given by international criminal law to a series of barbarous conducts (murder, torture, slavery, persecution etc.) united by their context of widespread and systematic attacks against a civilian population.[445]

It must be preliminary observed that the concept of CAH is extremely vague or, to borrow the more poetic words of Larissa Van den Herik and Elies Van Sliedregt, 'is the most elusive one, a chameleonic crime that can change colour over time since it does not possess an unambiguous conceptual character'.[446] It is a category used to classify a rather heterogeneous non-comprehensive list of crimes whose common features, according to Cassese, consist in being odious attacks on human dignity or a grave humiliation or degradation of one or more people, part of a widespread or systematic attack, are prohibited *in bello ac pace,* the victims are civilians or at least non-combatants,[447] whose prohibition can be found principally in international human rights law.[448]

It is significant that, contrary to genocide, aggression and war crimes which all have a more or less robust and clear conventional and customary base (the Genocide Convention, Resolution

---

[445] ROBINSON, D., '11. Crimes against Humanity', in Cryer *et al. supra* note 151 p. 229. See on the CaH in general: CASSESE, A., *supra* note 107, pp. 84-108; WERLE, *supra* note 43, pp. 214-66; BANTEKAS, *supra* note 150, pp. 185-202; SCHABAS, W., 'Crimes against Humanity', in *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge (2006), pp. 185–225; ATADJANOV R. 'The Protected Legal Interests of Crimes Against Humanity and Other Core Crimes Under International Law: A Comparative Analysis', in Atadjanov, R., *Humanness as a Protected Legal Interest of Crimes Against Humanity*, International Criminal Justice Series, vol 22, The Hague (2019), pp. 277-307; DUBLER SC, R., KALYK, M., *Crimes against Humanity in the 21st Century*, Leiden (2018); BASSIOUNI, M.C., *Crimes Against Humanity: historical evolution and contemporary application*, Cambridge (2011); Kirsch, S., Two Kinds of Wrong: On the Context Element of Crimes against Humanity, *Leiden Journal of International* Law, 22 (2009), pp. 525–41; LUBAN, D., A Theory of Crimes Against Humanity, *The Yale Journal Of International Law* 89(2004), pp. 85-167; MACLEOD, C., Towards a Philosophical Account of Crimes Against Humanity, *The European Journal of International Law* 21(2)(2010), pp. 281–302; DEGUZMAN, M., The Road from Rome: The Developing Law of Crimes against Humanity, *Human Rights Quarterly* 22 (2000), pp. 335–403; MURPHY, S.D., Crimes Against Humanity And Other Topics: The Sixty-Ninth Session Of The International Law Commission, *The American Journal Of International Law* 111(4)(2017), pp. 970-93; SADAT, L.N. (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge (2011).

[446] VAN DEN HERIK, L., VAN SLIEDREGT, E., Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note, *Leiden Journal of International Law*, 23 (2010), p. 825.

[447] With only limited exceptions in the (criticised) case-law of the Extraordinary Chambers in the Courts of Cambodia (ECCC). See: KILLEAN, R., DOWDS, E., KRAMER, A., Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes against Humanity, *Leiden Journal of International Law* 30 (2017) pp. 685–705.

[448] CASSESE, *supra* note 107, pp. 90-2. In the same sense: SCHABAS, W., Prevention of Crimes Against Humanity, *Journal of International CriminalJustice* 16 (2018), p. 705: 'Crimes against humanity may usefully be thought of as a cognate of gross and systematic violations of human rights'. A negative definition of the crime has been advanced in KILLEAN, R., DOWDS, E., KRAMER, A., *ibid.*, p. 690: 'Crimes against humanity emerged as a distinct category of crime in order to continue narrowing this protection gap, by protecting individuals from extreme harm that fell outside the definitions of war crimes and genocide'. On the origins of the crimes against humanity, particular with regard to the ICTY jurisprudence, see: ZAHAR, SLUITER, *supra* note 283, pp. 197-204: 'The IMT in its judgment did not define or explore the legal foundations of crimes against humanity, preferring what was perhaps felt to be a robust, pragmatic approach to the question', *ibid.* p. 199.

3314/1974, the Hague Rules and the Geneva Convention *etc.*), up until now, there has been no treaty defining CaH, or at least, until the Rome Statute (with the exception of the *ad hoc* tribunals and the other international tribunals) no convention has positively defined CaH.[449]

Despite this *caveat*, all the proposed definitions of CAH henceforth reproduced are remarkably close to the formulation of Article 7 ICC ST. which can be therefore be considered as *the* (current) definition of CAH, but that due to the text itself and not due to the value and purpose of the Rome Statute as such.[450]

In light of this consideration, the discussions surrounding the constitutive elements of the crime will refer to the text of article 7(1) and 7(2) ICC St.: "crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. "[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.'

Moving onto the *stricto sensu* codification of the crime, several initiatives have been taken to elaborate a convention in recent years.

Two, in particular, deserve to be quoted. First (in chronological order), The Crimes Against Humanity Initiative, launched in 2008 by Leila Nadia Sadat of the Washington University of Saint Louise and eminent scholars and practitioners such as Professor Bassiouni, Schabas and Van den Wyngaert[451] who, in August 2010, published the text of their *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.*[452]

---

[449] Though, even with regard to the ICC Statute it must be reminded that far from constituting a codification of international criminal law, Art. 10 thereto holds that '[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.' INTERNATIONAL LAW COMMISSION, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries* (2019), General Commentary, para. 1 p. 22. VON HEBEL, H., ROBINSON, D., 'Crimes within the jurisdiction of the Court', in Lee, R.S. (ed.), *The International Criminal Court. The making of the Rome Statute: Issues, Negotiations, Results*, The Hague (1999), p. 88. WERLE, *supra* note 43, VON HEBEL, ROBINSON, *ibid*., p. 220; 90-103; SADAT, L. N., 'Preface and Acknowledgments', in Sadat L.N., *supra* note 294, pp. xxii-iii; JALLOH, C.C., The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?, *Case Western Reserve Journal of International Law* 52 (2020), p. 344.

[450] This definition repeats almost *verbatim* the one included in Article 7 of the Rome Statute. DEGUZMAN, M., Defining Crimes Against Humanity: Practicality and Value Balancing, *African Journal of International Criminal Justice* 6(1)(2020), p. 206.

[451] advised by other fifty-three experts, including Judge Hisashi Owada, Robert Cryer, Claus Kress, Goran Sluiter, Carsten Stahn, Mortem Bergsmo and others. For the complete list of the Advisory Council Members, see: https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2019/07/CAHIAlphaJanuary2019.pdf.

[452] For the text of the Draft, see: https://sites.wustl.edu/crimesagainsthumanity/convention-text/.

In 2015 Professor Murphy, in his capacity as a member of the ILC, proposed to include in the Commission's agenda a study on crimes against humanity.[453] In 2019, the ILC submitted a final text of draft articles to the General Assembly.

In Article 2 of the Draft, the ILC defines crimes against humanity as 'any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.[454]

The second paragraph of Draft Article 2 clarifies the meaning of the expressions used in paragraph 1. In particular, it provides a general definition of the *chapeau* (or umbrella or contextual element): '"attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.[455]

---

[453] JALLOH, C.C., *ibid*., pp. 343-4 ff.

[454] See for comparison the analogous (and rather similar) definition proposed by the The Crimes Against Humanity Initiative (hereinafter, CAH initiative): 'Article 3. For the purpose of the present Convention, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifi able group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. See: AMBOS, K. ET AL. 'Article 7 Crimes against humanity', in Triffterer, O., Ambos, K.(eds.), *The Rome Statute of the International Criminal Court: a commentary, Third Edition* (2016), pp. 145 – 295.

[455] Art. 2(2)(a). the definitions of the single conducts will be provided in the next paragraphs. The formulation of the attack against the civilian population and of the *actus reus* of the crime is almost identical to the one by the CAH

Significantly, this definition mirrors the text of Article 7 ICC St, which can be therefore regarded as the current codification of CAHs.

After having identified a definition of CAH, or at least having examined the more contemporary definitions of CAH, it is time to dissect its constitutive elements. This analysis will be articulated in three parts: a) the interest protected by the CaH; b) a concise analysis of the contextual elements; c) an equally breviloquent explanation of the nebulous boundaries between genocide and CaH with particular regard to the tragedy of migrants and refugees at sea.

As already mentioned, CAH covers, as mentioned in the Preamble of the ILC Draft, acts 'that deeply shock the conscience of humanity',[456] 'threaten[ing] the peace, security and well-being of the world',[457] whose prohibition is a recognised *jus cogens norm*.[458]

What differentiates, however, the crimes against humanity from their constitutive *actus reus*, is their context,[459] namely the presence of a widespread and systematic attack (against any civilian population).[460] The issue of the contextual element of the CAH has been thoroughly examined in the literature.[461]

---

initiative. For the definitions contained in the statutes of international tribunals from Nuremberg to the *ad hoc* tribunals, see, *ex multis*: INTERNATIONAL LAW COMMISSION, *supra* note 298, paras. 2-8, pp. 28-30.

[456] Para. 1. On the concept of humanity relating to the CAH, see: KUSCHNIK, B., Humaneness, Humankind and Crimes against Humanity. *Goettingen Journal of International Law*, 2(2) (2010), in particular, pp. 506-10:' the notion of humanity as it is used in international criminal law includes a wide spectrum of non-legal components. […] the notion of humanity is understandable as an individualistic specification of humaneness - rendered more precisely by the upholding of the mental or physical human condition - as well as the protection of human dignity. The component of humankind emanates from humanity, too. In concert, crimes against humanity are generally regarded as crimes, which due to their heinous nature shock the collective conscience of the peoples and therefore are of concern for the international community as a whole.'

[457] para. 2.

[458] para. 3. In the same sense, *ex multis*, WERLE, *supra* note 42, p. 220; AMBOS, *supra* note 151, p. 48: '"Crimes against humanity', [...] intend to provide penal protection against the transgression of the most basic laws protecting our individuality as political beings and our social entity as members of political communities. The transgressor, that is, the criminal against humanity, becomes an enemy and legitimate target of all humankind, a *hostis humani generis*, who, in principle, anyone ('the people') may bring to justice'.

[459] As noticed by Halling, the widespread or systematic context serves as a jurisdictional watershed, allowing to distinguish 'inhumane crimes handled exclusively by national jurisdictions from crimes against humanity, which is a category of international crimes'. HALLING, M., Push the Envelope –Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity, *Leiden Journal of International Law*, 23 (2010), p. 828.

[460] As already underlined, civilian population does not mean exclusively civilian, as confirmed by the prevalent case-law, *e.g.* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 (ex ICTY), *Prosecutor V. Vujadin Popovič et Al.,* IT-05-88-A, Appeals Chamber Judgment, 30 January 2015, para. 569 p. 194: 'The population targeted by the attack must be predominantly civilian, but there is no legal requirement that a certain proportion of the victims of the underlying crime be civilians'.

[461] See *ex multis*: BANTEKAS, *supra* note 150, pp. 196-8; ROBINSON, D., *supra* note 294, pp. 234-40; DEGUZMAN, M., '4. Crimes Against Humanity', in Brown, B.S. (ed.), *Research handbook on international criminal law*, Cheltenham (2011), pp. 68-76; AMBOS, *supra* note 150, pp. 50-78; WERLE, *supra* note 150, pp. 221-9; KOOPS, A. G., 'Defining International Crimes', in Knoops, A.G., *An Introduction to the Law of International Criminal Tribunals*. Leiden (2014), pp. 51-2; WERLE, G., BURGHARDT, B., 'Do Crimes Against Humanity Require the Participation of a State

'The specific seriousness of crimes against humanity in relation to ordinary crimes (*e.g.* fraud) and 'normal' human rights violations (*e.g.* denial of the right to associate in trade unions) is constituted of two characteristics. Crimes against humanity comprise *only the most severe violations of human rights* (e.g. violations of dignity, life, or freedom) and, in addition, *must be committed either systematically or on a widespread scale.*'[462]

As already mentioned, to qualify as a CAH, any attack against any *civilian population* must be characterised as widespread or systematic.[463] This is a settled element of CAHs.[464]

The first problem with this definition comes from the identification of the civilian population,[465] the meaning of which remains hotly debated, as illustrated by *Kunarac*: it 'does not mean that *the entire population of the geographical entity in which the attack is taking place* must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the *attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.*'[466]

The formula 'widespread or systematic' enables us to consider both quantitative and qualitative aspects of the crime.[467] As explained in Ambos' Commentary to the Rome Statute, 'the widespread element is neither to be assessed strictly quantitatively nor geographically but 'on the basis of the individual facts'. Thus, it is not limited to a geographic extent, but can include

---

or a'State-like' Organization?', *Journal of International Criminal Justice* 10 (2012), p. 1160: 'All the crimes under Article 7(1)(a)-(k) of the Statute have in common that they involve intentional violations of fundamental human rights. The contextual elements 'attack', 'systematic' and 'widespread', which overlap in meaning, essentially imply three things: (1) A wide variety of intentional violations of the most fundamental human rights occurs. (2) There is a systematic link between these violations that justifies combining them into one overall crime. (3) The overall crime is large in scale. Without the policy element, the basic normative message of crimes against humanity would be, in simplified form: violations of fundamental human rights are a threat to the peace, security and well-being of the world if they occur intentionally, systematically and on a large scale.'

[462] AMBOS, *supra* note 150, p. 55.

[463] HALLING, *supra* note 311; SCHABAS, W., 'Crimes against humanity', in *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone,* Cambridge (2006), p. 191.

[464] JALLOH, *supra* note 301, p. 386. ICTY, *Prosecutor V. Du[ko Tadi] A/K/A/ "Dule"*, IT-94-1-T, Trial Chamber Opinion and Judgment, 7 May 1997, paras. 647-8, p. 235.

[465] *Ex multis*, FERNANDEZ, R., ESTAPA, J., Towards single and comprehensive notion of civilian population in crimes against humanity, *International Criminal Law Review* 17(1)(2017), p. 48.

[466] ICTY, *Prosecutor V Dragoljub Kunarac*, Appeals Chamber Judgment, IT-96-23& IT-96-23/1-A, 12 June 2002, para. 90, pp. 27-8. Emphasis added.

[467] WERLE, *supra* note 150, p. 225; ICTY, *Prosecutor V Dragoljub Kunarac Et Al.*, IT-96-23& IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2012, paras. 93-4 p. 28: 'The requirement that the attack be "widespread" or "systematic" comes in the alternative. […] the phrase "widespread" refers to the large-scale nature of the attack and the number of victims, while the phrase "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence'.

large numbers in a small area.'[468] The systematic quality of the crime is slightly more problematic, as it has been often confused (not entirely unreasonably) with the doubtful necessity of a policy between the crimes.[469]

The problem is that originally all the crimes were intended as crimes perpetrated by states agents or pursuant to plans elaborated by the *de jure* or *de facto* authorities,[470] yet except for the crime of aggression, which implies *a state-to(or rather, against)-state* dynamic, war crimes, genocide and crimes against humanity can and have been perpetrated by non-state actors, such as private militias or other private actors, not to mention the increasingly relevant issue of corporate involvement in international crimes, which have all been and are still being studied in the literature and the case-law.[471]

Skipping the reasoning and moving to the conclusions of the debate, the most sensible opinion is that whilst a policy can perfectly integrate the requirement of a systematic attack, it is not *per se* necessary to prove or trigger its existence.[472] What matters is that it must be possible to identify a pattern since casual or unrelated attacks (unless, of course, they met the alternative threshold of a *widespread* attack) could not be regarded as a CAH.[473]

---

[468] AMBOS ET AL., *supra* note 307, para. 19, p. 170.

[469] As it will be seen, there is no agreement on whether policy is or should be an element of the CAHs.

[470] See: LEFKOVITZ, D., 'International Criminal Law: Crimes Against Humanity and Universal Jurisdiction', in *Philosophy and International Law: A Critical Introduction*, Cambridge (2020), pp. 186 ff. *Infra*, WERLE, BURGHARDT, note 378.

[471] *Ex multis* SWEET, J.H., Slave Trading as a Corporate Criminal Conspiracy, from the Calabar Massacre to BLM, 1767–2022, *The American Historical Review* 128(1)(2023), pp. 1–30.

[472] Although, as noticed by ROBINSON (*supra* note 294, p. 236), the necessity of a policy element remains controversial. In favour of the policy element see JALLOH, *supra* note 301, pp. 386-7: he believes the existence of a state policy to be one of the constitutive elements of CAHs under customary law. In the same sense also Bassiouni and Schabas, as mentioned in DEGUZMAN, M., '8. Crimes against Humanity', in Schabas, W., Bernaz, N. (eds.), *Routledge handbook of international criminal law*, Abingdon (2011), p. 129: '[they] believe that the concept of crimes against humanity does not embrace all serious violations of human rights, but only those perpetrated by members of a state, or perhaps, a state-like entity. For them, it is the perversion of state power that makes these crimes particularly evil and the likelihood they will go unpunished mandates the availability of international jurisdiction. Proponents of this view promote the inclusion of a state policy element in the definition of crimes against humanity. Only inhumane acts committed as part of a state policy to commit such acts rise to the level of a crime against humanity'.

[473] As allegedly confirmed by the most recent jurisprudence of the *ad hoc* tribunals endorsed by the ICC. AMBOS ET AL., *supra* note 307, para. 20, pp. 170-1. See, *ex multis*, ICTR, *Laurent Semanza V. The Prosecutor*, ICTR-97-20-A, Appeals Judgment, 20 May 2005, para. 269, p. 89: 'although the existence of a policy or plan may be useful to establish that the attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element'; ANDREOPOULOS, G., 'Genocide, War Crimes, and Crimes against Humanity', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010), p. 302: 'in discussing the policy element in the commission of crimes against humanity, the ICTY ruled in the Tadic case that state policy does not constitute any more a requirement for their commission: "In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory." thus, crimes against humanity could be committed by nonstate entities'; METTRAUX, G. 'The Definition of Crimes Against Humanity and the Question of a "Policy"

The final element -or perhaps the first- is the notion of attack. 'It refers more generally to a campaign or operation conducted against the civilian population – a 'course of conduct'.[474] The attack is the common frame of single individual behaviours. It is the *rationale* (if it can be called this way) behind the single acts of violence.

Using a musical metaphor, the attack is the symphony in which the various notes and musical phrases played by the various instruments cease to exist in their individuality to collectively create the symphony itself. Regardless of how many notes each of the musicians play, they all play the same symphony.

Back to law, '[o]nly the attack, not the individual acts of the accused, must be widespread or systematic'.[475] As the members of the orchestra are aware of the overall text of the symphony of which they happen to play a fragment, so is the *mens rea* of the perpetrators of CAH: the perpetrator must know of the existence of the attack and that his individual act forms part of this attack.[476] These are, in very basic terms, the key features of crimes against humanity. One last question needs to be answered: are CaH perpetrated at sea against migrants?

3.2.1 The Mediterranean migrants' hecatomb

Element', in Sadat, L., (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge (2011), p. 153: 'the requirement of policy is the equivalent of [the] requirement of widespread or systematic scale." This position seems to be correct. If the phrase "widespread or systematic attack against a civilian population" is given its due meaning, it seems that all or most of the concerns expressed by the supporters of the requirement of "policy" dissipate or become quite insignificant'.

[474] AMBOS ET AL., *ibid*., para. 15, pp. 165-6.

[475] *Ibid.*, para. 16, p. 166.

[476] AMBOS ET AL., *supra* note 307, para. 26 p. 175: 'Article 7 explicitly requires that the perpetrator must commit the acts with knowledge of the broader widespread or systematic attack on the civilian population. The second contextual element in the Elements of Crimes, common to all the individual acts of crimes against humanity of article 7, requires that '[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population''. In the same sense also the Elements of Crimes, Article 7 (Crimes against humanity), Introduction para. 2: 'The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack'; WERLE, *supra* note 150, pp. 230-1; BANTEKAS, *supra* note 250, p. 201; ROBINSON, *supra* note 294, pp. 243-4. The principle was affirmed in *Kunarac*, *supra* note 319, para. 102, pp. 31-2: 'the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack." […] This requirement […] does not entail knowledge of the details of the attack'.

Perusing the list of conducts of crimes against humanity, several come to the eye as potentially appropriate descriptions of the acts of violence against migrants in the Mediterranean and other seas.[477]

First, the most obvious, *murder* (Article 7(1)(a) ICC St.). The Elements of Crimes[478] clarify the meaning of the term, explaining that ""killed" is interchangeable with the term "caused death"", and '[t]his footnote applies to all elements which use either of these concepts'.[479] In light of this article, any death caused[480] to migrants would likely qualify as a CAH of murder, since -contrary to the term 'kill'- death can also be caused by omitting those acts that in the circumstances of the case would prevent it from happening.[481]

Similarly, *extermination*, Art. 7(1)(b). Again the elements of crimes establish that '[t]he perpetrator killed [caused the death of] one or more persons,[482], including by inflicting conditions of life calculated to bring about the destruction of part of a population'.[483]

More problematic seem to be, on the contrary, the elements of the crime of *persecution* (art. 7(1)(h)), perhaps the closest crime to genocide. For this crime to exist (quoting again from the EoC), '[t]he perpetrator severely deprived, contrary to international law, one or more persons of

---

[477] See in this regard the *Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Refugees in Libya* submitted to the Office of the Prosecutor of the International Criminal Court by three associations of jurists on the 17th january 2022, available at https://www.strali.org/warcrimeslibya. Whilst not specifically referring to the crimes perpetrated at sea, it offers nevertheless an insightful analysis on the crimes perpetrated against migrants in the Mediterranean Sea.

[478] Hereinafter, EoC.

[479] ICC Elements of Crimes, Article 7(1)(a). Crime against humanity of murder, note 7 p. 5; ROBINSON, *supra* note 294, p. 245.

[480] by leaving them without the necessary sources, by not rescuing them etc.

[481] See in this sense, with specific regard to migrations, KALPOUZOS I., International Criminal Law and the Violence against Migrants. *German Law Journal 21* (2020), pp. 578-9: 'there are two ways of conceptualizing the combination of action and omission and their role in the causing of death. The first is one based on omission, starting from the observation that states fail to avert death, and arguing for a legal duty, even if one cannot be established in extraterritorial search and rescue obligations, resulting from the states' prior endangerment of the migrants through their policies of making it harder and more dangerous for them to make the journey to claim asylum. The second calls for an integrated understanding of acts and omissions demonstrated in such policies. According to this approach the deaths are a direct consequence either of the distancing measures or of states' actions to stop rescue efforts. The latter could be observed in European states' decision to shift from Operation Mare Nostrum to Operation Triton, through which Italy in cooperation with the European Union stopped patrolling the sea outside its territorial waters in the knowledge that this would lead to the death of migrants'.

[482] Technically, the key difference between murder and extermination lies in the fact that the latter 'requires a surrounding circumstance of mass killing'. ROBINSON, *Ibid*; *ex multis*, IRMCT, *Prosecutor V Mico Stanišić and Stojan Župljanin*, Appeals Chamber Judgment, IT-08-91-A, 30 June 2016, para. 1021 p. 424: 'The Appeals Chamber recalls that the *actus reus* of extermination is "the act of killing on a large scale". It is this element of "massiveness" that distinguishes the crime of extermination from the crime of murder. However, the expression "on a large scale" does not suggest a strict numerical approach with a minimum number of victims. While extermination as a crime against humanity has been found in relation to the killing of thousands, it has also been found in relation to far fewer killings.'

[483] ICC Elements of Crimes, Article 7 (1) (b) Crime against humanity of extermination, para. 1 p. 6. AMBOS, *supra* note 150, pp. 83-4.

fundamental rights. 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law. 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court'.[484]

As with genocide, the question is whether migrants could be considered a 'political, racial, national, ethnic, cultural, religious, gender […] or other grounds that are universally recognised as impermissible under international law'. In this case, however, the list is more comprehensive, covering also political, gender and other (unspecified) grounds.[485] It would seem *prima facie* that discriminating migrants and leaving them at the mercy of the unmerciful waves in often unseaworthy overcrowded vessels[486] without basic supplies after long and painful journeys marked by any imaginable violence,[487] or sending them back to states in which they are likely or even sure to be victims of international crimes,[488] in many cases equates to a death sentence.[489] This is repugnant and contrary to any moral or legal principle.

---

[484] ICC Elements of Crimes, Article 7 (1) (h) Crime against humanity of persecution, paras. 1-4 p. 10.

[485] AMBOS, *ibid.*, p. 105: 'the object of the persecution is determined as 'any identifiable group or collectivity' […] persecution is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.

[486] *Supra* note 33.

[487] See: *Unlawful death of refugees and migrants - Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (A/72/335), 15 august 2017, para. 23, p. 8: 'In Libya, for example, the United Nations Support Mission in Libya (UNSMIL) reports widespread, gross human rights violations against migrants by armed groups, smugglers and traffickers, private employers, police, the Libyan Coast Guard and the Department for Combatting Illegal Migration. UNSMIL has reported that interceptions of migrant boats by Libyan coast guards have involved actions that may constitute arbitrary killings. 19 The International Criminal Court is considering "carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya"'. Also, *ibid.* para. 33 pp. 9-10: '"Pushback" measures, in addition to violating the principle of "non-refoulement," may also amount to excessive use of force whenever officials place refugees or migrants intentionally and knowingly in circumstances where they may be killed or their lives endangered because of the environment. This may include, for instance, "push-back" of Rohingyas and Bangladeshis on the high seas without water or food, or interdiction of disembarkation.'

[488] The 1967 Protocol to the Convention Relating to the Status of Refugees imposes on States the core principle of non-refoulement, now a rule of customary law: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[489] See: ICTR, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, 13 December 2004, para. 522, p. 169: '[T]he Appeals Chamber finds that the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death [actus reus], and that the accused intended by his acts or omissions this result [*mens rea*]'

The EoC, however, establish a rather stringent threshold: the discrimination of the group must be 'universally recognised as impermissible under international law'.[490] Are migrants a political group? Hardly so. They would more likely be a social one. Does international law explicitly and universally condemn discrimination against migrants as such or against any social group? It seems equally not entirely reasonable[491] and yet still unclear since it has not been analysed either in the literature or case law.[492]

Another problematic aspect concerning the application of the law of CaH to the migrants' hecatomb and the other horrors of which they are victims lies in the possibility of identifying the contextual element of a widespread or systematic attack against them.

In *Tadić*, it is required that 'the acts of the accused must comprise part of a *pattern of widespread or systematic crimes directed against a civilian population* and that the *accused must have known* that his acts fit into such a pattern.'[493] Whilst knowledge is not *stricto sensu* a part of the contextual element but rather of the *mens rea,* it nonetheless underlines the vital importance of *finding some clear and not purely casual thread*[494] linking the various conducts.[495]

---

[490] No explanation on the meaning and substance of the targeted groups is offered by the Commentary.

[491] A positive answer may be based on Article 6 (1) of the International Covenant on Civil and Political Rights, which provides that "[e]very human being has the inherent right to life" and that no one "shall be arbitrarily deprived of his life." In the same sense, Article 26 entitles everyone to protection of this right "without any discrimination".

[492] A limited, although quite axiomatic, reference can be found in KALPOUZOS, *supra,* note 330, pp. 582-3; KALPOUZOS, I., MANN, I., Banal Crimes against Humanity: The Case of Asylum Seekers in Greece. *Melbourne Journal of International Law* 16(1)(2015), pp. 14-8: 'Extant doctrine allows the application of these categories for the protection of asylum seekers […] While asylum seekers, as a collectivity, might not prima facie satisfy the enumerated categories, such an interpretation is possible and may find support in ICL jurisprudence. One such approach would stand on a wide interpretation of 'political' grounds. While there are cases of narrow interpretation of 'political grounds', 'other jurisprudence has found that political persecution occurred where discrimination has been effected pursuant to political motivations or a' political agenda against a group which itself may not hold any political views'.

[493]ICTY, *Prosecutor v. Tadić*, "Appeals Judgement", IT-94-1-A, 15 July 1999, para. 248.

[494] ICTY, *Prosecutor v. Radovan Karadžić,* Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV (TC), 24 March 2016, para. 477: 'While the term "widespread" refers to the large-scale character of the attack and the number of persons targeted, the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence. The assessment of what constitutes "widespread" or "systematic" is to be conducted on a case by case basis and may take into account the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, and any identifiable patterns of crimes.'

[495] As underlined by AMBOS (*supra* note 162, p. 56), 'The widespread or systematic commission of crimes increases the gravity of the single crime in that it multiplies the danger of the individual perpetrator's conduct, as a victim who is the object of a widespread or systematic attack is much more vulnerable than a victim of ordinary criminal conduct. In the latter case police or neighbours may be called for help, or victims can even defend themselves without having to fear retaliation by other co-perpetrators. Perpetrators of crimes against humanity also pose a greater threat because they are normally beyond the reach of the ordinary response of the criminal justice system. In this sense, Antonio Cassese noted that, in contrast to the perpetrator of an ordinary crime, a criminal against humanity may not fear punishment. On the contrary, collective action tolerated or supported by official policy or authorities helps to overcome natural inhibitions. What is more, not only is the danger presented by the single perpetrator increased,

In *Kordić and Cerkez*[496] and later in *Blaskić,*[497] the ICTY affirmed the disjunctive nature of the attack, which could be *either widespread or systematic*. *Prlić* clarifies this concept: '[t]his requirement is in the alternative, rather than cumulative. The adjective "widespread" refers to the attack being conducted on a large scale as well as to the high number of victims it caused, whereas the adjective "systematic" emphasizes the organised character of the acts of violence and the improbability of their random occurrence. Thus, it is in the "patterns" of the crimes, in the sense of *the deliberate, regular repetition of similar criminal conduct that one discerns their systematic character*. Among the factors which may be taken into account in determining whether the attack meets either or both conditions ("widespread" or "systematic") are the consequences of the attack on the civilian population targeted, *the number of victims, the nature of the acts, the possible participation of political officials or authorities, or any identifiable pattern of crime in the sense defined above*.'[498]

The determination of the existence of the contextual element must, therefore, be identified on a case-by-case basis with regard to the specific circumstances of the crime. As affirmed in *Kunarac, Kovac and Vukovic*, 'it is essentially a relative notion'.[499]

Whilst it is comparatively unproblematic to identify a pattern both in the actions of human traffickers and smugglers, on the one hand, and in the consistent policy of certain states to push back migrants to a probable death stranded at sea, on the other, it remains dubious whether these behaviours may constitute attacks. In the *Muthaura, Kenyatta and Ali* Decision of the confirmation of charges, however, the ICC recognised that 'the precise identification of targets by the attackers is indicative of the planned and systematic nature of the violence'.[500]

---

but each individual participant in the attack also helps to constitute the attack itself, and, thus, helps to constitute the atmosphere and the environment for the crimes of others.'

[496] ICTY, *Prosecutor v. Kordić and Cerkez*, "Judgement", IT-95-14/2-T, 26 February 2001, para. 178: '[I]t is also generally accepted that the requirement that the occurrence of crimes be widespread or systematic is a disjunctive one'.

[497] ICTY, *Prosecutor v. Blaškić,* "Judgement", IT-95-14-T, 3 March 2000, para. 207: '[f]or inhumane acts to be characterised as crimes against humanity, it is sufficient that one of the conditions be met. The fact still remains however, that in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation'.

[498] ICTY, *The Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Judgement (TC), 29 May 2013, para. 41. Emphasis added.

[499] ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic,* "Judgement", IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 430 'The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.'

[500] ICC, *Prosecutor v. Muthaura, Kenyatta and Ali,* "Decision on the confirmation of charges", ICC-01/09-02/11, 23 January 2012, para. 176.

The meaning of attack and targeting should not, however, be understood in a purely military sense but rather, as stated in *Perišić,* 'it may encompass any mistreatment of the civilian population'.[501]

Similarly, with regard to the requirement of the organizational element, authoritative scholars have argued that it should not been understood as limiting the potential authors to state apparatus, but it may apply also to private actors.[502]

In the hermeneutic fog surrounding the organizational element of the CaHs, it would seem quite reasonable to conclude that the systematic pushbacks carried, as a matter of policy, by many states[503] would appear to meet the definition of the CaH.[504]

---

[501] ICTY, *Prosecutor v. Perišić*, "Judgement", IT-04-81-T, 6 September 2011, para. 82. AMBOS, *supra* note 150, pp. 58-9: 'the attack need not necessarily be 'violent in nature' (e.g., the system of apartheid). Also, the acts that form part of an attack need not all be of the same type, but may be different.' On the notion of attack, *supra* notes 350-1. In the same sense, METTRAUX, G. '11 *Chapeau* Elements of Crimes against Humanity', in *International Crimes and the Ad Hoc Tribunals,* Oxford (2006), pp. 156-61.

[502] See in this sense WERLE, BURGHARDT, *supra* note 341. The Authors, in particular, have identified three main arguments against the limitation of the organizational element to state-sponsored crimes or state-like entities: 1) The Historical-Phenomenological Argument: State Criminality as an 'Ideal Type', which, '[b]y deriving normative conclusions directly from history or criminal phenomenology, advocates of a restrictive interpretation of the term 'organization' are succumbing to a naturalistic fallacy' (p. 1161); 2) The Substantive Argument: State-like Threat Potential: 'If the threat potential is the decisive question, all organizations having such potential have to be included. In that case, however, we cannot explain ruling out organizations that may not be state-like, yet have proven fully capable of committing widespread and systematic attacks on civilian populations.' (pp. 1161-2); 3) The Technical Legal Argument: Acts by Non-state Actors are not Violations of Human Rights: 'The idea that acts may not be human rights violations if they cannot be attributed to a state points, at most, to a problem of the conceptualization of international human rights law. […] The question of who commits an attack on the civilian population does not affect the presence of mass violations of individual rights.' (pp. 1163-4). Also, in the same sense, AMBOS, *supra* note p. 52: 'the ILC lists as possible perpetrators persons with 'de facto power or organised in criminal gangs or groups'. Thus, the Draft, in fact, retains the need for some kind of authority, or at least power, behind the crimes, simply clarifying that a non-state actor can also meet this element. Finally, the 1991 Draft Code does not require that the victims of crimes against humanity be civilians. The 1996 Draft Code, while reintroducing civilians as victims (Article 18), confirms the context-related structure, according to which the systematic or large-scale commission of crimes is only required as background for the individual criminal conduct, that is, the individual himself need not act systematically or on a large scale. On the other hand, it is similar to the 1991 Draft Code in that the authority behind the crimes may also be a non-state actor since it suffices that the crimes be 'instigated or directed by a Government or any organisation or group'. *Ibid.* p. 73. As the Author clarifies, the question of the broader or stricter interpretation of the organizational element ultimately depends on either the human rights or classical liberal criminal approach to the issue. *Ibid.* p. 74.

[503] As argued by Bou, 'The ICC Statute has adopted a restrictive interpretation of the term 'attack'. Pursuant to its Article 7(2)(a), this restrictive interpretation requires the existence of a course of conduct but, due to the influence of the ICTR case-law, it substitutes the reference to the 'commission of acts of violence' by the term 'multiple commission of acts referred to in paragraph 1'. This interpretation adds, as a new requirement, that these 'acts' must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack". BOU, V., 'Chapter Thirty-Two. Crimes Against Humanity In Contemporary International Law', in Constantinides, A., Zaikos, N. (eds.), *The Diversity of International Law*, Leiden (2010), p. 550.

[504] See: PLACHTA, M., International Report Filed with the ICC Accuses European Union of Crimes Against Humanity in the Libya Situation, *International Enforcement Law Reporter* 35(6)(2019), pp. 233-5. On the distinction (and, as a consequence, the possibility of cumulative convictions) between persecution and genocide, see ICTR, *Nahimana et al. v The Prosecutor, ICTR-99-52-A, Appeals Judgment* 28 November 2007, para. 1032 p. 322: '[T]he Appeals

Less clear is if the same could also be said of the abuses perpetrated by human traffickers and smugglers. While, collectively taken, their actions delineate a pattern, if a racket could be found, a web, something more tangible pointing to some degree of organization, this would make a stronger case for the qualification of their crimes as CaHs.[505] In the absence of such element, whilst not completely unplausible, it would be harder to define the atrocities inflicted against migrants as CaHs, considering, however, that any evaluation on the qualification of the conducts as CaHs must be strictly made on a case-by-case basis In particular, given the alternative requirements of the *widespread or systematic* attack, given the self-evident magnitude of the horrors inflicted upon migrants,[506] it may be possible that a court or tribunal may rely on the first element rather than the organizational or policy one to decide whether the absolute human rights abuses could fall under the definition of CaHs.[507]

In the subsequent subparagraphs, other aspects of the inhuman conditions inflicted on migrants and, more generally, on seafarers will be very briefly illustrated.

3.3 Slavery, enslavement, slave-related practices, modern slavery and trafficking in human beings

Chamber would recall that the crime of genocide *inter alia* requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such persecution, like the other acts enumerated in Article 3 of the Statute, must have been committed as part of a widespread and systematic attack on a civilian population. It was therefore open to the Trial Chamber to enter cumulative convictions'

[505] Even without requiring the recognisedly 'hypertrophic definition of "systematic"', proposed by the PTC I in *Blaskic*, chaotically conflating requirements derived from different sources. On the contrary, 'the common denominator in the various definitions of a systematic attack is that "a systematic attack is one carried out pursuant to a preconceived policy or plan". More explicitly, what constitutes the *systematic* character of the attack is the *guidance* provided for the individual perpetrators as to the envisaged object of the attack, namely the group of victims'. AMBOS, WIRTH, pp. 19-20.

[506] See AMBOS, WIRTH, *ibid*. p. 21: 'it may be concluded that all that a widespread attack requires is a large number of victims which, as stated in *Blaskic*, can also be attacked by a single conduct "of extraordinary magnitude"'.

[507] *Contra*: SCHABAS, W., '*Mens Rea*, *Actus Reus*, And The Role Of The State', in *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals,* Oxford (2012), pp. 139-40: 'Eliminating the state plan or policy element from crimes against humanity has the potential to make the concept applicable to a wide range of criminal acts that go beyond those that are merely random or isolated. Instead of insisting upon a state plan or policy, the contextual element for crimes against humanity comes to depend solely on their 'widespread or systematic' nature. Crimes against humanity become applicable to serial killers, mafias, motorcycle gangs, and small terrorist bands. This was certainly not what was intended by the United Nations War Crimes Commission, the London Conference, and the International Military Tribunal, when the category of crimes against humanity first received legal definition at the conclusion of the Second World War. Nor does it make good sense from the standpoint of the policy of international judicial institutions.'

> '"*Servi sunt." Immo homines. "Servi sunt." Immo contubernales. "Servi sunt." Immo humiles amici. "Servi sunt." Immo conservi, si cogitaveris tantundem in utrosque licere fortunae.'* (Seneca)[508]

Servi sunt, immo homines. The deprivation of freedom and dignity *vis à vis* the essence of humanity and the rights deriving from it. A complex factual and legal issue characterised by overlaps and confusion.[509] Ascertaining the exact boundaries between slavery, enslavement, slave-related practices, modern slavery and trafficking in human beings is not only a laudable intellectual pursuit, but it reverberates on the concrete rights and duties of individuals and states since, under Article 99 UNCLOS, '[e]very State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag', but offer no definition of 'transport of slaves', which must, therefore, be borrowed or inferred *aliunde*. In this regard, identifying the precise reference of Article 99 UNCLOS is anything but clear.

---

[508] SENECA, L.A., *Ad Lucilium Epistulae Morales: With an English Translation by Richard M. Gummere*. London (1917), pp. 301-2, *Littera XLVII*. 'They're slaves,' people say. No. They're human beings. 'They're slaves: But they share the same roof as ourselves. 'They're slaves.' No, they're friends, humble friends. 'They're slaves.' Strictly speaking they're our fellow-slaves, if you once reflect that fortune has much power over us as over them'.

[509] See on the topic: AMBOS ET AL., *supra* note 307, paras. 119-22 pp. 258-263; AMBOS, *supra* note 151, p. 85; PIOTROWICZ, R., The Legal Nature of Trafficking in Human Beings, *Intercultural Human Rights Law Review* 4 (2009), pp. 175-204; OBOKATA, T., Human Rights Framework to Address Trafficking of Human Beings, *Netherlands Quarterly of Human Rights*, 24(3)(2006), pp. 379-404; CORLISS, C., Human Trafficking as "Modern Slavery": The Trouble with Trafficking as Enslavement in International Law, *South Carolina Law Review*, 71(3)(2020), pp. 603-38; ATAK, I., SIMEON, J.C., Human Trafficking. *Journal of International Criminal Justice*, 12(5)(2014), pp. 1019-38; MCGREGOR, L., Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings. *Human Rights Quarterly*, 36(1) (2014), pp. 210-41; SILLER, N., 'Modern Slavery'. Does International Law Distinguish between Slavery, Enslavement and Trafficking?, *Journal of International Criminal Justice* 14 (2016), pp. 405-27; BASSIOUNI, M.C., Enslavement as an International Crime, *International Law And Politics* 23 (1991), pp. 445-517; OBOKATA, T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Leiden (2006); RIJKEN, C., A human rights based approach to trafficking in human beings, *Security and Human Rights*, *20*(3)(2009), pp. 212-22; VISEUR SELLERS, P., GETGEN KESTENBAUM, J., Missing in Action: The International Crime of the Slave Trade, *Journal of International Criminal Justice* 18 (2020), pp. 517–42; KOJIMA, *supra* note 24, pp. 4-17; ALLAIN, J., *The Slavery Conventions. The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Leiden (2008); ARONOWITZ, A., 'Understanding Trafficking in Human Beings: A Human Rights, Public Health, and Criminal Justice Issue', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010), pp. 118-25; STOYANOVA, V., 'Criminalisation Of Trafficking In Human Beings', in Planitzer, J., Sax, H. (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*. Cheltenham (2020), pp. 258-68; MCCREIGHT, M., Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on Comparative Perspective, *European Law Journal*, 12(1)(2006), pp. 106-29; SCOVAZZI, T., The Evolution of International Law of the Sea: New Issues, New Challenges, *Collected Courses of The Hague Academy of International Law - Recueil des cours* 286 (2000), p. 224; PIOTROWICZ, R., REDPATH-CROSS, J., 'Human trafficking and smuggling', in Opeskin, B., Perruchoud, R., Redpath-Cross J., (eds.), *Foundations of International Migration Law*, Cambridge (2012), pp. 234-59; BASSIOUNI, M.C., 'Specific Contents', in *Crimes against Humanity: Historical Evolution and Contemporary Application, Cambridge* (2011), pp. 374-81; KNUST N., LINGENFELTER K., 'Individual Criminal Responsibility Beyond the State: Human Trafficking as Both a Transnational and an International Crime', in Winterdyk J., Jones J. (eds.) *The Palgrave International Handbook of Human Trafficking*, Cham (2020), pp. 1765-84; MALLIA, P., *Migrant Smuggling by Sea: Combating a CurrentThreat to Maritime Security through the Creation of a Cooperative Framework*, Leiden (2010).

In particular, whereas some authors stick to a conservative and restrictive interpretation of slavery, requiring -as Guilfoyle- the existence of 'powers attaching to the rights of ownership over a person',[510] it is not uncontroversial what are these rights of ownership and whether they can be found in human trafficking, irrespectively of Article 99 UNCLOS.

Amongst the various arguments raised against the assimilation of the two concepts of human trafficking and the slave trade, it is observed that even though oftentimes fraudulently obtained or forced by need,[511] many people migrate 'voluntarily'.[512] Furthermore, while it is universally acknowledged that *trafficking and slavery are frequently strongly intertwined crimes*,[513] the defining features of trafficking 'are often determined by what happens after migrants reach their destination, rather than a set of distinctive experiences in traffic'.[514]

To put it differently, according to this perspective, trafficked humans, once they reach their destinations, often end up being slaves or subject to severe deprivation of fundamental rights and freedoms, yet *what happens during the voyage and its aftermath are two cognate but different issues*.

As recognised in the Preamble to the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[515] though, 'since the conclusion of the Slavery Convention signed at Geneva on 25 September 1926, which was designed

---

[510] GUILFOYLE, D., 'Article 99 Prohibition of the transport of slaves', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary,* München (2017), III Elements, para. 6 p. 732. LEAGUE OF NATIONS, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414, Article 1. 'For the purpose of the present Convention, the following definitions are agreed upon: (1) Slavery is the status or condition of a person over whom *any or all of the powers attaching to the right of ownership are exercised*.' Emphasis added.

[511] BOISTER, N., *An introduction to transnational criminal law,* 2nd edition, Oxford (2018), p. 62.

[512] QUIRK, J., *The anti-slavery project. From the slave trade to human trafficking,* Philadephia (2011), p. 217.

[513] In this sense HIGH COURT OF AUSTRALIA, *The Queen v Tang* [2008] HCA 39, *28 August 2008,* M5/2008, para. 116, p. 51: 'Human trafficking involves the movement, recruitment or receipt of persons, often by means of the threat or use of force, for the purpose of exploitation. As such, it commonly operates in conjunction with, or as part of, slavery.'

[514] QUIRK, *supra* note 565, p. 224. In the same sense Decaux: 'certes les migrations irrégulière peuvent favoriser à fois la traite des êtres humains […] [m]ais c'est l'exploitation clandestine qui est en cause, plus que le flux migratoires en tant que tels, d'autant que le mots <<traite>> (trafficking) et <<trafic>> (smuggling) ne doivent pas êtres confondus'. DECAUX, E., *Les formes contemporaines de l'esclavage*, Leiden (2009) pp. 66-7. See in the same sense the third Preambular paragraph of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and Article 4(a) thereto: 'Considering that trafficking in human beings may result in slavery for victims'; '"Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude* or the removal of organs.' Emphasis added.

[515] Hereinafter, Supplementary Slavery Convention or SSC.

to secure the abolition of slavery and of the slave trade, *further progress* has been made towards this end'.

It is interesting to notice, in this regard, the strong similarities existing between the conditions of the victims of IUU fishing and the 'serfdom' defined in Article 1(b) of the 1956 Supplementary Slavery Convention, in spite of the reference thereby made to the tenancy and the land, which obviously cannot apply on vessels: 'the condition or status of a tenant who is by law, custom or *agreement bound to live and labour* on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'.[516] In its essence, it seems that Article 1(d) purports to encompass not only the old, somehow still feudal, idea of serfdom but also its modern versions, either on land or across the waves, which also include the elimination of forms of compulsory labour.

Article 8 ICCPR, adopted less than ten years after the SSC, significantly combines slavery, servitude and forced labour, establishing that '1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour',[517] the only exceptions to the prohibition of forced labour being punishment for a crime, service of military character, service in case of emergency or calamity or civil service.[518]

Under Article 8 '[s]lavery occurs where one human being effectively 'owns' another, so that the former can thoroughly exploit the latter with impunity. […] 'Servitude' refers to other forms of egregious economic exploitation or dominance exercised by one person over another, or 'slavery-like' practices […] forced or compulsory labour […] is essentially defined in ILO

---

[516] Emphasis added.

[517] Repeating almost *verbatim* Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950: 'ARTICLE 4 Prohibition of slavery and forced labour 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. For the purpose of this Article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.'

[518] (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include (i) any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) any work or service which forms part of normal civil obligations.

Convention 29 as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[519]

As seen, under Article 1 of the 1926 Slavery Convention, slavery was the condition of a person over which *any of the powers* attached to the right of ownership was attached. *Any* of the powers, not necessarily the exercise of the full extent of ownership rights.

In its paper on Transnational Organized Crime in the Fishing Industry (2011), the UNDOC identified two distinct contexts in which fishing and human trafficking intersect. First, as previously seen 'migrant labourers and fishers fall prey to *human traffickers as victims of trafficking for the purpose of forced labour on board fishing vessels*, rafts or fishing platforms, in port, or in fish processing plants. In this instance fishing operators or fish processing operators are creating a demand for victims of trafficking. [...] human trafficking for the purpose of forced labour, as this seems to be the most prevalent form of exploitation in the fishing industry and of a character particular to this industry'.[520]

Besides the recruitment of fishers and fishing vessels crews, their condition of absolute subjugation is also demonstrated by the frequency and gravity of the physical and psychological abuses perpetrated against these people, frequently resulting in their death. In this context, specifically, '"coercion" may take the form of physical confinement. Fishers are reportedly locked up or chained whilst at sea. Victims are subjected to threats of financial penalties such as non-payment. They can also be threatened to be reported to the immigration authorities to facilitate deportation.'[521]

---

[519] JOSEPH, S., CASTAN, M., *The International Covenant On Civil And Political Rights. Cases, Materials, and Commentary, Third Edition*, Oxford (2013), paras. 10.04-05, p. 330. See in the same sense Article 3(a) of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime: 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.

[520] UNDOC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011), p. 25 https://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf.

[521] *Ibid.* pp. 30-1.

It should be asked *which (if any) elements of freedom*[522] remain upon the victims of these acts or, to put it differently, what, if any, *of the powers attaching to the right of ownership are exercised* is *not* encompassed by them.[523]

The *UN Slavery, slave trade, and other forms of servitude report* (1953) in this sense already identified six characteristics of the right of ownership pursuant to Article 1 of the 1926 Slavery Convention: '1. the individual of servile status may be made the object of a purchase; 2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law; 3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour; 4. the ownership, of the individual of servile status can be transferred to another person; 5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; 6. the servile status is transmitted' ipso facto to descendants of the individual having such status'.[524]
Furthermore, this Report recommended,[525] *inter alia*, '*to study movements of population*, such as pilgrimages, labour migrations, etc., *and their relation to the clandestine traffic in slaves*; and to devise such means as may be necessary to check the exploitation of individuals participating in such population movements'.[526]

In other words, back in 1953, the international community already acknowledged (at least *dubitatively* and in an explorative manner) the links and definitional challenges between

---

[522] See, ICC Elements of Crimes, Article 7 (1) (c) Crime against humanity of enslavement. Elements 1. The perpetrator exercised *any or all of the powers attaching to the right of ownership* over one or more persons, such as by *purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.* Emphasis added. It should also be noticed that Regulation 2.1 of the Maritime Labour Convention (2006) expressly stipulates the freedom of seafarers to choose whether or not accept the proposed working conditions: '1) The terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code and 2) Seafarers' employment agreements shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.' The maritime labour convention, though, does not apply to fishers, disciplined by the MLC - Maritime Labour Convention, 2006 (MLC, 2006), entered into force on 20 August 2013.

[523] As argued by MACFARLANE, *supra* note 190, p. 113, 'slavery extends to the de facto condition, and that it exists on a continuum with other forms of severe exploitation, it is argued that the slave trade thus encompasses the acquisition of vulnerable persons through manning agents with the intention to reduce them to conditions amounting to slavery [...] In other words, for a person at sea to find themselves in conditions that amount to slavery, it must follow that, at some previous juncture, they were acquired by the person who now exercises over them-the powers attaching to the right of ownership. Furthermore, the control of that person through any act of coercion implies the intent to reduce them to slavery. Such a vessel would, therefore, be engaged in the slave trade'.

[524] UN, *Slavery, the slave trade, and other forms of servitude: report / submitted by the Secretary-General pursuant to resolution 388 (XIII) of the Economic and Social Council, of 10 September 1951*, 27 January 1953, p.28

[525] Recommendation E of the ad hoc Committee (E/1988, pp. 25-26).

[526] *Supra* note 581, letter (e), p. 56.

migrations and the *unofficial* slave trade. It should not be forgotten that the *existing definitions of slavery which might integrate UNCLOS are, in the best case, almost seventy years old,*[527] and in the meantime, both the social dynamics and *the notion of slavery have radically evolved*.[528]

In this context, has emerged the so-called modern slavery, which, in public conscience, has essentially replaced or at least updated or integrated the classical idea of slavery.

Significantly, in this sense, Article 7(1)(c) ICC St. lists among the CAHs the crime of enslavement, the *actus reus* of which consists in the 'exercise[] [of] any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a *similar deprivation of liberty*'.[529] Note 11 thereto further clarifies the meaning of *deprivation of liberty*, which 'may, in some circumstances, include exacting *forced labour* or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'

While the definition of enslavement accepted in the RS encompasses and includes the crime of trafficking in human beings (as they are *reified* like any other commodity), the latter is autonomously defined in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol):[530] '"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, *by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent*

[527] Referring to the 1956 Slavery Convention. With regard to the first Geneva Convention, almost a century has passed since its adoption.

[528] See in the same sense Article 4 of UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),: 'No one shall be held in slavery or servitude; *slavery and the slave trade shall be prohibited in all their forms.'* See in this sense ALLAIN, J., Slavery and Its Obligations Erga Omnes, *Australian Yearbook of International Law* 36(2018), p. 87: 'The prohibition was codified into law in 1966 via Article 8 of the International Covenant on Civil and Political Rights which, as of the end of 2018, has 172 States Parties.5 These elements-the prohibition's inclusion in the Universal Declaration, the near universality of the Covenant-along with the acceptance of the prohibition as one of the peremptory norms of general international law, all speak to the prohibition of slavery being accepted as general international law.' in the specific context of the ECHR, the Court has stated in multiple occasions the necessity of interpreting the Convention and the rights consecrated therein in an evolutive manner, consonant with the Convention's status as a *living instrument. Ex multis:* ECHR, SECOND SECTION *Case Of Siliadin V. France* (Application no. 73316/01), 26 july 2005, para. 121, p. 33.

[529] ICC Elements of Crimes, Article 7(1)(c) Crime against humanity of enslavement, para. 1, p. 16.

[530] *Supra* note 112. KNUST, LINGENFELTER, *supra* note 346 p. 1766.

of a person having control over another person, for the purpose of exploitation.[531] Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'[532]

In brief, currently, *there are two crimes of trafficking,*[533] *one a standalone offence and one as the CAH of slavery,*[534] provided that the conditions required by the contextual element are met.[535]

Starting from the CAH of slavery, the most punctual analysis of the crime, its sources, and its development can be found in the ICTY *Kunarac* trial and appeals judgments.[536] Among the various passages of the judgments, a couple of passages need to be quoted due to their relevance to the crime problem at sea.

First, forced or compulsory labour is a cognate crime of slavery. As recalled by the Trial Chamber, '[t]he 1957 Convention Concerning the Abolition of Forced Labour ("Forced Labour Convention") was [...] drafted under the auspices of the ILO and was intended to complement the Slavery Convention, the Supplementary Slavery Convention and the Forced and Compulsory Labour Convention'.[537]

---

[531] See in this sense CANADA, SUPREME COURT, *B010 v. Canada* (Citizenship and Immigration), 2015 SCC 58 (CanLII), [2015] 3 SCR 704, 27 november 2015, para. 51: '*A key distinction between the Smuggling Protocol and the Human Trafficking Protocol lies in the concepts of coercion and consent.* The latter protocol defines human trafficking as involving threats or use of force, abduction, deception, fraud or other forms of coercion against the trafficked person. By contrast, the Smuggling Protocol applies to cases where the smuggler and the smuggled agree that the former will procure the latter's illegal entry into a state, in consideration of a financial or other material benefit. *While the lines between trafficking and smuggling may sometimes blur, the presence or absence of consent remains an organizing principle of the two Palermo Convention protocols.'* Emphasis added.

[532] VAN DER WILT, *supra* note 346, pp. 301 ff.

[533] Or at least two complementary manifestations of the same crime.

[534] On the intersection between human trafficking and art. 7 ICC St., see: POCAR F., 'Human Trafficking: A Crime Against Humanity', in Savona E.U., Stefanizzi S. (eds.) *Measuring Human Trafficking,* New York (2007), pp. 5-12: 'The following acts listed in Article 7 of the Rome Statute may be considered in relation to human trafficking: enslavement, deportation or forcible transfer, sexual slavery and enforced prostitution, and finally the catch-all clause, "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". *Ibid.*, p. 7; VAN DER WILT, *supra* note 15, p. 5: 'The dividing line between trafficking in human beings and slavery, for instance, is porous and the former may qualify as a crime against humanity, provided that the contextual elements are met'.

[535] ALLAIN, *supra* note 346 p. 444. In this sense, on the distinction of organised crime and CAHs: HAUCK, P., '21 Transnational Organised Crime and International Criminal Law', in Hauck, P., Peterke, S. (eds.) *International Law and Transnational Organised Crime*, Oxford (2016), p. 455: 'Although the scope of Article 7(1) ICCSt has been escalated in recent years, such a situation does not occur in the course of ordinary transnational organised crime: victims of such crime do not need special protection by international human rights law [...] but ordinary protection by regular criminal law'.

[536] ICTY, *Prosecutor V. Dragoljub Kunarac* et al., IT-96-23-T, Trial Chamber Judgment, 22 February 2001, paras. 515-43 pp. 178-94; ICTY, *Prosecutor V. Dragoljub Kunarac* et al., IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002, paras. 116-23 pp. 35-8.

[537] *Ibid.* para. 521 p. 179.

The evanescent boundaries between the two crimes could already be found in the Nuremberg trials, where, according to the Chamber, 'no attempt [was made] to define these concepts or to draw a systematic distinction between deportation to slave labour and enslavement.'[538]

In practice, trafficking and forced labour are often intertwined, particularly at sea. What begins as a case of trafficking (or at least irregular migration) often ends up in forced labour or slavery situations, as documented *ex multis* in the 2014 Report on the Thai fishing industry elaborated by the Environmental Justice Foundation.[539]

Beyond these considerations, however, from our point of view, the most significant statement of the Tribunal is that *the crime of slavery tends to encompass what has been historically perceived as slavery, to include 'the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law'*.[540] Furthermore, while the Tribunal does not say that human trafficking constitute a form of enslavement, it nevertheless highlighted the close relationship between them, arguing that '[f]urther indications of enslavement include […] human trafficking'.[541]

Moving to the parent phenomenon of *smuggling of migrants,* Article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime allows to identify two complementary *rechtsgüters* affected by the smuggling: not only 'the activities of organized criminal groups in smuggling of migrants and other related criminal activities' 'bring great harm to the States concerned',[542] but they can also endanger the lives or security of the migrants,[543] as signified, *inter alia*, by the imperative recognition as aggravating circumstances those entailing '*inhuman or degrading treatment, including for exploitation of such migrants*'.[544] In other words, the Smuggling Protocol patently recognises the profound connection between slavery, enslavement and trafficking in human beings.

---

[538] *Ibid*. para. 523 p. 181.
[539] EJF, *SLAVERY AT SEA: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry* (2014), p. 9; *supra* para. 1. See: MUTAQIN, Z.Z., 'Modern-Day Slavery at Sea: Human Trafficking in Thai Fishing Industry', in Lee, E.Y.J. (ed.), *ASEAN International Law*, Singapore (2022), pp. 461-80.
[540] *Ibid*. para. 541. In the same sense, ICTY, *Prosecutor V Dragoljub Kunarac Radomir Kovac And Zoran Vukovic,* Appeals Chamber Judgment, IT-96-23& IT-96-23/1-A, 12 June 2002, paras. 117-9, pp. 35-6.
[541] *Ibid*. para. 542.
[542] *Ibid*. para. 6: 'Also concerned that the smuggling of migrants can endanger the lives or security of the migrants involved'.
[543] *Ibid*. para. 6.
[544] Article 6(3)(b). Emphasis added.

In conclusion, persisting interpreting the notion of slavery -under Article 99 UNCLOS and beyond it- through the anachronistic lenses of the 1926 and 1956 Geneva Conventions does not seem reasonable or acceptable. On the contrary – following the principles of *evolutive interpretation*[545] *and systemic integration-*[546] it should encompass '*modern slavery*',[547] as argued by substantial literature.[548]

3.4 Torture and other inhuman and degrading treatments

---

[545] Also referred to as 'evolutionary', 'evolutional' 'progressive' or 'dynamic' interpretation. On the notion of evolutive interpretation see: DJEFFAL, C., *Static And Evolutive Treaty Interpretation. A Functional Reconstruction*, Cambridge (2016).

[546] Its reason, as explained by MCLACHLAN, C. (2005). The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention, *The International and Comparative Law Quarterly*, *54*(2)(2005), p. 282, is that 'the content of international law changes and develops continuously - it provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism.' In this sense, it serves a dual purpose: it ensures the coherence of the legal system and it avoids the risk of anachronistic crystallizations. Similarly, Virzo explains that Article 31(3)(c) VCLT seeks 'to avoid an international treaty being interpreted and applied as if it established a self-contained regime and, therefore, mitigate the risk of progressive fragmentation of international law'. VIRZO, R., 'The 'General Rule of Interpretation' in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea', in Del Vecchio, A., Virzo, R. (eds.) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Cham (2018), p. 27.'

[547] In the same sense Article 5 of the Charter Of Fundamental Rights Of The European Union, 2012/C 326/02: '*Article 5*. Prohibition of slavery and forced labour. 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings is prohibited.'

[548] *Ex multis:* BROLAN, C., An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from Refugee Protection Perspective, *International Journal of Refugee Law* 14(4)(2002), pp. 561-96; KOJIMA, *supra* note 300; PAPPA, M., UNSCR 1325 and Maritime Security, *Max Planck Yearbook of United Nations Law Online*, *24*(1)(2021), p. 144: 'Another criminal activity is illegal, unreported, and unregulated fishing (IUUF), which takes place in many parts of the world. Women and young children are subject to forced or unpaid labour on fishing vessels or markets. What is more, IUUF is often associated with human trafficking. Many women and girls who are forced to work in fishing are also victims of sexual abuse and exploitation. *This constitutes a modern-day case of slavery*, threatening human security.' (Emphasis added); SURTEES,R., Trapped at Sea. Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers, *Groningen Journal of International Law* 1(2)(2013) p. 122; VAN DER WILT, H., Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts, *Chinese Journal of International Law* 13(2)(2014), p. 298 (see the sources cited at note 3); GALLAGHER, A., DAVID, F., *The International Law of Migrant Smuggling*, Cambridge (2014), p. 424. While the Authors refuse the general idea of modern slavery *as such*, they recognise that conducts of 'exploitative smuggling of migrants' may be characterised as slave trade: 'While avoiding the temptation to expand the definition of slavery beyond what is correct and appropriate, it is nevertheless important to recognize that the concept is indeed evolving and may well accommodate (presently, or at some point in the future) egregious forms of exploitation that involve the clear exercise of powers attached to the right of ownership. The possibility certainly exists that vessels engaged in transporting migrants for profit may also be engaged in conduct that could be characterized as slave trading.'; PAPASTAVRIDIS, E., Interception of human beings on the high seas: contemporary analysis under international law, *Syracuse Journal of International Law and Commerce* 36(2) (2008), pp. 164 ff.; MUTAQIN, Z. Z., Modern-day slavery at sea: human trafficking in the Thai fishing industry, *Journal of East Asia and International Law*, 11(1)(2018), pp. 75-98. *Contra:* ALLAIN, J., 'Immanent Critique: International Law and the Dubious Case-Law on Slavery', in *The Law and Slavery* Leiden (2005), pp. 230-50; BOYLE, A., Further Development of the Law of the Sea Convention: Mechanisms for Change. *The International and Comparative Law Quarterly*, *54*(3)(2005), p. 565.

As seen in the previous Paragraph, the Smuggling Protocols seek to end the infliction of inhuman and degrading treatments[549] upon migrants. The problem of IADT, however, does not concern only migrants, but -being a denial of fundamental human rights- is a matter for humanity as such.[550]

The expression IADT appears identically in Article 5 of the Universal Declaration Of Human Rights[551] and Article 7 of the International Covenant On Civil And Political Rights[552] affirming that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', a prohibition of recognised *jus cogens* character.[553]

In this Paragraph, a brief introduction will thus be provided of the crimes of torture and inhuman or degrading treatment, mindful of the absolute magnitude of the topic.[554]

---

[549] Hereinafter, IADT.

[550] To quote a famous verse of Terence, '*homo sum; humani nihil alienum a me puto*'. TERENTIUS, P.A., *Heauton Timorumenos*, 1.1,25.

[551] Hereinafter, UDHR.

[552] Hereinafter, ICCPR.

[553] COMMITTEE AGAINST TORTURE, Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, *General Comment No. 2,* CAT/C/GC/2 24 January 2008, para. 5; ICTY, *The Prosecutor v. Anto Furundžija,* IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, Paras. 143-4, pp. 54-5; 153, pp. 58-9: 'The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace. In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or jus cogens. […] the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force'. See also *supra* note 95.

[554] See in general on torture and inhuman and degrading treatment as CAHs and autonomous crimes: TAYLOR, P., 'Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment', in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights,* Cambridge (2020), pp. 171-217; ROTH, B.R., Just Short of Torture. AbusiveTreatment and the Limits of International Criminal Justice, *Journal of International Criminal Justice* 6 (2008), pp. 215-39; SCHABAS, W., SAX, H. (eds.), *Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty*, Leiden (2006); CASSESE, A., '13. Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in Cassese, A., Gaeta, P., Zappalà, S. (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese,* Oxford (2008), pp. 295-331; OETTE, L., 'Universal and extraterritorial jurisdiction for torture', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*. Cheltenham (2020), pp. 357-77; PORTEOUS, T., '26. Torture today', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention,* Cheltenham (2020), pp. 567-71; CRYER, R., '13. International law, crime and torture', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*, Cheltenham (2020), pp. 288-313; COMMITTEE AGAINST TORTURE, *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, General Comment No.*

As previously mentioned, the peculiarity of torture lies in its parallel existence as a WC or CAH and as what is commonly regarded as a transnational crime.[555]

In spite of the multiple lives of our crime, a definition seems to be lacking, or at least, it remains unclear. In this paragraph we will therefore inquire about the core of torture and IADT. According to Article 1 of the United Nations Convention against Torture (UNCAT), torture refers to '*any act by which severe pain or suffering, whether physical or mental [is inflicted]*'.[556] This is the core of the definition common both to torture as a discrete crime (as in Cassese's words)[557] and as a CAH.

Whilst the latter requires the existence of the already analysed contextual element of a widespread and systematic attack, its definition does not require either the commission or instigation or acquiescence by a public official or a *de jure* or *de facto* state authority nor the specific intent (*dolus specialis*) that the pain and suffering must be employed to obtain a confession or a piece of information, to punish the victim or someone else or to coerce them,[558] necessary under the definition of torture as a discrete offence.

In essence, the definition of torture as CAHs (and WCs) is wider than torture as an autonomous crime in spite of some jurisprudential disagreement,[559] as confirmed by the structure accepted in

---

2, 24 January 2008; RODRÍGUEZ-PINZÓN, D., MARTIN, C., *The Prohibition Of Torture And Ill-Treatment In The Inter-American Human Rights System, A Handbook For Victims And Their Advocates*, World Organisation Against Torture (OMCT), Geneva (2014); SEDDIGHZADEH, H., 'Developing A Universal Standard Of Care For Victims Of Trafficking Under The Guiding Principles Of Non-State Torture', in Winterdyk, J., Jones, J. (ed.), *The Palgrave International Handbook of Human Trafficking*, Cham (2020), pp. 195-205; MCCALL-SMITH, K., Treaty Bodies: Choreographing the Customary Prohibition against Torture, *International Community Law Review* 21 (2019) pp. 344–68; SMEULERS, A., GRÜNFELD, F., 'IV Torture', in *Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*, Leiden (2011), pp. 119-58; AMBOS, *supra* note 151, pp. 89-92; AMBOS ET AL., *supra* note 307, para. 52, pp. 204-6; ROBINSON, *supra* note 296, pp. 249-51; WILMSHURST, *supra* note 259, pp. 346-51; CASSESE, *supra* note 107, pp. 95-6, 132-5; WERLE, supra note 150, paras. 709-20 pp. 244-7; BANTEKAS, supra note 150, pp. 231-2.

[555] *Supra* note 259. GUILFOYLE, *supra* note 298, p. 804.

[556] Emphasis added.

[557] *Supra* note 371.

[558] UNCAT art. 1 in the omitted part establishes in fact that the pain and suffering must be ' intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. AMBOS, *supra* note 151, p. 89.

[559] For instance in *Furundžija* (*supra* note 370), referring to torture in the context of armed conflicts, it is held that 'the elements of torture in an armed conflict require that torture: (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.'

the EOC.[560] As noticed in *Akayesu*, '[t]he United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence'[561] nor does in fact, in spite of its name, offer any definition of IADT, which must therefore be identified in the case-law.[562]

Before seeking to provide a brief and congenitally incomplete list of acts amounting to torture or likely to amount to torture,[563] a couple of words on the issue of *gravity*.

As already seen, gravity is a chronic pain in international criminal law, and torture and IADT make no exception. With regard to torture and IADT, a distinction has been proposed between '*[c]onduct constituting torture* per se' and '*[c]onduct that may be proven to constitute torture*'.[564]

The *discrimen* between these two categories has been found in the more substantial gravity of the latter as a requirement for the inclusion of those conducts in the definition of torture. Pain and suffering are, however, highly subjective, thus the myriad of parameters elaborated by the

(para. 162 pp. 63-4); at the contrary, *Kunarac* Appeals Chamber refutes this assertion: 'the Appeals Chamber in the *Furund`ija* case was in a legitimate position to assert that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity". This assertion, which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally. *The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.* [emphasis added]', ICTY, *Prosecutor V Dragoljub Kunarac Et Al.*, IT-96-23& IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002, paras. 147-8, pp. 63-4. In the same sense: ICTY, *Prosecutor V. Miroslav Kvocka et al.*, IT-98-30/1-A, Appeals Chamber Judgment, 28 February 2005, para. 284 p. 94; WERLE, *supra* note 150, para. 715, pp. 245-6. See also: Nowak, M., Can Private Actors Torture?, *Journal of International Criminal Justice* 19(2)(2021), p. 419, where the former UN Special Rapporteur on Torture criticises the outdated requirement of the official position of the torturer in UNCAT art. 1. In the same sense: Gaeta, P., When is the Involvement of State Officials Requirement for the Crime of Torture, *Journal of International Criminal Justice*, 6(2)(2008), pp. 183-94.

[560] 'Article 7 (1) (f) Crime against humanity of torture. Elements 1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. 2. Such person or persons were in the custody or under the control of the perpetrator. 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'. Footnote 14 thereto specifies that 'no specific purpose need be proved for this crime'. CASSESE, *supra* note 107, p. 135; WERLE, *ibid.* p. 246; AMBOS ET AL., *ibid.*

[561] *Supra* note 277, para. 687. SCHABAS, W., The Crime of Torture and the International Criminal Tribunals, *Case Western Reserve Journal of International Law* 37(2)(2006), p. 355.

[562] According to Smeulers, and Grünfeld, '[t]he difference between torture on the one hand and cruel, inhuman or degrading treatment on the other is one of gradation'. SMEULERS, GRÜNFELD, *supra* note 371, p. 120.

[563] BURCHARD, *supra* note 161, pp. 164-6.

[564] *Ibid.*

Tribunals to check whether a specific conduct in a specific context could amount to torture.[565] The same reasoning patently applies also to the dichotomy of *torture v IADT*.[566]

Moving back to acts of torture *per se* and acts likely to constitute torture, according to *Brđanin,* '[s]ome acts, like rape, appear by definition to meet the severity threshold. Like torture, rape is a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person. Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.'[567]

These are, in sum, the main features of torture and inhuman and degrading treatment. There is plenty of evidence of torture and inhuman and degrading treatment at sea.[568]

For instance, in 2018, the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment held that 'border closures', including '[a]t sea, "pushbacks" [, which] essentially involve the interception of vessels carrying migrants inside or outside territorial waters, followed by immediate repatriation to their port of origin without, or with only summary, on-board screening for protection needs'[569] 'tend to encourage smuggling, crime and police corruption, and to expose irregular migrants to extortion, violence, sexual abuse and trafficking'.[570]

---

[565] *Ibid.* pp. 164-6. ICTY, *Prosecutor V. Radoslav Brđanin,* IT-99-36-T, Trial Chamber Judgment 1 September 2004, para. 484 p. 188: 'Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime'.

[566] BURCHARD, *Ibid.* pp. 166-7; *Brđanin, supra* note 382, para. 483 pp 187-8. 'The seriousness of the pain or suffering sets torture apart from other forms of mistreatment. […] it […] depends on the individual circumstances of each case'. See: ROTH, *supra* note 371; SCHABAS, SAX, *supra* note 371, para. 17 p. 16: 'Cruel, inhuman or degrading treatment or punishment' is not defined in the Convention Against Torture, which treats it as a residual category for acts that do not rise to the level of torture. The Human Rights Committee has said that '[i]t may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment.'

[567] *Ibid.* para. 485 p. 188.

[568] See: PAPANICOLOPULU, I., Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative, *Diritto, Immigrazione e Cittadinanza* 3(2017), pp. 1-29.

[569] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50, para. 51, p. 14.

[570] *Ibid.*, para. 52, p. 15.

As previously noticed,[571] fishers and seafarers have also been subjected to conditions manifestly amounting to torture on many occasions, from incidents with pirates[572] to corporal punishments[573] and any other sort of cruelty.[574]

4. Environmental crimes

Since the Vietnam War[575] and more intensely in recent years, scholars and private citizens have become tragically aware of the gravity and scale of environmental catastrophes. From the deliberate destruction of the environment as a means of warfare[576] or simply as a casualty of economic development, to the exploitation of natural resources, to wildlife smuggling, to pollution, crimes connected to the environment are a widespread phenomenon linked to the most serious crimes of international concern, from war crimes, to slavery and CAH, to the proposed fifth core crime, *ecocide*.[577] Needless to say, the topic is beyond huge, not to mention the problem of state responsibility for violation of national and collective sovereignty over natural resources.[578]

---

[571] *Supra*, note 23.

[572] SAFETY4SEA, *Crewman Reveals Torture Ordeal*, 23 april 2012 https://safety4sea.com/crewman-reveals-torture-ordeal/: 'He revealed one crew member had his genitals painfully tied together with plastic ties and that he himself was threatened with the same action if he didn't tell them where extra fuel on board the ship was hidden, although he repeatedly told them there wasn't any. Dereglazov was also hung from a meat hook inside the ship's freezer while half-clothed and had his feet and hands tied together for hours under the hot sun'.

[573] *e.g.* KENNEY, S., Slavery and Torture Bait Fishermen in the Pacific, *Catalyst*, 10 june 2020 https://catalyst.cm/stories-new/2020/6/10/slavery-and-torture-bait-fishermen-in-the-pacific: 'In 2011, 32 Indonesian fishermen escaped from the South Korean-flagged Oyang 75 while it docked in New Zealand. They told horrifying tales of being physically and sexually assaulted repeatedly by Korean officers, who would chase them as they returned from the showers. Punishments on board included being fed rotten fish bait and being locked inside of refrigerators. On good days, fishermen worked for 20 hours straight'.

[574] *Ex multis*, *supra* note 202 with regard to torture and/or IADT in the context of an armed conflict (in this case, the violence perpetrated by the Japanese forces during WWII).

[575] *Infra* para. 6.1.

[576] *e.g.* the term 'ecocide' was originally coined to address the US bombings with herbicides such as Agent Orange in Vietnam, thus the (then-) definition of ecocide as 'the intentional destruction of the physical environment needed to sustain human health in a given geographical region'. BEDAU, H., Genocide in Vietnam, *Boston University Law Review* 53(3)(1973), p. 620. See also: ZIERLER, D., *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think about the Environment,* Athens (2011).

[577] *Supra*, note 461, *infra* para. 6.1.

[578] See: LYCAN, T. ET AL, *What We Know About Maritime Environmental Crime,* One Earth Future, Stable Seas, Safe Seas July 2021; ELLIOTT, L., SCHAEDLA, W. H. (eds.), *Handbook of Transnational Environmental Crime*, Cheltenham (2016); TANAKA, Y., 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* 22 (2020) pp. 389–409; WHITE, R., 'Transnational Environmental Crime', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010), pp. 193-9; DAM-DE JONG, D., *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations,* Cambridge (2015); FAURE, M., PARTAIN, R., Environmental Crime', in *Environmental Law and Economics: Theory and Practice* Cambridge (2019), pp. 211-32; STEWART, J., *Corporate*

The exploitation of natural resources is a well-known phenomenon that transcends war and peace, land and sea. No environment is left untouched by the suicidal violence against nature, systematically linked to direct violence against human beings, from the forests[579] to the seas,[580] not to mention the most obvious victims of such violence, animal and plant species led to extinction.[581]

Abuse of the environment is the fourth largest criminal activity in the world. Worth up to USD 258 billion (in 2016), it is increasing by five to seven per cent every year and converging with other forms of international crime, making it a serious and increasing threat to peace, security and stability.[582]

There is no settled definition of environmental crime.[583] In criminology, it is understood as encompassing: 'transgressions that are *harmful to humans, environments and non-human animals*,

---

War Crimes: Prosecuting the Pillage of Natural Resources, New York (2011); KOJIMA, C., 'Climate Change and Protection of the Marine Environment: Food Security, Evolutionary Interpretation, and the Novel Application of Dispute Settlement Mechanisms under the United Nations Convention on the Law of the Sea', in Craik, N., Jefferies, C., Seck, S., Stephens , T. (eds.), *Global Environmental Change and Innovation in International Law*, Cambridge (2018), pp. 138-58; LAMBERT, C., Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?, *Leiden Journal of International Law* 30(2017), pp. 707–29; HOUGH, P., Defending Nature: The Evolution of the International Legal Restriction of Military Ecocide, *THE GLOBAL COMMUNITY Yearbook of International Law & Jurisprudence* 1(2014), pp. 137-52; DAHLGREN, C., 'Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals', in Andersson, S. (ed.), *On Nuclear Weapons: Denuclearization, Demilitarization and Disarmament: Selected Writings of Richard Falk*, Cambridge (2019), pp. 264-90; WHITE, R., *Crimes Against Nature: Environmental criminology and ecological justice,* Cullompton (2008); DAM-DE JONG, D., STEWART, J., 'Illicit Exploitation of Natural Resources', in C. Jalloh, C., Clarke, K., Nmehielle, V. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge (2019), pp. 590-618; PINESCHI, L., 'Inter-Legality and the Protection of Marine Ecosystems', Klabbers, J., Palombella, G. (eds.), *The Challenge of Inter-Legality*, ASIL Studies in International Legal Theory, Cambridge (2019), pp. 188-205; CROOK, M., SHORT, D., Marx, Lemkin and the genocide–ecocide nexus, *The International Journal of Human Rights*, 18(3)(2014), pp. 298-319; SANDS, P. ET AL., *Principles of International Environmental Law, fourth edition,* Cambridge (2018); ZAGARIS, B., 'International Environmental Crimes', in *International White Collar Crime: Cases and Materials*, Cambridge (2015), pp. 252-82; STEPHENS, T., 'Marine wildlife and ecosystems', in *International Courts and Environmental Protection*, Cambridge Studies in International and Comparative Law, Cambridge (2009), pp. 196-244; LAVORGNA, A., ET AL., CITES, wild plants, and opportunities for crime, *European Journal on Criminal Policy and Research* 24 (2018), pp. 269–88; STAHN, C., IVERSON, J., EASTERDAY, J. (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices,* Oxford (2017); FALK, R. A., Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals. *Bulletin of Peace Proposals*, 4(1)(1973), pp. 80–96.

[579] See: BOENKHOUT VAN SOLINGE, T., 'The Illegal exploitation of natural resources', in Paoli, L. (ed.), *The Oxford Handbook of Organized Crime*, Oxford (2014), pp. 500-28.

[580] See *ex multis*: ROOPNARINE, P., HERTOG, R. Exploitation, secondary extinction and the altered trophic structure of Jamaican coral reefs, *Nature Precedings* (2010); ROBERSON, L.A., WATSON, R.A. KLEIN, C.J., Over 90 endangered fish and invertebrates are caught in industrial fisheries. *Nature Communication* 11(4764)(2020).

[581] As recognised in UNGA res. 73/343, 20 September 2019, preambular para. 4.

[582] INTERPOL; UNEP, *Strategic Report Environment, Peace And Security A Convergence Of Threats* December 2016, The Convergence of Threats to Environment, Peace and Security Foreword file:///C:/Users/Utente/Desktop/INTERPOL-UNEP%20Strategic%20Report%20-%20Environment,%20Peace%20and%20Security%20-%20A%20Convergence%20of%20Threats.pdf.

[583] 'If one wonders what 'environmental crime' is, the only feasible reply seems to be that the boundaries of this notion are unclear; it is a broad and ambiguous concept, as it is that of environment itself […] The conducts that

regardless of legality *per se*; and environmental-related harms that are facilitated by *the state*, as well as *corporations and other powerful actors*, insofar as these institutions have the capacity to shape official definitions of environmental crime in ways that allow or condone environmentally harmful practices.'[584]

In this final section, we will thus attempt to provide a knowingly insufficient and inevitably rhapsodic overview of this developing field of studies, with a particular focus on maritime crimes, to better understand the jurisdictional challenges connected to the repression of said offences.

4.1 Plunder in natural resources, wildlife smuggling, IUU fishing, environmental destruction as a means of warfare

Beginning from the issue of environmental destruction as a means of warfare, as already seen, the environment has often been targeted in armed conflicts, whether for depriving enemies of hiding places or vital supplies such as water and food.[585] Often, however, nature is only an accidental victim of war or a commodity used to fuel the hostilities.[586]

In the Rome Statute, environmental damage appears only once.[587] Article 8(2)(b)(iv) recognises as a war crime '[i]ntentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

Unfortunately, as recognised in literature, the threshold set by art. 8(2)(b)(iv) seems very unlikely to be met in ordinary circumstances since not only the *damage should be widespread* (*e.g.* on a scale of hundreds of kilometres), with longstanding severe effects, clearly disproportionate to what would be achieved through the attack. Its *mens rea* is perhaps the greatest obstacle to its application by requiring a positive *intention*, thus excluding the possibility of a reckless attack.[588]

---

could potentially fall within the ambiguous category at stake are therefore multifarious: trafficking in waste, in protected species, or in ozone-depleting substances (ods), pollution, fly-tipping, illegal fishing, and so on.' MITSILEGAS, V., GIUFFRIDA, F., The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol, *Transnational Crime 1.1* (2017), p. 3.

[584] WHITE, R., *supra* note 463, p. 4.

[585] With regard to Vietnam, Indonesia and Iraq: HOUGH, *supra* note 463, pp. 138-40.

[586] *Ibid.* pp. 141-4.

[587] ARNOLD, R., WEHRENBERG, S., '4. Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment', in Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Munich, Oxford, Baden Baden (2016) para. 253, p. 378.

[588] *Ibid.* para. 254, p. 379; DRUMBL, M., 'Waging war against the world: The need to move from war crimes to environmental crimes', in Austin, J., Bruch, C., (eds.), *The Environmental Consequences of War: Legal, Economic, and*

In spite of these difficulties, it is nevertheless important that twenty-four years ago, environmental damage was included in the Rome Statute.[589] A quick reference with an almost impossible threshold might be objected, but present nonetheless.

If we move from Rome or The Hague to Geneva, we can find other provisions relating to the protection of the environment in IHL[590]. Amongst the various provisions directly or indirectly providing from the protection of the environment, article 35(3) of Additional Protocol I[591] explicitly prohibits 'to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'. API does not require any clear disproportion between the damage and the foreseeable advantage. As explained in the Commentary, '[a]ny method or means of warfare which are planned to cause, or may be expected (albeit without the intention) to cause serious damage to the natural environment, even if this effect is incidental, are prohibited'.[592]

Another issue that needs to be mentioned is the plunder of natural resources. Wars have been fought and still are -whilst I am writing these very paragraphs, a terrible war is being fought in Ukraine in areas -and likely for the control of, *surprisingly*, rich- of natural resources[593] for and

Scientific Perspectives, Cambridge (2000), pp. 622-6. A potential, non-maritime case in which it would not seem to be completely unreasonable to invoke Art. 8(2)(b)(iv) ICC St. may perhaps be found in the Russian attack against the Nova Kakhovka Dam in Eastern Ukraine, resulting in massive floodings and incalculable environmental, economic damage. HANSEN, T.O., Could the Nova Kakhovka Dam Destruction Become the ICC's First Environmental Crimes Case?, *Just Security*, 9 june 2023 https://www.justsecurity.org/86862/could-the-nova-kakhovka-dam-destruction-become-the-iccs-first-environmental-crimes-case/. See also MILANOVIC, M., The Destruction of the Nova Kakhovka Dam and International Humanitarian Law: Some Preliminary Thoughts, *EJIL:Talk*, 6 june 2023 https://www.ejiltalk.org/the-destruction-of-the-nova-kakhovka-dam-and-international-humanitarian-law-some-preliminary-thoughts/.

589 Borrowing the wording of article 35(3) Additional Protocol I of 1977.

590 See: HENCKAERTS, J-M., CONSTANTIN, D., 'Ch. 19 Protection Of The Natural Environment', in Clapham, A., Gaeta, P. (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford (2014), pp. 469-91; ICRC, *Guidelines on the protection of the natural environment in armed conflict. Rules and recommendations relating to the protection of the natural environment under international humanitarian law, with commentary* (2020).

591 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Hereinafter, API.

592 ZIMMERMANN, B., ET AL., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Leiden (1987), para. 1440, p. 410.

593 See: MYKHNENKO, V., Causes and Consequences of the War in Eastern Ukraine: An Economic Geography Perspective, *Europe-Asia Studies*, 72(3)(2020), pp. 528-60.

thanks to the exploitation of natural resources, whether living or not[594], as recognised *inter alia* by the UNSC in 2005.[595]

In several African coastal states, the ongoing conflicts have created opportunities for corporations to engage in what has been described as '*resource theft*'[596] and other forms of illegal natural resource exploitation. This, in turn, has exacerbated the plight of coastal states since exploitation has worsened the stability and economic development of these states in a downward spiral of increasing economic, social and security turbulence[597] with severe effects also on the environment.[598]

Scholars have thus questioned whether, in spite of the regrettable laconicism of the RS, it might be possible to find any legal basis to prosecute the spoliation of natural resources in time of armed conflict to try to repress this phenomenon.

According to the literature, the most suitable candidate for this purpose would seem to be pillage[599] due to the broad construction of the crime, which require that: 1. the perpetrator appropriated certain property; 2. the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; 3. the appropriation was without the consent of the owner.[600]

Unfortunately, the proposal of revitalising the old crime of pillaging to address the exploitation of natural resources in armed conflicts *is not a panacea,*[601] as recognised by Larissa Van den Herik and Daniëlla Dam-de Jong. There are some significant problems with the

---

[594] STEWART (2011), *supra* note 463, pp. 9-10; VAN DEN HERIK, C., DAM-DE JONG, D., Revitalizing The Antique War Crime Of Pillage: The Potential And Pitfalls Of Using International Criminal Law To Address Illegal Resource Exploitation During Armed Conflict, *Criminal Law Forum* 15(2011), pp. 240-4.

[595] UNSC res. 1625 (2005), S/RES/1625 (2005), 14 September 2005, para. 6, p. 3: 'Reaffirms its determination to take action against illegal exploitation and trafficking of natural resources and high-value commodities in areas where it contributes to the outbreak, escalation or continuation of armed conflict'.

[596] TSABORA, J., Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones during Armed Conflict, *Natural Resources Journal* 54(1)(2014), pp. 184-5.

[597]See, for instance, on the relationship between political instability, environmental depredation and piracy in Somalia: GLASER, S.M., ROBERTS, P.M., HURLBURT, K.J., Foreign Illegal, Unreported, and Unregulated Fishing in Somali Waters Perpetuates Conflict, *Frontiers in Marine Science* 6(704)(2019), pp. 1-14.

[598] *Ibid.*

[599] Artt. 8(2)(b)(xvi) and 8(2)(e)(v).

[600] ICC Elements of Crimes, Article 8(2)(b)(xvi). War crime of pillaging, p. 26.

[601] 'The idea of international criminal responsibility for looting natural resources has, however, proved difficult to implement. Not only would it require that a nexus with the conflict be established it would also bring about huge difficulties from a conceptual and policy-oriented point of view, with the adequacy of international criminal law to address issues of natural resources exploitations being called into question.' D'ASPREMONT, J., Towards an International Law of Brigandage: Interpretive Engineering for the Regulation of Natural Resources Exploitation, *Asian Journal of International Law* 3(1)(2013), p. 10.

applicability of the elements of the crime, from the meaning of private and personal use and its applicability to rebels or armed groups or corporate entities.[602]

Amongst the most deleterious environmental crimes, IUU fishing deserves particular attention, not just and not only in light of the topic of this dissertation but rather due to peculiarities of that crime and its links with international and transnational threats[603].

There is no univocal definition of IUU fishing.[604] In basic terms, IUU fishing refers to practices harmful to the marine environment consisting of three alternative and not cumulative elements: a) illegal: the practice of fishing in contravention of domestic or international regulations and measures on the conservation and management of fish; b) unreported: these fishing activities are unreported, *i.e.* the competent authorities have no knowledge of the existence and extent of overfishing or other connected illegal practices; c) unregulated: these activities are carried by unflagged vessels, by vessels flying the flag of a state non-party to the regulating international instruments *de quibus* or are perpetrated in areas or concerning species not covered by any regulation.[605]

IUU fishing is a multi-offensive phenomenon. First, it has tragic impacts on living maritime resources. As recognised by the Council Regulation (EC) No 1005/2008 of 29 September 2008, '[i]llegal, unreported and unregulated (IUU) fishing constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources and jeopardises the very foundation of the common fisheries policy and international efforts to promote better ocean governance. IUU fishing also represents a major threat to marine biodiversity[606] which needs to be addressed in

---

[602] VAN DEN HERIK, DAM-DE JONG, *supra* note 476, pp. 264-73.
[603] *Supra* notes 7, 13-7, 20-1.
[604] See on the definition of IUU fishing: PALMA-ROBLES, M. A., Tightening the Net: The Legal Link between Illegal, Unreported and Unregulated Fishing and Transnational Crime under International Law, *Ocean Yearbook Online*, *29*(1)(2015), PP. 146-7; TANAKA, *supra* note 20, note 18, p. 392; DUBNER, B., VARGAS, L. M., On the Law of Pirate Fishing and Its Connection to Human Rights Violations and to Environmental Degradation A Multi-National Disaster, *Journal of Maritime Law and Commerce* 48(2)(2017), p. 110; ROSELLO, M., 'Chapter 3 Illegal, Unreported and Unregulated (IUU) Fishing as a Maritime Security Concern', in Otto, L. (ed.), *Global Challenges in Maritime Security,* Cham (2020) pp. 33-4; SOYER, B., LELOUDAS, G., MILLER, D., Tackling IUU Fishing: Developing a Holistic Legal Response. *Transnational Environmental Law, 7*(1)(2018), note 3 p. 140.
[605] The reported definition is loosely based on paragraph 3 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001).
[606] e.g. LIDDICK, D., The dimensions of a transnational crime problem: the case of IUU fishing, *Trends in Organised Crime* 17(2014), p. 293: '[i]n addition to overfishing for tuna, lobster, shark, and deep water shrimp in Somali waters, hundreds of commercial vessels also damaged coral reefs and contributed to the destructive by-catch of dugongs, sea turtles and dolphins'.

accordance with the objectives set out in the Communication from the Commission — Halting the loss of biodiversity by 2010 — and beyond.'[607]

Nature, however, is only one of the victims of IUU fishing.[608] IUU fishing, in fact, affects the local community robbed of their natural resources[609] but also, if not predominantly, it affects its material perpetrators: 'IUU fishing practices reveal widespread violations of human rights and the employment of forced labour.[610] Security issues may also arise from lawful activities, as the fishing 'wars' between regularly licensed fishing vessels show'.[611]

As documented by UNODC, 'migrant labourers and fishers fall prey to human traffickers as victims of trafficking for the purpose of forced labour on board fishing vessels, rafts or fishing platforms, in port, or in fish processing plants. In this instance fishing operators or fish processing operators are creating a demand for victims of trafficking. Second, women and children in fishing ports are vulnerable to organized exploitation of their prostitution by fishers'.[612]

Also, '[l]iving conditions on board fishing vessel are reported to be abysmal in some circumstances. Sleeping quarters are often cramped: there are reports of shared bunks with cardboard mattresses stacked less than a meter above one another. Cooking facilities may be unhygienic and food supplies are limited. Victims of trafficking for the purpose of forced labour in the fishing industry are reported to have become severely malnourished and fallen ill due to excessive exposure to sun and seawater.'[613]

---

[607] COUNCIL REGULATION (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, preambular para. 3.

[608] With regard to environmental damage, IUU fishing is also responsible for marine pollution due to the substandard conditions of the employed ships. PAPANICOLOPULU, I., 'People, the Sea, and International Law', in *International Law and the Protection of People at Sea*, Oxford (2018), p. 32.

[609] And, as it has already been documented, IUU fishing is one of the economic causes of piracy in Somalia. *Ex multis*: DUBNER, VARGAS, *supra* note 485, p. 107; CABRAL, R.B., ET AL. Rapid and lasting gains from solving illegal fishing. *Nature Ecology & Evolution* 2(2018), pp. 650–8.

[610] UNODC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011), p. 22; MACFARLANE, D., The Slave Trade and the Right visit Under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand, *Asian Journal ofInternational Law* 7(2017), pp. 94–123; BECKER-WEINBERG, V., 'Chapter 10 Human Trafficking & IUUF: Legal and Gender Implications' in Papanicolopulu, I. (ed.), *Gender and the Law of the Sea*, Leiden (2019), p. 236.

[611] PAPANICOLOPULU, *ibid*.

[612] UNODC, *ibid.*, p. 25.

[613] *Ibid.*, p. 28.

More in general, there is abundant literature connecting IUU fishing with organised crime: fishing vessels are used for the purpose of smuggling of migrants, illicit traffic in drugs (primarily cocaine), illicit traffic in weapons, and acts of terrorism.[614]

Before moving on to ecocide, one brief mention of wildlife smuggling is commanded. This is not an exclusively maritime problem, but since oceans are commonly used (or perhaps even abused) as the highway of the world, oftentimes hidden amongst lawful commodities, protected species are unlawfully smuggled.

The framework on wildlife smuggling is set by the CITES convention,[615] whose Article VIII calls states to take appropriate measures to enforce the provisions of the Convention and prohibit trade in specimens in violation thereof through the penalization of trade in, or possession of, such specimens, or both and the confiscation or return to the State of export of such specimens.[616]

With regard to maritime sources, *corals, tropical fish, giant clams, seahorses, shark fins, sea cucumbers, marine turtles, fish swim bladders, eels, baby lobsters, abalone and caviar* are the maritime specimens most commonly smuggled[617] whether to decorate *aquariums*[618] or to be worn as jewels or consumed as food, with highly detrimental effects on the environment.[619]

4.2 The proposed crime of ecocide

[614] *Ibid.*, p. 4. See also: BARNES, R., ROSELLO, M., 'Fisheries and maritime security: understanding and enhancing the connection', in Galani, Evans, *supra* note 431, pp. 48-82.
[615] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).
[616] See: ZAGARIS, *supra* note 463, pp. 254-8; KOJIMA, *supra* note 463; STROBEL, K., *Organized Crime and International Criminal Law*, Leiden (2021), pp. 213 ff.
[617] BASEL INSTITUTE ON GOVERNANCE, *Wildlife crime – understanding risks, avenues for action Part 4: Corruption in marine wildlife trafficking Associated Institute of the University of Basel Green Corruption team*, June 2021, p. 4.
[618] CUSACK, C.M., *Fish, Justice, and Society*, Boston (2018), pp. 14-7, 188-201.
[619] MCMURRAY, C. A., Wildlife Trafficking: U.S. Efforts to Tackle Global Crisis, *Natural Resources & Environment* 23(3)(2009), p. 16: 'Demand for wildlife and wildlife products takes a variety of forms. Souvenirs, exotic pets, food, traditional medicines, jewelry, and clothing are all powerful sources of demand that can translate into mortality for wildlife. The seemingly unquenchable demand for tusks, fins, skins, shells, horns, and the internal organs of wildlife species is often deeply ingrained within traditional cultural practices. Many Asian societies, for example, accord spiritual or healing properties to the parts of specific animals.' See, with particular regard to turtles and tortoises in Thailand: NIJMAN, V., SHEPHERD, C.R., Trade in non-native, CITES-listed, wildlife in Asia, as exemplified by the trade in freshwater turtles and tortoises (Chelonidae) in Thailand, *Contributions to Zoology*, 76(3)(2007), pp. 207-11.

The term *ecocide* was first coined by Arthur W. Galston, a plant biologist and chair of the Department of Botany at Yale University in 1970 as a label for the campaign of deforestation carried out by the US forces in Vietnam.[620]

In 1973 Professor Falk elaborated a legal definition for the crime in Article II of his *Proposed International Convention On The Crime Of Ecocide*.[621] The crime consisted of 'any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem: a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other: b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes; c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops; d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war; f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.'

Although formally conceived as a crime that could be perpetrated both in peace or armed conflicts,[622] it clearly reflected its belligerent roots. It was at its core, understood as *a primarily war crime*, although Galston's words suggest a different interpretation. In his own words, in fact, ecocide was to become a reunited twin of the other *-cide* crime: 'After the end of World War II, and as a result of the Nuremburg trials, we justly condemned the willful destruction of an entire people and its culture, calling this crime against humanity *genocide*. It seems to me that the willful and permanent destruction of environment in which a people can live in a manner of their own choosing ought similarly to be considered as a crime against humanity, to be designated by the term *ecocide*. I believe that the most highly developed nations have already committed autoecocide over large parts of their own countries. At the present time, the United States stands alone as possibly having committed ecocide against another country, Vietnam, through its massive use of chemical defoliants and herbicides. The United Nations would appear to be an appropriate body for the formulation of a proposal against ecocide.'[623]

---

[620] ZIERLER, *supra* note 461, P. 15.
[621] FALK, *supra* note 463, pp. 21-4.
[622] *Ibid*. article I.
[623] ZIERLER, *supra* note 461, p. 19.

With the very modest exceptions of the few environmental provisions in the Geneva Additional Protocols and the ICC Statute,[624] no progress has unfortunately been made in the sense of the international criminalization of conducts affecting the environment and particularly of the widespread degradation or direct aggression perpetrated against nature since then.[625]

Between 2020 and 2021, two groups of experts[626] from Academia, UN and no profit organizations elaborated a draft amendment to the ICC Statute, lobbying for the inclusion of ecocide in its jurisdiction *ratione materiae*.

---

[624] *Supra* note 406-7.

[625] In the meantime, scholars have continued to remark the importance of strengthening the development of international environmental law through the adoption of criminal provisions, as already seen with the attempt to apply pillage to environmental exploitation in armed conflicts (*supra* note 484-7), others, having recognised the *jus cogens* status of rules preventing and punishing environmental catastrophes, like BERAT, L., Defending the Right to Healthy Environment: Toward Crime of Geocide in International Law, *Boston University International Law Journal*, 11(2)(1993), pp. 327-48, who proposed the recognition of the crime of *geocide* (a sort of ecocide) 'because the survival of the planet depends on it, it should be regarded as jus cogens.' (*ibid*., p. 339). Many others have also continued to campaign in favour of the recognition of the crime of ecocide: *ex multis*, MALHOTRA, S., The International Crime That Could Have Been but Never Was: An English School Perspective on the Ecocide Law, *Amsterdam Law Forum*, 9(3)(2017), pp. 49-70; GRAY, M., The International Crime of Ecocide, *California Western International Law Journal*, 26(2)(1996), pp. 215-72; MÉGRET, F. 'The Case for a General International Crime against the Environment', in Jodoin, S., Cordonier Segger, M. (eds.), *Sustainable Development, International Criminal Justice, and Treaty Implementation*, Cambridge (2013), pp. 50-3. See also: TECLAFF, L. A., Beyond Restoration The Case of Ecocide, *Natural Resources Journal* 34(4)(1994), pp. 933-56. On the various drafts and proposals on ecocide, see: ECOCIDELAW, *Selected Previous Drafts of the International Crime of Ecocide:* https://ecocidelaw.com/selected-previous-drafts/.

[626] On February 29, 2020, the Promise Institute for Human Rights at UCLA School of Law convened a cross-functional group of experts ("Group of Experts" or "Group") to explore the potential of international criminal law to protect the environment and mitigate climate change. The Group of Experts researched and deliberated on the legal, practical and political parameters of developing a new crime of "ecocide". The Group's findings and this report were submitted to the Independent Expert Panel for the Legal Definition of Ecocide established by the Stop Ecocide Foundation. The Group included: Jelena Aparac (Chairperson-Rapporteur of the UN Working Group on the use of mercenaries), Shirleen Chin (Managing Director, Green Transparency), Matthew Gillett (Senior Legal Officer at the Organisation for the Prohibition of Chemical Weapons), Kate Mackintosh (Executive Director of the Promise Institute for Human Rights at UCLA School of Law), Nema Milaninia (Advisor at Center for Climate Crimes Analysis and Counsel with Alphabet's Regulatory Response, Litigation and Strategy team), Jessica Peake (Assistant Director of the Promise Institute for Human Rights at UCLA School of Law), Darryl Robinson (Professor at Queen's University, Faculty of Law (Canada)), Richard J. Rogers (Founding Partner at Global Diligence LLP), Maud Sarlième (Legal Adviser, Special Tribunal for Lebanon). PROMISE INSTITUTE FOR HUMAN RIGHTS (UCLA) GROUP OF EXPERTS, *Proposed Definition of Ecocide*, 9 April 2021 https://ecocidelaw.com/wp-content/uploads/2022/02/Proposed-Definition-of-Ecocide-Promise-Group-April-9-2021-final.pdf. The Expert Panel, which published in June 2021 the draft of the new proposed art. 8ter was composed by: Philippe Sands QC (Professor, University College London/Barrister, Matrix Law (UK/France/Mauritius)), Dior Fall Sow (UN jurist and former prosecutor (Senegal)), Kate Mackintosh (Executive Director, Promise Institute for Human Rights, UCLA School of Law (US/UK)), Richard J Rogers (Partner, Global Diligence; Executive Director, Climate Counsel (UK)), Valérie Cabanes (International jurist and human rights expert (France)), Pablo Fajardo (Environmental lawyer (Ecuador)), Syeda Rizwana Hasan (Chief Executive, Bangladesh Environmental Lawyers Association (Bangladesh)), Charles C Jalloh (Professor, Florida International University/ UN International Law Commission (Sierra Leone)), Rodrigo Lledó (Director, Fundación Internacional Baltasar Garzón (Chile/Spain)), Tuiloma Neroni Slade (Former International Criminal Court judge (Samoa)), Christina Voigt (Professor, University of Oslo (Norway)), Alex Whiting (Former International Criminal Court prosecutions coordinator/Professor, Harvard Law School (US)). ECOCIDELAW, *Independent Expert Panel for the Legal Definition of Ecocide*, https://ecocidelaw.com/independent-expert-drafting-panel/.

The proposed Article 8-ter ICC St. thus reads as: '1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts. 2. For the purpose of paragraph 1: a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated; b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources; c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings; d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time; e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.' [627]

Regardless of the obstacles on the road to The Hague and despite the intrinsic value or deficiencies of the newly proposed crime,[628] the social function of law can by no means be ignored or understated.[629] Without opening the *Pandora's box* of the links between politics and the ICC, it is fully evident that the tragic circumstances we are living in Ukraine and the political tensions between states might not be the best time to think about retouching the Rome Statute.[630]

---

[627] ECOCIDELAW, Independent Expert Panel for the Legal Definition of Ecocide, *COMMENTARY AND CORE TEXT June 2021* https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf.

[628] See in particular AMBOS, K., Protecting the Environment through International Criminal Law?, *EJIL:Talk!* 29 june 2021 https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2#; HELLER, K.J., Ecocide and Anthropocentric Cost-Benefit Analysis, *OpinioJuris*, 26 june 2021 http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/; HELLER, K.J., The Crime of Ecocide in Action, *OpinioJuris,* 28 june 2021 http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/.

[629] *supra*, note 49. In the same sense: PEZZOT, R., GRAF, J-P., Ecocide – Legal Revolution or Symbolism?, *Völkerrechtsblog,* 03.02.2022, doi: 10.17176/20220203-120935-0.

[630] Not to mention the well-known chronic difficulties of amending the Rome Statute. As underlined by Heller, 'even if 2/3 of states parties are willing to support an ecocide amendment, which is unlikely, an amendment to Art. 5 of the Rome Statute — which ecocide would be — would apply only to states that formally accepted it. As with the aggression amendments, the states most likely to commit ecocide would simply decline to accept the ecocide amendment.'. HELLER, K.J., Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't), *OpinioJuris*, 23 june 2021 https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/.

Regardless of what will happen to the crime of ecocide or its close relatives, if the debate around it serves to stimulate the conscience of humanity and manages somehow to trigger positive action[631] in protecting the environment, it would already be a great success.[632]

In this regard and with regard to the aggression against Ukraine, the debate around ecocide is already serving to achieve two practical purposes.

First, it is drawing attention to the increasingly precarious state of the environment and the threat that this degradation poses to the survival of humanity.[633] Second, calling states to cooperate to address this vital threat against humanity might help understand the moral and practical imperative of stopping wasting time and energy in fruitless quarrels and instead focusing on global challenges endangering humanity as a whole.

The potential impact of the notion of ecocide on maritime crime has been interestingly analysed by Garcia Ruiz, South and Brisman. The authors have applied the idea of ecocide in the context of marine environments to two cases. First, a recurrent catastrophe destroying Europe's largest saltwater lagoon is occurring on the coast of Mar Menor (Spain), with thousands of fish and crustaceans washed up dead on beaches in the region due to lack of oxygen, unsustainable urban developments, farming, and pollution. Second, the problem of destructive practices, such as overfishing and coastal development in the Balearic Islands, the northwest Ionian, the Aegean and Levantine Seas. According to them, these situations would likely meet the requirements of the definition of ecocide.[634]

Another example. In July 2020, the *M/V Wakashio*, one of the world's largest capesize bulk carriers, ran aground onto a coral reef, releasing almost 1000 tons of toxic fuel onto the pristine

---

[631] As Prof. Sands declared in an interview with The Guardian, "'[f]or me the single most important thing about this initiative is that it's part of that broader process of changing public consciousness, recognising that we are in a relationship with our environment, we are dependent for our wellbeing on the wellbeing of the environment and that we have to use various instruments, political, diplomatic but also legal to achieve the protection of the environment." HAROON, S., Legal experts worldwide draw up 'historic' definition of ecocide, *The Guardian*, 22 June 2021 https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide?fbclid=IwAR1iwcQ375g4cjbNreSZQfuhRLvqUZCddQTyVoht7z-7W5fRjXTQ0mC9u-A.

[632] As Robinson comments, '[t]he crime of ecocide would shine a stronger light on environmental harms of staggering magnitude'. ROBINSON, D., Your guide to Ecocide: Part 1, *Opinio Juris*, 16 july 2021. http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/.

[633] 'humanity stands at a crossroads. The scientific evidence points to the conclusion that the emission of greenhouse gases and the destruction of ecosystems at current rates will have catastrophic consequences for our common environment. Along with political, diplomatic and economic initiatives, international law has a role to play in transforming our relationship with the natural world, shifting that relationship from one of harm to one of harmony'. ECOCIDELAW, *supra* note 512.

[634] GARCÍA RUIZ, A., SOUTH, N., BRISMAN, A., Eco-Crimes and Ecocide at Sea: Toward a New Blue Criminology, *International Journal of Offender Therapy and Comparative Criminology* 66(4)(2022), p. 416.

waters of Mauritius, causing disastrous environmental consequences[635] in the areas surrounding Pointe d'Esny.[636] The vessel's captain admitted drinking during an onboard birthday party. He and the first officer were found guilty of 'endangering safe navigation' under Mauritian law and sentenced to (a mere) twenty months of imprisonment.[637]

Leaving aside the problem of complementarity of the ICC jurisdiction, it seems that the conducts of the captain and his first officer might fall *prima facie* under the proposed article 8-ter ICC St. First, the *mens rea*. Conducting an enormous ship under bad meteorological conditions across vulnerable areas while being drunk shows reckless disregard for any potential disaster happening to the vessel or because of the vessel, and that clearly exceeds any social benefit of toasting to a birthday party.[638] Second, the *actus reus*. According to local media, there are 'videos and photos of the mammals showing the presence of oil in the mouth, blowholes and skin. Apart from dolphins and porpoises, other species such as turtles, fish, shellfish, and crabs have been washed ashore with the impact of the maritime disaster felt at least 21 nautical miles away.'[639]

Also, the accident took place near two environmentally protected marine ecosystems and the Blue Bay Marine Park Reserve, which is a *wetland of international importance*.[640]

At first sight, it would appear that also the conducts (or rather, their consequences) meet the substantial requirements of Article 8-*ter* as the incident caused severe (dozens of dead cetaceous plus other species washed ashore) and either widespread (the impact was felt dozens of miles away)[641] or long-term damage to the environment.

---

[635] NEWS DESK, Captain and First Officer of Wakashio get 20 months in prison for endangering safe navigation, *Shippingandfreightresource*, 28 december 2021 https://www.shippingandfreightresource.com/captain-and-first-officer-of-wakashio-get-20-months-in-prison-for-endangering-safe-navigation/.

[636] KHADKA, N.S., Why the Mauritius oil spill is so serious, *BBC News*, 13 august 2020 https://www.bbc.com/news/world-africa-53754751; DEGNARAIN, N., Anger As Dead Dolphins Wash Up On Mauritius Beaches A Day After Wakashio Oil Ship Deliberately Sunk, *Forbes*, 26 august 2020 https://www.forbes.com/sites/nishandegnarain/2020/08/26/anger-as-dead-dolphins-wash-up-on-mauritius-beaches-a-day-after-wakashio-oil-ship-deliberately-sunk/?sh=361f6d4526ff.

[637] Revised Laws of Mauritius P8A – 1 [Issue 4], *Piracy And Maritime Violence Act*, Act 39 of 2011 – 1 June 2012, Section 5https://attorneygeneral.govmu.org/Documents/Laws%20of%20Mauritius/A-Z%20Acts/P/PIRACY%20AND%20MARITIME%20VIOLENCE%20ACT.pdf. See: FRANCE24, Ship captain sentenced to 20 months over Mauritius oil spill: magistrate, 27 December 2021 https://www.france24.com/en/live-news/20211227-ship-captain-sentenced-to-20-months-over-mauritius-oil-spill-magistrate-1.

[638] NEWS DESK, *ibid*.: 'The investigation reportedly further found that the lookout officer had been allowed to stay at the birthday party which meant that he could not ensure the safe navigation of the ship'.

[639] NEWS DESK, Should the Captain of the Wakashio be held responsible for dead dolphins, *Shippingandfreightresource*, 29 august 2020 https://www.shippingandfreightresource.com/should-the-captain-of-the-wakashio-be-held-responsible-for-dead-dolphins/.

[640] *Supra* note 520.

[641] 'At the time of the incident, Greenpeace Africa warned that "thousands" of animal species were "at risk of drowning in a sea of pollution" with dire consequences for the economy, food security, and health in Mauritius'. *Ibid*.

The question is: which was the legally protected interest most seriously damaged by the *Wakashio*? The security of navigation or the environment? Perhaps the answer should be both. On the one hand, the *navigation* of the *Wakashio* was undoubtedly criminal *per se*. On the other hand, this erratic and unsafe navigation resulted in a catastrophic environmental damage they could have caused (which they did).

Leaving the Mauritius and moving back to The Hague, regardless of the outcomes of the laudable and stimulating campaign for the introduction of the crime of ecocide in the Rome Statute, it is undeniable that, at least in academia, there is a compelling sense of urgency in excogitating mechanisms to hold individuals (and corporate entities) accountable for environmental crimes, a trend which appears to be confirmed -to a degree- by the *2016* OTP *Policy paper on case selection and prioritisation*: '[t]he Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment'.[642]

5. Trafficking in weapons and the link to atrocities

Trafficking in weapons is a common and deadly phenomenon, fuelling violence and allowing criminals to increase their ability to threaten society and the existence of many.[643] Currently, the problem of trading and trafficking in weapons is tackled by two complementary instruments, although the discipline appears to be rather fragmented and lacks an overall policy and coordination.[644]

First, the fight against transnational organised crime.

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition,[645] supplementing the United Nations Convention against Transnational Organized Crime contains the international normative framework for firearms with

---

[642] ICC, Office Of The Prosecutor, *Policy Paper On Case Selection And Prioritisation*, 15 September 2016, para. 7, p. 5 https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[643] See: UNODC, *Global Study on Firearms Trafficking*, 2020.

[644] *ex multis*, GUILFOYLE, D., 'Maritime counter-proliferation of weapons of mass destruction', in *Shipping Interdiction and the Law of the Sea*, Cambridge (2009), p. 233: "Absent a relevant treaty obligation, there is no customary law prohibition on possessing WMD, and the existing WMD treaties, while they may contain obligations to reduce or destroy weapon stockpiles, do not criminalise trade in WMD materiel".

[645] See: LEGGETT, T., 'Transnational Firearms Trafficking Guns for Crime and Conflict', in Natarajan, M. (Ed.), *International and Transnational Crime and Justice,* Cambridge (2019), pp. 37-42.

the aim to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, hampering the well-being of peoples, their social and economic development and their right to live in peace.[646]

The Protocol defines *firearms* as 'any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas',[647] thus covering a large range of weapons (basically, every portable weapon short of artillery) used or likely to be used in the commission of crimes ranging from 'common' organised crime to terrorism to international crimes.

Trafficking is instead defined as 'import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorise it in accordance with the terms of this Protocol or if the firearms are not marked'.[648] Article 5 a duty to criminalise those conducts as well as the manufacturing, falsifying the certificates and the aiding and abetting of the aforementioned acts.

The Protocol was integrated in 2013 by The *Arms Trade Treaty* adopted by the UNGA with Resolution 67/234.[649] The reasons for the adoption lies, as mentioned in the Preamble[650] and reiterated in article 1, in the 'need to prevent and eradicate the illicit trade in conventional arms and [...] prevent their diversion to the illicit market, or for unauthorised end use and end users, including in the commission of terrorist acts'.[651]

---

[646] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, Preamble, para. 1. See (with regard to the Arms Trade Treaty): HANDERSON, S., The Arms Trade Treaty: Responsibility to Protect in Action?, *Global Responsibility To Protect* 9 (2017) pp. 148 ff.

[647] *Ibid*. Art. 3(a).

[648] *Ibid*. Art. 3(e).

[649] See in general on the Treaty: DA SILVA, C., WOOD, B. (eds.), *The Arms Trade Treaty*, Cambridge (2021); LUSTGARTEN, L., The Arms Trade Treaty: Achievements, Failings, Future, *International and Comparative Law Quarterly* 64 (2015), pp. 569-600; PAIGE, T. P., 'Chapter 17 Small Arms Trade (Resolution 2117 (2013) and the Arms Trade Treaty)', in Paige, T. P., *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'threat to the peace' under Article 39 of the UN Charter*. Leiden (2019), pp. 153-60; SMALL ARMS SURVEY, Breaking New Ground? The Arms Trade Treaty. In *Small Arms Survey 2014: Women and Guns*, Geneva (2014) pp. 76-107; STEDJAN, S., Introductory Note To The Arms Trade Treaty, *International Law Materials* 52(2013), pp. 985-7; COPPEN, T., The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty, *Goettingen Journal of International* Law 7(2)(2016), pp. 353-82.

[650] DANON, E., 'Preamble', in Da Silva, C., Wood, B. *supra* note 221, pp. 9-11; 12.

[651] Article 1. Object and Purpose The object of this Treaty is to: – Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; – Prevent and eradicate the illicit trade in conventional arms and prevent their diversion; for the purpose of: – Contributing to international and regional peace, security and stability; – Reducing human suffering; – Promoting

This Convention overlaps and goes beyond and complements the Firearms Protocol insomuch as, first, concerns more lethal or destructive weapons (whilst retaining the small weapons covered by the Protocol)[652] and secondly the activities targeted by the Convention do not include trafficking but more in general 'export, import, transit, transshipment and brokering, hereafter referred to as "transfer"'.[653] Particularly relevant in this sense is Article 6,[654] which provides that '[a] State Party shall not authorise any transfer of conventional arms covered under Article 2 (1) [...] if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes. 2. A State Party shall not authorise any transfer of conventional arms covered under Article 2 (1) [...] if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms. 3. A State Party shall not authorise any transfer of conventional arms covered under Article 2 (1) [...] if it has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party'.

---

cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

[652] Article 2 Scope. 1. This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large-calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.

[653] Article 2(2). The transfer of weapons is not prohibited as such, per se, but it imposes a duty to the States to assess the potential that the conventional arms or items: (a) would contribute to or undermine peace and security; (b) could be used to: (i) commit or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law; (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party. (art. 8(1)). If those risks are found, the States should take measures to mitigate them and, if no effort is likely to succeed, prevent the transfer of the weapons. The duties imposed to the state include both the control over the export (and specularly, of the import) of arms as well as their diversion. Under art. 11(1) 'Each State Party involved in the transfer of conventional arms covered under Article 2(1) shall take measures to prevent their diversion'.

[654] STEDJAN, *supra* note 221, p. 986: 'The centerpiece of the Arms Trade Treaty is the requirement in Articles 6 and 7 that countries refrain from exporting arms when the weapons will be used to undermine the Treaty's humanitarian goals. These articles are intended to place a strong stigma on arms transfers that contribute to or fuel atrocities, human rights abuses, violations of the laws of armed conflict, terrorism, or transnational organized crime. The Treaty stigmatizes such transfers by prohibiting arms exports in certain circumstances, most notably when the exporter knows that the importer will use the weapons for genocide, crimes against humanity, and war crimes. Under no circumstance can a State Party transfer arms when it has the knowledge that the weapons will be used for these crimes'.

No penal provision can be found in the Treaty, yet it is not unreasonable to find a duty to criminalise conducts incompatible with the obligations accepted under the Treaty in the general clause of Article 14 (enforcement),[655] thereby making it possible to close the circle of preventing and repressing any illicit movement of whatever kind of weapon if the conditions for the safe transfer and use of weapons delineated in the Treaty are not met.[656]

Significantly, under Article 11(5) (diversion), states must take measures to prevent the transferred weapons from falling into the wrong hands. To that goal, states are encouraged first and foremost to share all the available 'information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organised groups engaged in diversion'.

The prevention-oriented approach of the Treaty, however, does not exclude the possibility -or even, the necessity- of adopting simultaneous repressive measures.[657] In the same sense, the PSI appears to have particular importance due to its connection with the law of the sea and the effect on the criminalisation of said conducts.[658]

In the aftermath of 9/11, the US and their allies underlined the unacceptable risk that weapons of mass destruction fell into the hands of terrorists and rough states. A problem emerged: for centuries, the seas have been the highways of civilisations, of trade and power and billions of tons of goods are still traded through the oceans every year. Smuggling weapons, drugs, any sort of forbidden utility is tremendously easy and dangerous for the livelihoods of millions.[659]

---

[655] Article 14 Enforcement. Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty. See: LEWIS, M., MANGION, R., SOLLIER, J., 'Article 14: Enforcement', in Da Silva, C., Wood, *supra* note 221, pp. 304-20. In particular consistent with the idea of an implicit duty to criminalise the illicit ownership and transfer of weaponry: *ibid.*, pp. 308-9.

[656] *Supra* note 221.

[657] See: FUKUTI, Y., The Arms Trade Treaty: Pursuit for the Effective Control of Arms Transfer, *Journal of Conflict and Security Law*, 20(2)(2015), p. 311.

[658] The Proliferation Security Initiative, https://www.psi-online.info/psi-info-en/-/2075520.

[659] On the PSI and its relationship with the law of the sea, see: SHARP, W. G. S., Proliferation Security Initiative: The Legacy of Operacion Socotora, *Transnational Law & Contemporary Problems* 16(3)(2007), pp. 991-1028; GUILFOYLE, D., The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?. *Melbourne University Law Review*, 29(3)(2005), pp. 733-764; SONG, Y-H., The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment, *Ocean Development and International Law*, 38(1-2)(2007), pp. 101-146; BANZAI, H., The Proliferation Security Initiative and International Law of the Sea: A Japanese Lawyer's Perspective, Journal of East Asia and International Law 3(1)(2010), pp. 7-28; PERRY, T. C., Burring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea, *Ocean Development and International Law* 37(1)(2006), pp. 33-54; HEINTSCHEL VON HEINEGG, W., The Proliferation Security Initiative: Security vs. Freedom of Navigation?, *International Law Studies, US Naval War College*, 81 (2006), pp. 55-76; GIBBONS, P., Proving the Point: North Korea and the Ratification of the Proliferation Security Initiative, *Loyola Maritime Law Journal* 7 (2009), pp. 47-76; SONG, Y., The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment.

The states participating in the initiatives have formulated a principles requiring states to undertake a series of -cooperative- enforcement mechanisms to end the proliferation of WMDs, including the right to board and inspect the suspected vessels.[660]

6. Terrorism and maritime terrorism

Strongly, if not even inextricably, connected with piracy (*stricto* and *lato sensu*) and trafficking is the problem of (maritime) terrorism.[661]

Needless to say, after 9/11, terrorism has been and still is a hot topic on which an incredible amount of comments have been written.[662] Equally so, maritime terrorism, in the aftermath of the *Achille Lauro* incident and the maritime security crisis of the last decades. Whilst terrorism and maritime terrorism present some non-purely linguistic points of contacts, the two phenomena are not identical. In this Paragraph, we will seek to provide a concise definition of terrorism as a crime under international law before diving into the specific issue of maritime terrorism.

The general definition of terrorism is notoriously controversial. There is *no universal convention providing for a comprehensive discipline of the crime, nor a legally binding definition*,[663] even though there seems to be a general acceptance of the elements provided in Article 2 of the

---

Ocean Development and International Law, 38(1-2)(2007), pp. 101-146; HODGES, D. G., High Seas and High Risks: Proliferation in Post-9/11 World, *Ocean and Coastal Law Journal*, 19(2)(2014), pp. 189-218.

[660] More *infra* Chapter III.

[661] On the different *rechtsgüters* affected by piracy and (maritime) terrorism see SPAIN, AUDIENCIA NACIONAL, SALA DE LO PENAL, Sección 4ª, Sentencia de 3 May. 2011, rec. 93/2009, paras. 142-3: 'nunca podrá deducirse que la finalidad pretendida por los piratas fuera atacar el orden constitucional o alterar gravemente la paz pública, sino otra muy distinta y guiada por un espíritu abiertamente económico, la obtención del mayor lucro posible […] [mientra] el bien jurídico protegido del delito de terrorismo, [es] la salvaguarda de la paz social, y no la vida de los afectados,'

[662] See on the general definition of terrorism under international law *ex multis*: DUFFY, H., '"Terrorism' in international law', in *The 'War On Terror' And The Framework Of International Law, Second Edition,* Cambridge (2015), pp. 29-42; SAUL, B., 'Civilizing the Exception: Universally Defining Terrorism', in Masferrer, A. (ed.), *Post-9/11 And The State Of Permanent Legal Emergency: Security And Human Rights In Countering Terrorism,* Dordrecht Heidelberg New York London (2012), pp. 79-100; SAUL, B., *Defining Terrorism in International Law*, Oxford (2010); RONZITTI, N., WMD Terrorism, *Japanese Yearbook of International Law*, 52(2009), pp. 175-90; CONTE A., 'Terrorism, Counter-Terrorism and International Law', in *Human Rights in the Prevention and Punishment of Terrorism*, Berlin, Heidelberg (2010), pp. 369-88; DI FILIPPO, M., 'The Definition(s) of Terrorism in International Law', in Saul, B. (eds.) *Research Handbook on International Law and Terrorism,* Cheltenham (2014), pp. 105-42; AMBOS, *supra* note 151, pp. 228- 32; HIGGINS, R., FLORY, M. (eds.), *Terrorism and international law,* London New York (1997).

[663] *Ex multis*: JEßBERGER, *supra* note 402, p. 79: 'On the international level, treaty law is "sectoral" only: the existing conventions do not address terrorism comprehensively; rather, they suppress specific types of violence commonly used by terrorists.' The 1937 Convention for the Prevention and Punishment of Terrorism in fact, despite offering a definition of terrorism, is devoided of any legal value since it never came into force. DUFFY, *ibid.*, p. 31.

ILC Draft Comprehensive Convention Against International Terrorism[664] and possibly also in Paragraph 3 UNSC res. 1566(2004)[665] and Article 2(1) of the International convention for the suppression of the Financing of Terrorism (1997).[666]

In sum, there may not be a black-on-white, strict *definition* of the crime, but this does not mean that there is *no notion* of it at all. The definitions contained in the aforementioned texts show a very high level of consistency, identifying a nucleus of *actus reus* (death, bodily injury, damage to public or private property etc.), and a *mens rea*, a *dolus specialis* consisting (alternatively) in spreading terror amongst a civilian population or intimidating it or to compel an authority (*lato sensu*) to do or abstain from doing any act. That having been said, the troubles with terrorism do not end with its definition (or lack thereof). *The status* itself *of terrorism as a discrete crime under international law* is contested and, currently, predominantly rejected.[667] Similarly, it is equally disputed whether *acts* of terrorism may amount to other crimes under international law. In this sense, while affirming that 'there can be no doubt that acts that may terrorise civilian populations in order to achieve political objectives may also, in specific circumstances, constitute crimes against humanity, or war crimes, or for that matter, genocide',[668]

---

[664] 'Article 2. 1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act'.

[665] 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature'.

[666] 'Article 2 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.

[667] *Supra* note 146. *Ex multis*: AMBOS, *ibid.* pp. 231-2; HIGGINS, R., 'Terrorism and international law', in Higgins, Flory, *supra* note 419, pp. 13-4; DUFFY, *ibid.*, pp. 48-9.

[668] SCHABAS, W., 'Is Terrorism a Crime Against Humanity?', in Langholtz, H., Kondoch, B., Wells, A. (eds.), *International Peacekeeping: The Yearbook of International Peace Operations* 8(2002), p. 256.

Schabas seems to deny that terrorist attacks[669] may *ordinarily* amount to CAHs as defined under art. 7 ICC St., since this categorization would only simplistically and superficially meet the contextual requirements[670] and the gravity of CAHs, opening the doors to minor incidents, clearly disregarded by international criminal law.[671] Less controversial, on the contrary, is *whether terrorism may fall under other crimes*, and particularly *war crimes*.

In *Galić*, the ICTY Appeals Chamber enumerated many IHL provisions prohibiting terrorist attacks in armed conflict,[672] whose violations give rise to individual responsibility under international criminal law and the possibility of prosecuting certain acts of terrorism as war crimes seems to be accepted under international law.[673]

Moving back to the sea, or at least to acts of terrorism taking place on it, it is now time to provide some specific definitions of the problem and the related issues.[674]

---

[669] Professor Schabas specifically refers to the 9/11 attacks.

[670] *Ibid.*: 'Although "terrorism" is a concept that has eluded definition, There is undoubtedly an overlap. But this does not mean that terrorist acts are, by definition, crimes against humanity, merely because they may appear to be "widespread" or "systematic" attacks with civilian victims'.

[671] *Ibid.* p. 257.

[672] ICTY, *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber Judgment, 30 November 2006, paras. 87-98 pp. 41-9.

[673] *Ibid.* paras 99-104, pp. 48-51. On terrorism as a war crime see: JODOIN, S., Terrorism as a War Crime, *International Criminal Law Review* 7(2007), pp. 77–115; SAUL, B., 'Terrorism in International Humanitarian Law', in Saul, B., *Defining terrorism, supra* note 415, pp. 271-313. In the same sense also AMBOS, *supra* note 151, p. 234.

[674] See on the topic: TUERK, H., Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *Center for Oceans Law and Policy* 12(2008), pp. 41-8; KLEIN, N., 'Terrorism and Proliferation of Weapons of Mass Destruction', in *Maritime Security and the Law of the Sea*, Oxford (2011), pp. 151-4; VAN HESPEN, *supra* note 395, pp. 288-91; HONG, N., NG, A.K.Y., The international legal instruments in addressing piracy and maritime terrorism: A critical review, *Research in Transportation Economics* 27(2010), pp. 51–60; WOLFRUM, R., 'Fighting Terrorism at Sea: Options and Limitations under International Law', in Moore, J.N. et al. (eds.), *Legal Challenges in Maritime Security*, Leiden (2008), pp. 1-40; SOHN, L. B., '14 Maritime Terrorism and Security', in Sohn, L.B. et al (eds.), *Cases and Materials on the Law of the Sea, Second Edition*, Leiden (2014), pp. 703-37; SCHNEIDER, P., When Protest Goes to Sea: Theorizing Maritime Violence by Applying Social Movement Theory to Terrorism and Piracy in the Cases of Nigeria and Somalia, *Ocean Development and International Law* 51(4)(2020), pp. 283-306; MELLOR, J., Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism, *American University International Law Review*, 18(2)(2002), pp. 341-98; KIM, S., 'Maritime Terrorism and the SUA Convention Regime', in *Global Maritime Safety & Security Issues and East Asia*, Leiden (2019), pp. 104-47; FRANCIONI, F., Maritime Terrorism and International Law: The Rome Convention of 1988, *German Yearbook of International Law* 31(1988), pp. 263-88; JOYNER, C.C., The 1988 IMO Convention on the Safety of Maritime Navigation: Towards Legal Remedy for Terrorism at Sea, *German Yearbook of International Law*, 31(1988), 230-62; PAPASTAVRIDIS, E., Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas, *The International Journal of Marine and Coastal Law* 25(2010) 569–99; GALANI, S., EVANS, M.D., 'The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?', in Galani, S., Evans, M.D. (eds.), *The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?* Cheltenham (2020), pp. 1-24; KUBIAK, K., Terrorism at Sea: New Threat to International Security, *Polish Quarterly of International Affairs*, 11(3)(2002), pp. 50-68; MCLAUGHLIN, R., ''Terrorism' as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2011', in Schmitt, M.N., Arimatsu, L. (eds.), Yearbook of International Humanitarian Law 14(2011), pp. 391-409; HALBERSTAM, M., Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law* 82(2)(1988), pp. 269-310.

As already seen, the tragic events of the hijacking of the *Achille Lauro* in October 1985 and the killing of Klinghoffer by members of the Palestine Liberation Front seeking to compel Israel to free some Palestinian prisoners provided the impetus for the drafting of the SUA Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation), elaborated by the IMO and adopted in Rome in 1988.[675]

Before its adoption, the only maritime crime under international law was piracy, and when the Achille Lauro incident happened, there were tentatives to push the definition of piracy to encompass 'any armed violence at sea which is not a lawful act of war',[676] fatally distorting and betraying the history, definition and rationale of the crime of piracy.[677]

For this reason, back in 1985, the legal advisors to several governments agreed that the seizure of the Achille Lauro could not be considered an act of piracy, as defined in the 1982 Convention, 'because the hijackers did not act for "private ends" and there was no second vessel involved.[678] The States acknowledged this lacuna. Back in December 1985, the UNSC President 'condemn[ed] terrorism in all its forms, wherever and by whomever committed' and the immediately subsequent UNSC Res. 579(1985) '[u]rge[d] the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment *of all acts of hostage taking and abduction as manifestations of international terrorism*[679]'.

So this is the factual and legal background of the SUA,[680] whose Article 3 reads: 'Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over

---

675 Together with the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

676 TUERK, *supra* note 427, p. 46.

677 TREVES, T., Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, *The European Journal of International Law* 20(2)(2009), p. 402.

678 TUERK, *Ibid.* p. 48; FRANCIONI, *supra* note 427, p. 266. With regard to the *dolus specialis* of piracy see *supra* note 409.

679 Emphasis added. Para. 5.

680 'In November 1986, the Governments of Austria, Egypt, and Italy proposed that IMO prepare a convention on the subject of maritime terrorism "to provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation, which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole."' KRASKA, J., PEDROZO, R., 'Chapter Twenty-Two Commentary for the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', in *International Maritime Security Law*, Leiden (2013), p. 802. As noticed by MacDonald, explainig the reason behind the formulation of the SUA, the Convention is in essence an adaptation (maritimization?) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of which, significantly, also reproduces the title. MCDONALD, D.S., The SUA 2005 Protocol: A Critical Reflection, *The International Journal of Marine and Coastal Law* 28 (2013) p. 489; MCDORMAN, T.L., 'CHAPTER THIRTEEN Maritime Terrorism and the International Law of Boarding of Vessels

a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)'.

Article 4 further provides for the spatial scope of the crimes above: 'the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State'.

Reading through the slightly convoluted formulation, it means, in its essence, not only in all the maritime areas beyond a (single) state's jurisdiction, but it also includes vessels from and to the waters beyond; thus, the definition stretches also to the territorial sea, at least as long as the attacked ship does not intend to remain within the territorial waters.[681]

While conceived to address terrorism at sea, it seems that the SUA provides the definition of an offence partially overlapping piracy and terrorism but at the same time distinct from them[682]. As efficiently summarised by Tuerk, pirates and terrorists operate for different purposes: the pirate wants to become rich, the terrorist wishes to make a political point and unleash his brutality and share its horror with the broadest public possible, whereas the pirate keeps a lower profile.[683]

---

at Sea: A Brief Assessment of the New Developments', in Caron, D.D., Scheiber, H.N. (eds.), *The Oceans in the Nuclear Age*, Leiden (2014), pp. 240-1.

[681] KRASKA, PEDROZO, *ibid*. pp. 809-10; BECKMAN, R., 'Chapter 15. Jurisdiction over Pirates and Maritime Terrorists', in Schonfield, C., Lee, S., Kwon, M. (eds.), *The Limits of Maritime Jurisdiction*, Leiden Boston (2014), pp. 353-4; KARIM, M.S., 'The International Law of Maritime Terrorism', in *Maritime Terrorism and the Role of Judicial Institutions in the International Legal Order,* Leiden (2016), p. 56.

[682] 'The SUA Convention does not expressly cover the crime of piracy and its offences are not coextensive with the crime of piracy, as defined under UNCLOS. Not all piracy acts will fall within SUA Convention, but an attack from one vessel against another and acts of violence intended to seize control of ship can constitute both piracy and an offence under SUA Convention. Conversely, internal hijacking of a vessel would be a SUA Convention offence but not piracy.' SATKAUSKAS, R., Piracy at sea and the limits of international law, *Aegean Review of the Law of the Sea* (2011), p. 222. In the same sense, MCDONALD, *supra* note 432, p. 490.

[683] TUERK, *ibid*. p. 47.

Article 3 does not require any special intent, the underlying actions need not be motivated by the intention to spread terrors amongst a civilian population and/or compel an authority to do or not to do something, nor it requires an *animus furandi* or any other private intent[684]. A simple *dolus generalis* is sufficient to establish the offence under Article 3 of the SUA.[685] A possible indication of the ontological difference between terrorism at sea and maritime terrorism could also be found in the wording of Article 3. Even though Kubiak argues that the lack of any reference to terrorism lies in the controversial status and legal meaning of the term,[686] which would not be unreasonable at all, it might also show that the offences under Article 3 and terrorism belong to separate (yet close) *ghénos*.[687]

The SUA 1988 is not, however, the end of history. In 2005 -in the aftermath of 9/11-,[688] 'recalling [*ex multis*] resolutions 1368 (2001) and 1373 (2001) of the United Nations Security Council, which reflect international will to combat terrorism in all its forms and manifestations'[689] and believing 'that it is necessary to adopt provisions supplementary to those of the Convention, to suppress additional terrorist acts of violence against the safety and security of international maritime navigation and to improve its effectiveness'[690] it was adopted an additional Protocol to the SUA Convention.[691]

The SUA 2005 introduces significant elements of novelty into the original text of the Convention[692]. Apart from removing the reference to the killing or injury to persons on the

---

[684] With the exception of art. 3(2)(c) above.

[685] 'The requisite mens rea in the chapeau for offenses in article 3 is intent and that is combined with a second mental element in the provision that could be either one of general intent (for example, in 1(c), the offender damages a ship, which is likely to endanger safe navigation) or specific intent (for example, in 1(f), the offender communicates information, knowing it to be false)'. KRASKA, PEDROZO, *supra* note 432 p. 808; BECKMAN, *ibid;* JOYNER, *ibid.*, p. 237.

[686] KUBIAK, *supra* note 427, p. 61. In the same sense, KARIM, *ibid.*, p. 55: 'The SUA Convention did not define the term 'terrorism' or the term 'maritime terrorism' […] the definition of terrorism is a highly contested issue. Instead, the Convention identified some relevant offences or unlawful acts'.

[687] That with regard to the SUA 1988. The SUA 2005, however, as it will be shortly seen, in Article 3bis introduced within the *mens rea* of the maritime terrorism an explicit reference to the 'purpose […] to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'. *Infra* note 488.

[688] HARRINGTON, C.A., Heightened Security: The Need to Incorporate Article 3BIS(1)(A) and 8BIS(5)(E) of the 2005 Draft Sua Protocol into Part VII of the United Nations Convention on the Law of the Sea, *Pacific Rim Law and Policy Journal* 16(1)(2007), p. 119.

[689] Protocol Of 2005 To the Convention For The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation (hereinafter, SUA 2005), preambular para. 6.

[690] *Ibid.* preambular para. 13.

[691] which entered into force in 2010 but, unfortunately, has a very low level of ratification. MCDONALD, *supra* note 432, p. 486.

[692] FINK, M., 'International Agreements on Maritime Interception', in *Maritime Interception and the Law of Naval Operations*, The Hague (2018), p. 149.

vessels[693] and simplifying Para. 2 of the original Article 3 of the Convention, it introduces the new Article 3bis[694]. Paragraph 1 letter (a) 'terrorizes'[695] the previously unspecific text of the Convention by establishing that 'when the *purpose of the act*, by its nature or context, *is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act*[696]*:* (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or (iii) uses a ship in a manner that causes death or serious injury or damage; or (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii)'.

The employment of WMDs is thus criminalised under the *chapeau* of the *dolus specialis* of terrorism.[697] Under the same paragraph, however, are also included conducts that do not formally qualify as weapons or as dangerous materials, but are nevertheless likely to cause significant damage to humans (and logically, also the environment), such as oil *etc.*

In sum, anything that is a weapon *per se* or which may be weaponised in practice[698] is now covered by the SUA Convention (more precisely, by the Convention for those states which are party to both instruments), although only when used with the specific aim of terrorising or compelling authorities.[699]

Letter (b) of new Article 3*bis* touches another relevant, and in a way, a prodromic, problem which has already been examined in the course of this Dissertation[700] namely the movement (trafficking, smuggling, trading *et similia*) of WMDs, introducing a specific regime for the seas complementing the non-proliferation initiatives:[701] 'transports on board a ship: (i) any explosive

---

[693] Originally absent due to the unlikeliness that killing a single person might endanger maritime saferty. See HALBERSTAM, *supra* note 427 pp. 293-5. Then killing and injuring has now been moved to art. 3*quater*.
[694] See: KRASKA, PEDROZO, *supra* note 432, pp. 826-8.
[695] 'The 2005 Convention is one of the strongest instruments to stop the scourge of international terrorism. The preamble to the treaty references "terrorism," and "terrorist attacks," and "terrorist acts," and article 3ter incorporates by reference nine other anti-terrorism conventions.' *ibid.* p. 820.
[696] Emphasis added.
[697] KARIM, *supra* note 433 p. 60.
[698] Including the ships themselves. MCDONALD, *supra* note 432, p. 503.
[699] HARRINGTON, *supra* note 438, p. 120.
[700] *Supra*, para. 3.2.
[701] KRASKA, PEDROZO, *supra* note 432, p. 828.

or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.'

The two issues (maritime terrorism and WMDs[702]) are thus joined together in the SUA 2005 since in drafting the latter, the IMO borrowed solutions employed in the anti-smuggling conventions.[703] The sole, perfectly logical exception to that prohibition is that it does not constitute an offence to transfer such material to a state party to the Treaty on the Non-Proliferation of Nuclear Weapons *per* the rules thereby set.[704]

Whilst trafficking in WMDs is a frequent, or at least regular, occurrence of our times,[705] thriving with the blood of the many troubles and conflicts scattered around the globe, no records of maritime terrorism had been registered in 2021 with the very modest exceptions of attacks relating to the ongoing Yemenite conflict between Iranian-backed Houthis and Saudi Arabian forces and settlements in the Red Sea and Gulf of Aden and in the region of the Niger Delta, equally characterised by persistent instability.[706]

---

[702] On the substantial nexus existing between trafficking in weapons and terrorism, see *ex multis*: BERTOLOTTI, *supra* note 42, pp. 61-2.
[703] MCDONALD, *supra* note 432, pp. 486, 495-502.
[704] Art. 3bis(2). KRASKA, PEDROZO, *ibid*.
[705] In this sense, between August 2023 and January 2024 Western intelligence services have claimed having gathered evidence of several deliveries of North Korean munitions and military equipment to Russia. Whilst part of this trade has been allegedly been made via railway, several vessels have been spotted offloading undisclosed cargos from the port of Rajin (NK) to the Russian facilities in Dunai. If verified, it would not seem unreasonable to attempt invoking the potential responsibility of NK authorities as accomplices (*lato sensu*) to the crimes perpetrated in Ukraine. See: BYRNE, J., BYRNE, J., SOMERVILLE, G. (RUSI), The Orient Express: North Korea's Clandestine Supply Route to Russia, *RUSI* 16 october 2023 https://rusi.org/explore-our-research/publications/commentary/report-orient-express-north-koreas-clandestine-supply-route-russia; ROTH, A., UK sends UN experts photographs of North Korean shipments to Russia, *The Guardian* 22 january 2024 https://www.theguardian.com/world/2024/jan/22/uk-sends-un-experts-photographs-north-korean-shipments-russia.
[706] THE EDITORIAL TEAM, IFC: Maritime Security Situation Mid-Year Report 2022, *Safety4Sea*, 22 August 2022: https://safety4sea.com/ifc-maritime-security-situation-mid-year-report-2022/; DRYAD GLOBAL, *ANNUAL*

REPORT 2021, pp. 13, 17-8: https://safety4sea.com/wp-content/uploads/2022/03/Dryad-Global-Annual-Report-2021-2021_03.pdf.

CHAPTER III. Taxonomies of evil and the quest for a unified regime over (maritime) crimes of international concern. Piracy: the prototype of crime at sea

Introduction

As the maritime zones artificially drawn onto the sea flow unbroken into each other, so do the crimes tainting the waves blur their lines in a *continuum* of evil. A great example of this continuum and ancillary of different crimes is the phenomenon of piracy in the Horn of Africa. The causes of its outbreak have been traced back to the illegal, unreported, unregulated fishing[707] systematically perpetrated by foreign vessels in and off Somalian waters.[708] This practice -and the resulting devastation of the local marine ecosystem-[709] has robbed 'the Somali people of their livelihoods, marine resources, ecosystem and health', triggering the quest for other sources of revenue,[710] and piracy has happened to be quite a *lucrative* one,[711] despite not being the most

[707] Hereinafter, IUU fishing. See also on this topic RICARD, P., Pêche / Exploitation durable des ressources halieutiques, *Répertoire de Droit Internationale* (2021).

[708] In fact, it is submitted that at first the then-pirates tried to patrol Somalian waters to counter illegal fishing and then it progressively evolved into its current features, where the primary business of pirates consist in attacking ships with the goal of looting their cargos and increasingly holding the crew as hostages to force shipping companies and states to pay the ransom. BARNES, R., ROSELLO, M., 'Fisheries and maritime security: understanding and enhancing the connection', in Evans, M.D., Galani, S. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?* (2020), pp. 48-9.

[709] Also contaminated by the dumping of *nuclear waste* and other pollutants allegedly carried out by (*inter alia*) Italian criminal organizations, as the '*Ndrangheta* and *Mafia* with the alleged complicity of undisclosed civilian and military servants at the highest levels of the Republican hierarchy. See in this sense, N. 1680/96 RGNR, *Declassified Document pursuant to the communication of the Prosecutor of the Tribunal pf Reggio Calabria to the President of the Chamber of Deputies, 17 september 2015*. PROCURA DELLA REPUBBLICA presso la Pretura Circondariale di Reggio Calabria, *N. 2114/94RGNR Reggio Calabria 23.07.96, Oggetto:- Trasmissione Atti Fascicolo Proc. 2114/94 RGNR al Sig.S. Procuratore della Repubblica, Doti. Alberto Cisterna, Reggio Calabria*, pp. 15-6. 'il Progetto dell'O.D.M. di effettuare l'interramento nei fondali oceanici di rifiuti radioattivi, mediante l'utilizzo di penetratori, anche se non emerge se lo smaltimento di scorie nucleari sia mai stato effettuato […] tentativi effettuati […] con paesi sottosviluppati con promesse in danaro e costruzioni di opere pubbliche di prima necessità, […] afferma, di ottenere mediante altri canali e amicizie internazionali il consenso per il seppellimento delle scorie radioattive nei fondali marini, anche dopo il parere negativo degli stati da lui interpellati'. While the quoted passages of the inquiry do not explicitly affirm that such dumpings effectively took place, either in Somalia or elsewhere, it certainly points -albeit in a highly suggestive and indirect way, towards a certain consolidated practice of disposing of asbestos, radioactive or chemically pollutant substances either on the African soil or in the surrounding oceanic subsoil. Also, KELBESSA, W., 'Environmental Injustice and Disposal of Hazardous Waste in Africa' in: Brinkmann, R. (ed.), *The Palgrave Handbook of Global Sustainability*, Cham (2023), p. 1963. According to current research, it has been suggested that the mysterious deaths of Ilaria Alpi and Milan Hrovatin in Somalia (1994) should be linked to the investigations on these very smuggling and dumping activities.

[710] DUBNER, B., VARGAS, L. M., 'On the Law of Pirate Fishing and Its Connection to Human Rights Violations and to Environmental Degradation A Multi-National Disaster', *Journal of Maritime Law and Commerce*, 48(2) (2017), p. 107.

[711] See the report by the FINANCIAL TASK FORCE at note 12.

honourable.[712] However, the *nexus* between IUU fishing and piracy is not limited to Somalia. It equally affects piracy and armed robbery at sea worldwide, finding its ultimate roots in the poverty of the affected areas.[713] Not only the roots of piracy can be linked to other crimes, but it is also claimed that some proceedings derived from it are employed to fuel other delicts, from terrorism to various forms of smuggling.[714]

With reference to terrorism (in particular *maritime* terrorism), there is plenty of evidence of its connection to piracy.[715] Amongst the most recent allegations of this nexus, the UNSC *Resolution* 2608 (2021) affirms 'the ongoing threat [posed by] resurgent piracy and armed robbery at sea', adding that piracy exacerbates instability 'by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism.'[716]

This very synthetic analysis may suffice to represent the absolute level of intricacy in maritime criminal affairs and the chains of causality linking different phenomena.[717] Nevertheless, there are still a couple of issues to be inquired about before leaving the domain of reality to enter the intricacies of the law.

The first attention-deserving issue is that of the *fishing industry*. *Over* and *IUU* fishing are not just linked to the systematic plunder of biological resources at sea,[718] but perhaps even more

---

[712] SUMAILA, U. R., BAWUMIA, M., 'Fisheries, ecosystem justice and piracy: A case study of Somalia', Fisheries Research (2014), pp. 159-60.

[713] 'The main reason behind maritime piracy is poverty'. THE FUND FOR PEACE, *Threat Convergence Transnational Security Threats in the Straits of Malacca* (2012), pp. 7-8.

[714] Of humans, drugs, weapons etc. WORLD BANK, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa. A World Bank study* (2013), pp. 4 ff. In the strait of Malacca, piracy and armed robbery at sea have also been linked to drug trafficking and smuggling of human beings: UNODC, *Combating Transnational Organized Crime Committed at Sea Issue Paper* (2013), pp. 21-2; NORTON-TAYLOR, R., Sea trafficking report reveals how ships move guns and drugs, *The Guardian*, 30 January 2012 https://www.theguardian.com/world/2012/jan/30/sea-trafficking-report-guns-drugs.

[715] *Ex multis*: MØLLER, B., *Piracy, Maritime Terrorism And Naval Strategy*, Danish Institute For International Studies Report n. 2 (2009), pp. 23-9. Harmen Van der Wilt also highlights the links between narco-trafficking and terrorism in what has been called *narco-terrorism*. VAN DER WILT, H., 'Legal responses to transnational and international crimes: towards an integrative approach?' in Van der Wilt, H., Paulussen, C. (eds.), *Legal responses to transnational and international crimes: towards an integrative approach* (2017), p. 13.

[716] *Supra* note 3. See also: FINANCIAL ACTION TASK FORCE, *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011), in particular para. 18 pp. 9-10 and paras. 65-82 pp. 27-33.

[717] See: UNODC, *supra* note 10 p. 4. More in general, on the linkages between various forms of criminality and between transnational crimes and international crimes see: VAN DER WILT, *supra* note 14, pp. 13-6.

[718] As they may also take place in freshwater bodies, as previously seen. ENVIRONMENTAL JUSTICE FOUNDATION, *Blood And Water: Human rights abuse in the global seafood industry* (2019), pp. 8-9; TANAKA, Y., '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* 22 (2020), pp. 392-3, 397 ff. BARNES, R., ROSELLO, M., *supra* note 7 p. 54.

shockingly, to widespread and systematic human rights abuses.[719] Furthermore, vessels used to fish, once they have carried their former swimming cargo to its destination, may move back to their port of origins with other, *more fishy* -pun intended- commodities. For instance, in the parliamentary inquiry of the Italian Chamber of Deputies concerning the murder of *Ilaria Alpi* and *Milan Hrovatin*, it is mentioned that vessels belonging to the Somalian company *Shifco* may have been used to trafficking arms and weapons into the African state,[720] contributing to the neverending circle of violence in the latter.

Back to human right abuses in relation to fisheries, quoting from an article from the *New York Times*, '…the sick cast overboard, the defiant beheaded, the insubordinate sealed for days below deck in a dark, fetid fishing hold'.[721] These are the inhuman conditions inflicted upon fishers in many world areas, particularly in Thailand[722] and Indonesia, Cambodia, Vietnam and the surrounding countries condemned to forced labour and slavery on often unseaworthy vessels.[723]

Slavery and sea. History inextricably links these two terms, but even in our age sees the seas are the liquid prisons of many. Modern slavery, as the *inhuman exploitation of workers*, has often been called,[724] and massive human rights abuses are also linked to human trafficking and maritime migrations.[725]

Oftentimes *modern slavery* is the result of *(maritime) migrations and human smuggling*. Desperate individuals seeking to improve their miserable conditions, convinced by fraud and false promises to move abroad, work on vessels, help their families.[726] That is the common incipit of

---

[719] LEWIS, S.G. *ET AL.*, 'Human Rights and the Sustainability of Fisheries', in Levin, P.S., Poe, M.R. (eds.) *Conservation for the Anthropocene Ocean: Interdisciplinary Science in Support of Nature and People* (2017), pp. 381 ff. See also: ENVIRONMENTAL JUSTICE FOUNDATION, *supra* note 14.

[720] See *ex multis* ATTI PARLAMENTARI XIV LEGISLATURA, CAMERA DEI DEPUTATI, DOC. XXII-BIS N.1-BIS, COMMISSIONE PARLAMENTARE D'INCHIESTA SULLA MORTE DI ILARIA ALPI E MIRAN HROVATIN […], *Relazione di minoranza (presentata da:Mauro Bulgarelli) Presentata alla Commissione in data 23 febbraio 2006 Comunicata al Presidente della Camera il 28 febbraio 2006*, pp. 31-48 https://leg14.camera.it/_dati/leg14/lavori/documentiparlamentari/indiceetesti/022bis/001bis/INTERO.pdf.

[721] URBINA, I., 'The Outlaw Ocean. 'Sea Slaves': The Human Misery That Feeds Pets and Livestock', *The New York Times*, 27 july 2015.

[722] DOW, S., ''Such brutality': tricked into slavery in the Thai fishing industry', *The Guardian*, 21 september 2019. See also: HUMAN RIGHTS WATCH, *Hidden Chains Rights Abuses and Forced Labor in Thailand's Fishing Industry* (2018); GREENPEACE, *Turn The Tide: Human Rights Abuses and Illegal Fishing in Thailand's Overseas Fishing Industry* (2018).

[723] URBINA, I., 'Lawless Ocean: The Link Between Human Rights Abuses and Overfishing', *Yale Environment 360*, 20 november 2019.

[724] See: KOJIMA, C., 'Modern Slavery and the Law of the Sea: Proposal for a Functional Approach', *Korean Journal of International and Comparative Law* 9 (2021), pp. 6-11.

[725] HUMAN RIGHTS WATCH, *supra* note 17, pp. 17-25.

[726] A similar fate is also shared by many women lured into prostitution in Central Asia and elsewhere. See CURLEY, M., SIU-LUN, W., *Security and Migration in Asia: The Dynamics of Securitisation*, London (2008), p. 90 ff.

many tragedies, and this problem is not limited to some remote lands. Still, it concerns even developed, highly civilised progressive countries like Ireland and the United Kingdom.[727] Physical violence, withholding of wages, overwork, and debt burdens as workers owe fees to brokers for securing their jobs, no chance to bring their cases to a judge to seek judicial help.[728]

The magnitude of migrations at sea and the related tragedies echo through the media almost daily and reality speaks for itself with unrestrained brutality[729]. Nevertheless, while the images are eloquent, it is worth classifying the accidents to grasp the exact scale and peculiarities of the phenomenon.

First, the deaths. According to the 2018 UNDOC report, based on data offered by the IOM in 2017, for instance, the total number of deaths due to drowning or presumed drowning in the context of maritime routes amounts to 3,597 or the 58% of the total.[730] Many have also died by the hands of the Libyan coastguard, which, instead of saving the lives of people in distress in precariously navigating boats, fired upon them.[731] However, even for those who survive, it is still a voyage of uncertainty and pain. Overcrowded, unseaworthy vessels,[732] lack of food,[733] violence

[727] ENVIRONMENTAL JUSTICE FOUNDATION, *supra* note 14, p. 10.

[728] ""the young, inexperienced Indonesian was a favourite punching bag, particularly when catches were poor. He claims one senior crew member was "a furious person. He hurt people, he always cursed his people, bad mouthing us and slapping our heads for no reason at all. There were instances when he got mad and threw our laundry and toiletries in the ocean." The crew were assaulted with fishing hooks, he alleges, adding that on one occasion the Indonesian teenager was slapped hard in the face with a thick sandal. Arif had seemed lonely the night he died and was found lifeless when colleagues tried to wake him in the morning.' SMITH, N., CAI, L., LOVEARD, D., 'Death on the high seas: Taiwanese rights groups demand end to modern slavery on fishing boats', *The Telegraph*, 14 January 2021.

[729] See for intance the recent Rohingya crisis. In 2020 hundreds of thousands Rohingya were trying to flee Myanmar due to political-religious persecutions, seeking refuge in Bangladesh and other South-Eastern Asian Countries. After having been prevented from disembarking due to Covid19-related border restrictions, they were pushed back into the sea by state authorities in Thailand, Malaysia and Indonesia, resulting in hundreds of deaths. Eventually they were confined, in atrocious conditions, on Bhasan Char Island, a remote and unstable silt island off the coast of Bangladesh were they have been basically imprisoned. The dystopian intersection of migratory crisis and Covid, which has plagued our recent history, has pushed the already tragic conditions of migrants, seafarers, fishers to unheard limits of inhumanness. JAGHAI-BAJULAIYE, S., *Joint Submission to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children*, 1 june 2020, paras. 6-7.

[730] UNODC, *Global Study on Smuggling of Migrants* (2018), p. 9.

[731] See, for instance, TONDO, L., 'The most unsafe passage to Europe has claimed 18,000 victims. Who speaks for them?', *The Guardian*, 2 december 2021.

[732] *Ex multis*: 'Rescuers pull 394 migrants from dangerously overcrowded boat off Tunisia', *Reuters*, 2 August 2021.

[733] RUHALA, E., 'Horror at Sea: Adrift for Months, Starving Asylum Seekers Threw 98 Bodies Overboard', *The Time*, 19 february 2013; CASS. I PEN., 7 may 2019 n. 19314. Every day, perusing the newspapers, TV news and webpages from all over the world, countless records of overcrowded, hardly fit for navigation, vessels with humans abandoned without basic supplies can be found.

and other inhuman conditions.[734] If possible, the recent Covid-19 pandemic has worsened the already disastrous conditions of fishers, workers, migrants and asylum seekers.[735]

Migrations at sea and human trafficking have also been linked (in various forms and degrees) to *other* crimes, terrorism *in primis*.

For instance, the terrorists responsible for the attacks in the Basilica of *Notre-Dame-de-l'Assomption* in 2020 in Nice,[736] the 2016 Christmas Market in Berlin[737] and, more recently, the killer of two Swedes in Brussels (2023)[738] had come to Europe by sea, landing in Lampedusa alongside genuine refugees and honest migrants.

Whilst terrorists and criminals, in general, constitute a *minimal fraction* of the human waves moving across the seas, there is solid evidence of the linkages between migration routes by sea, various forms of trafficking and terrorism.[739] Referring to the latter, in the Mediterranean area, in particular, this can primarily be linked to the collapse of Libyan institutions[740] and the substantial void of authority to enforce law and order: the ideal context for the viral proliferation of criminal activities.

As it will be seen in the next Paragraph, however, whereas the sea is an incredible prism enabling us to see with exceptional sharpness the complexities and interconnectedness between international and transnational crimes, the issue of their boundaries and the alleged merit of their dichotomy is not a purely maritime concern but rather appears to be a general taxonomical problem with significant jurisdictional ripercussions

---

[734] As reckoned *e.g.* in CASS. I PEN., 13 august 2021 n. 31652.

[735] *Supra*, note 28. During the September 2020 crew change crisis, 400,000 seafarers were left stranded at sea around the world: 'UN launches key initiative to protect seafarers' human rights amid COVID-19 crisis', *UN News*, 6 may 2021; 'More action needed for seafarers, 'collateral victims' of measures to curb COVID-19', *UN News*, 6 october 2020; 'Starving Rohingya refugees rescued off Bangladesh after two months at sea', *BBC News*, 16 april 2020.

[736] BURKE, J., TONDO, L., 'Suspect in Nice terror attack phoned his family hours before rampage', *The Guardian*, 30 october 2020.; SARZANINI, F., 'Attentato a Nizza, il killer era in Italia il 9 ottobre. Dopo lo sbarco a Lampedusa portato a Bari e identificato', *Il Corriere della Sera*, 29 october 2020.

[737] PARAVICINI, G., 'Suspected Berlin attacker spent 4 years in Italian jails', *Politico*, 21 december 2016; ARGOUBY, M., NASR, J., SCHERER, S., 'Berlin attack suspect emerged from jail with 'totally different mentality', *Reuters*, 22 december 2016.

[738] BETTIZA, S., Brussels shooting: Gunman who killed two Swedes had escaped Tunisian prison, *BBC News* 24 october 2023 https://www.bbc.com/news/world-europe-67195715.

[739] See: BERTOLOTTI, C., 'Libya: the businesses of human trafficking and the smuggling of oil, drug and weapons. A structural threat to Europe', *Osservatorio Strategico* 19(5)(2017), pp. 55-62; YUHAS, A., 'Nato commander: Isis 'spreading like cancer' among refugees'', *The Guardian*, 1 march 2016.

[740] *Ibid.* In many respects, as seen in Chapter IV, similar to the proliferation of piracy and Jihadi terrorism in Somalia and the waters surrounding it.

1. The crimes and their taxonomy. Arguments and critics of the international v transnational dichotomy

'Theories were clean and convincing and comprehensible. Life was messy and full of nonsense'.[741]

Classifying crimes is not an academic pastime. On the contrary, the importance of a correct understanding of the different categories of crimes serves a twofold aim, a *semiotic* and a *practical* one.

The importance of the terms used to refer to reality is evident.[742] As seen in the opening quote of the Introduction, according to the Génesis, immediately after having created the universe, God gave a name to all things, entrusting them with an identifying element. More radically, the Prologue of St. John the Evangelist's Gospel *is a hymn to the power of the primordial Word which existed before anything came to be*: '*Ἐν ἀρχῇ ἦν ὁ λόγος*'.[743] Similarly, underlying the inextricable nexus between reality and the names imposed on it, Dante explained that '*nomina sunt consequentia rerum*'.[744] At the same time also the opposite however appears to be true: *res sunt consequentia nominum*.

Being a 'common' criminal is one thing; being an *international* criminal is another. Committing tax fraud or burglary is one thing. Being a criminal against humanity, a *genocidaire* or an international terrorist or a human smuggler or a torturer or a pirate is another. There are different *social perceptions and stigmas*[745] which transfigure in more mundane aspects.[746]

---

[741] BARNES, J., *The noise of time* (2016), p. 53. I want to thank Prof. Niels Blokker (Leiden University) for the suggestion of this quote. In this sense also CASSESE, A., 'Soliloquy', in Cassese, A., Gaeta, P., and Zappalà, S. (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (2008), LXV.

[742] And this is one of the explications of the insistence on *Latin* and its pleaded role as the official language of international law, besides the obvious affection of the Author of this Dissertation. Whilst a proper argument - admittedly, *delightfully anachronistic* and likely even foolish - cannot be properly developed in this Dissertation, suffice it to say that the development of a non-partisan, non-hegemonic shared universal language for universal law would be quite desirable, without having to recur to newly, artificially invented idioms (although using Tolkien languages in treaties, judgments, quarrels would definitely be rather amusing). The relationship between words and behaviour has been explored, classical obsessions aside, by behaviouralists, psychologists and also by an increasing number of legal scholars, *e.g.* BIANCHI, A., HIRSCH, M., *International law's invisible frames: social cognition and knowledge production in international legal processes*, Oxford (2021).

[743] BIBLIA (Septuaginta), *Johannes* 1.1.

[744] ALIGHIERI, D., *Vita Nuova*, XIII, 4.

[745] *Supra*, Introduction, para. 6.

[746] Reasoning on the consequences of the *Pinochet case*, Ambos highlights that alongside *stricto sensu*, penal consequences other effecs might cohexist, such as naming and shaming, loss of reputation and so on (the so-called expressivist impact of punishment). AMBOS, *supra* note 46, p. 70-2; STAHN, C., 'Chapter 20 How Can We Justify

Beyond the semiotic aspects of the classification of crimes, as it will be more thoroughly seen in the next Chapter, the taxonomy of crimes bears with it significant jurisdictional consequences since *international crimes* can be prosecuted and punished, with some *caveats*, theoretically everywhere on the basis of the so-called *universal jurisdiction*.

That said, both the taxonomical criteria and the content itself of the various categories of crimes are not undisputed[747] -apart from the so-called *core crimes* (almost universally recognised as international).[748] genocide, crimes against humanity, war crimes, crimes against peace (also referred to as crime of aggression), apartheid and torture.[749]

Antipodally to the core crimes are those crimes *unencumbered* by international law. I am referring to '*ordinary*' crimes routinely prosecuted by the national authorities under their domestic legislation, such as driving under the influence of alcohol, thefts and burglaries, murders, building abuses, *etc.*[750]

Between these opposites, according to the prevailing dichotomic taxonomy, lies the muddy wetland *of transnational crimes* constantly in the balance between the land and the sea, or to put it differently, between the extra-national and the domestic dimension.[751]

International Criminal Justice?', in Blokker, N. M., Dam-de Jong, D., Prislan, V. (Eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*. Leiden (2021), pp. 407-9.

[747] BASSIOUNI, M. C., *Introduction to international criminal law* (2003), p. 114. Also, from a criminological and anthropological point of view, see BANTEKAS, I., 'Introduction: an interdisciplinary criminology of international criminal law', in Bantekas, I, Mylonaki, E. (eds.) *Criminological Approaches To International Criminal Law* (2014), p. 5: 'The principal difference between ordinary (domestic) crime and inter-national crime is context. Ordinary crime involves deviant conduct in a given societal setting that is subject to a degree of control by the local authorities. International crimes, on the other hand, particularly so-called core crimes (genocide, crimes against humanity and war crimes) occur in situations of lawlessness and breakdown of authority. Most transnational crimes, therefore, such as organised crime and terrorism, are akin to ordinary crime as far as their context is concerned. As a result of this diffused context between ordinary and international crimes it is not possible simply to transplant existing criminological theories to explain deviant conduct in the international realm.'

[748] WERLE, G., *Principles of international criminal law,* The Hague (2005), p. 26.

[749] *Ex multis*, US COURT OF APPEALS, SECOND CIRCUIT, *Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Peña-Irala,* case no. No. 191, Docket 79-6090, 630 F.2d 876; 1980 U.S. App. LEXIS 16111, 30 june 1980: '[t]urning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. […] The international consensus surrounding torture has found expression in numerous international treaties and accords. […] The substance of these international agreements is reflected in modern municipal i. e. national law as well. […] during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations'; *Infra* note 101.

[750] SCHABAS, W., *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford (2012), p. 27.

[751] JALLOH, C.C., 'The distinction between 'international' and 'transnational' crimes in the African Criminal Court', in Van der Wilt, H., Paulussen, C. (eds.), *supra* note 14, p. 272, 275. There are also common crimes which, for some accidental element, may acquire a *de facto* transnational element: *e.g. a rape committed by a national of the state A against a national of state B on board a vessel registered in state C presents (several) transnational elements. Similarly, a fraud committed by nationals of state A and J against nationals of states B-F. These crimes have transnational elements but are not (stricto sensu) transnational crimes.*

To understand this delicate, dynamic balance it is useful to make a summary incursion in the history of international criminal law, a process with no certainties but change,[752] moved by currents of history and the attention brought to specific phenomena.[753]

2. General principles of criminal jurisdiction (notes)

As explained by Schmitt in his masterpiece *Der Nomos der Erde* (1950),[754] 'the *ordo* [in Italian, il *diritto*] is terranean and pivoted on land'.[755] Whereas land is a checkboard of states clearly separated from each other by their boundary lines,[756] 'the sea remains beyond any quintessentially state-based spatial rule. […] the sea knows no borders beyond its coastlines.'[757]

Whereas the maritime paradigm of jurisdiction will be discussed in Chapter IV, in this Chapter it ought to address the applicability of the frame of criminal jurisdiction to crimes of international concern perpetrated at sea.

The very, still somehow surviving, post-Westphalian *Nomos der Erde* finds its gravitational centre in the state understood as a spatially delimitated, land-based, self-governing legal entity.[758] *Jurisdiction operates under a presumption of territoriality*.[759] Or at least, criminal jurisdiction is *by default* territorial. The foundation of this presumption lies in the belief -sometimes perhaps even the illusion- that states can and do actually exercise effective control over their territories[760]

---

[752] e.g. JACKSON, *supra* note 72, para. 163 'International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state'; WERLE, *supra* note 42, p. 26.

[753] STAHN, C., *A Critical Introduction to International Criminal Law*, Cambridge (2018), p. 15.

[754] The personal English translation of the various quoted passages is actually based on the Italian translation of the book. *Supra* note 9.

[755] *Ibid*. p. 21.

[756] Whether the lines in question are contested or not is comparatively irrelevant; what matters is that states are able to physically delimit their bodies and the principle that each state is sovereign within these lines is undisputed.

[757] *Ibid*. p. 205.

[758] PCIJ, *The Case Of The S.S. Lotus, France V. Turkey*, P.C.I.J. Ser. A No. 10. 2 (1927), p. 20.

[759] For instance, if Z kills X in the town Y, the murder will ordinarily fall under the jurisdiction of the authorities of Y irrespectively of the nationalities of Z and X. REBUT, D., *Droit penal international*, Paris (2019), p. 112. GALLANT, K.S., 'The Territorial Principle', in *International Criminal Jurisdiction: Whose Law Must We Obey*, Oxford (2022), pp. 181 ff.

[760] A doctrine particularly developed in the context of human rights law. See *ex multis* RAIBLE, L., Between facts and principles: jurisdiction in international human rights law, *An International Journal of Legal and Political Thought* 13(1)(2022), pp. 52-72; MORENO-LAX, V., The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model.", *German Law Journal* 21(3)(2020), pp. 385–416; GIUFFRÉ, M., A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights, *Questions of International Law* (2022), pp. 53-80; VIOLI, F., 'The Function of the

despite the contrary evidence *e.g.* rough or heavily forested terrains, vast unpopulated areas or characterized by extremely harsh climatic (*e.g.* Siberia, the Australian Outback, the various deserts etc.) or social conditions (rebel or infought areas, failed states, such as Haiti, Somalia, Yemen), where no authority can *de facto* be asserted and enforced.[761]

That said, when crime has a transnational element (either *ratione personae*[762] or *ratione loci*[763]), things become much less clear.[764]

In general terms,[765] international (criminal) jurisdiction is pivoted on five bases: 1) *Territoriality*: a State has jurisdiction with respect to any crime committed in whole or in part within its territory;[766] 2) *Active personality*: the offender was a national of the state;[767] 3) *Passive personality*: the victim was equally a national the state;[768] 4) *Protective principle:* when the crime vulnerates an essential interest of the state, such as security, territorial integrity or the sustainability of state finances (*e.g.* by counterfeiting its money);[769] 5) *Universality: jurisdiction exercised in the absence of any territorial, nationality or any other recognised nexus between the offence and the proceeding state.*[770]

Triad 'Territory', 'Jurisdiction', and 'Control', in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order*, Oxford (2020), pp. 77-8.

[761] SZIGETI, P., The Illusion of Territorial Jurisdiction, *Texas International Law Journal* 52 (2017), pp. 369–99.

[762] *e.g.* the offender is a national of state F, and the victim is a national of G.

[763] *e.g.* the *actus reus* was started in state A and continued or had its effects in state B.

[764] See in this sense *ex multis* Article 113-1-14 Code Pénale Francaise, Artt. 12-3 Criminal Code of the Russian Federation. PAYER, A., The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross-Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries, *International Criminal Law Review* 23(2023), pp. 175–238.

[765] *Ex multis*, RYNGAERT C. *Jurisdiction in International Law*, Oxford (2015); OXMAN, B.H., 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law* [MPEPIL], November 2007, para. 3; ALLEN, S., ET AL. (eds.), *The Oxford Handbook of jurisdiction in international law*, Oxford (2019); O'KEEFE (2015), para. 1.3 p. 3; MILLS, A., Rethinking Jurisdiction in International Law, *British Yearbook of International Law* 84(1)(2014), pp. 187–239; STAKER, C., '10. Jurisdiction', in Evans, D. (eds.), *International Law, Fifth Edition*, Oxford (2018); CRAWFORD, J., 'Part VII State jurisdiction, 21 Jurisdictional competence', in *Brownlie's Principles of Public International Law (9th Edition)*, Oxford (2019); AUST, A., 'Jurisdiction', in *Handbook of International Law*. Cambridge (2005), pp. 33 ff.; Harvard Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29(1935), pp. 439–42.

[766] O'KEEFE, *supra* note 374, pp. 9-10; RYNGAERT, C., Territory in the Law of Jurisdiction: Imagining Alternatives, in Kuijer, M., Werner, W. (eds) *Netherlands Yearbook of International Law* 47(2016), pp. 51-4; WERLE, G., JESSBERGER, F., *Principles of International Criminal Law, fourth edition,* Oxford (2020), p. 95; FLEURY GRAFF, T., Territoire et droit international, *Civitas Europa* 35(2015), pp. 41-53; AMBOS, K., *Treatise on International Criminal Law - Volume III: International Criminal Procedure,* Oxford (2016), pp. 212-3.

[767] See *ex multis* AKANDE, D., 'Active personality principle', in Cassese, A. (ed.), *The Oxford Companion to international criminal justice*, Oxford (2010), pp. 228-9; WERLE, JESSBERGER, *ibid*; O'KEEFE, *ibid.*, p. 11.

[768] O'KEEFE, *ibid*., pp. 12-3.

[769] O'KEEFE, *ibid.*, p. 12; FRASER, H.S., The Research In International Law—Third Phase, *American Bar Association Journal* 21(11)(1935), p. 729.

[770] See WOLSWIJK, H., Locus delicti and criminal jurisdiction. *Netherlands International Law Review* 46(1999), pp. 161-82.

3. A-territorial and extraterritorial (also called universal) criminal jurisdiction

With regard to this latter ground,[771] the recurse to non-territorial jurisdictional grounds can be traced back to two principal sets of problems: a) the lack of authorities endowed with territorial jurisdiction (this *a-territoriality* may be either a *de jure* or *de facto* condition[772]) in its *locus commissi delicti;*[773] b) the 'irrelevance' of territoriality and/or personal jurisdiction *vis à vis* the Kantian imperative to punish certain crimes vulnerating the international community as such, tracing the two dimensions of universal jurisdiction them back to the *Schmittian land-sea dichotomy* and the distinction between *deontic and utilitarian purposes* of law.

As seen on several occasions, the public order of the seas rests (almost) entirely on the personal jurisdiction exercised by each state upon the vessels flying its flag scattered in the farthest point of the earth. To put it differently, the sea marks and transcends the limits of territoriality with its antithetic dimension[774] and piracy -THE maritime crime- follows suit.[775]

When this masterpiece of *otherness* is read in conjunction with its subversive potential, the impact on maritime navigation and trade as well as the moral outrage resulting from the violences perpetrated during piratical attacks, it is possible to understand why it has warranted universal

---

[771] See SANDER, O., WOOD, M., 'Chapter II. Extraterritorial jurisdiction and the limits of customary international law', in Parrish, A., Ryngaert, C. (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham (2023), pp. 31-44.

[772] *i.e* the radical inapplicability of territoriality in a given context, e.g. the Outer Space or -even without '*boldly go[ing] where no man has gone before*'- *in ABNJs*. As for the second category I am referring to the so-called 'ungoverned spaces', a category encompassing failed states, regions troubled by anarchy et similia. Whilst in these situations there would be legally competent authorities, in practice they exercise no jurisdiction or control over the communities entrusted to them. See LYNCH, M., Failed States and Ungoverned Spaces. *Annals of the American Academy of Political and Social Science,* 668(2016), pp. 24-35; STANISLAWSKI, B. H., ET AL., Para-States, Quasi-States, and Black Spots: Perhaps Not States, but Not 'Ungoverned Territories,' Either, *International Studies Review 10(2)(2008), pp. 366–96*.

[773] Art. 10(d) Harvard Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29(1935), 439–42.

[774] DAVIES, M., 'Maritime Law, the Epitome of Transnational Legal Authority', in Handl, G., Zekoll, J., Zumbansen, P. (eds.). *Beyond Territoriality*, Leiden (2012), pp. 325-40. Whereas at its origins ships and vessels were perceived and used as floating parcels of territory, subject to the jurisdiction of the matriculating Powers, in our times the link between a vessel and its flag is consistently defined in terms of personality rather than territoriality. subject to the jurisdiction of the matriculating Powers, in our times the link between a vessel and its flag is consistently defined in terms of personality rather than territoriality. *E.g.* before the development of long-range artilleries allowing for engagements from remote, the bridges of the ships were treated as wobbly and cramped battlefields with combatants trying to overpower the enemy to get in control of the watercrafts or sinking them by opening cracks in their hulls. WARMING, R., 'An Introduction to Hand-to-Hand Combat at Sea: General Characteristics and Shipborne Technologies from c. 1210 BCE to 1600 CE', in Rönnby, J. (ed.), *On War on Board: Archaeological and historical perspectives on early modern maritime violence and warfare. 1st ed*, Hudding (2019), pp. 99-124.

[775] Infra Chapter para.

jurisdiction.[776] Differently put, *the enlargement of the bases of jurisdiction applicable to piracy was - if not merely- largely a consequence of territoriality* (*rectius*, the inapplicability thereof). In this context, therefore, it served a primarily *utilitarian* purpose. On the contrary, as illustrated in the Introduction, the *post-Nuremberg model* of justice pursues a quintessentially deontic or Kantian function, identified in the elimination of impunity.[777] More radically, the roles of international criminal justice and its champion, the ICC, have eschatologically[778] been read as a kind of international legal version of the *Katéchon*,[779] a 'bulwark against evil'.[780]

Before delineating with some very quick pen strokes the jurisdictional regime of the ICC, however, some general problems relating to universal jurisdiction must be preliminary discussed.

Back in June 1945,[781] Cowles postulated that, unless specifically forbidden to do so, under *Lotus* (1927) states were allowed to exercise jurisdiction over (alleged) war crimes:[782] 'in order to establish that, under international law, the principle of universality does not apply to the trial and punishment of such war crimes, it is necessary to show that States generally, as a matter of

---

[776] *Ex multis* CASSESE, *supra* note 48, p. 24. See also ROTH, M.P., 'Historical Overview of Transnational Crime', in Reichel, P., Albanese, J. (eds.), *Handbook of Transnational Crime and Justice Second Edition* (2014), pp. 6, 8-9. In the same volume it is, however, alleged that piracy would most certainly be an (international) crime under international customary law alongside 'war crimes, crimes against peace, crimes against humanity, genocide, […] slavery, and torture'; JOUTSEN, M., 'International Instruments on Cooperation in Responding to Transnational Crime', in Reichel, Albanese (eds.), *ibid.*, p. 304.

[777] 'there could be no more sacred trust than upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command.' FINCH, G.A., The Nuremberg Trial and International Law, *The American Journal of International Law* 41(1)(1947), p. 22. Emphasis added.

[778] SALTER, M., Carl Schmitt on the secularisation of religious texts as resacralisation of jurisprudence? *International Journal for the Semiotics of Law* 26(1)(2013), pp. 113-48.

[779] THE COMMON ENGLISH BIBLE, *Thessalonians* II, 2: 4-8: The person who is lawless is revealed, who is headed for destruction. […] Now you know what holds him back [ὁ κατέχων] so that he can be revealed when his time comes. The hidden plan to live without any law is at work now, but it will be secret only until the one who is holding it back is out of the way. Then the person who is lawless will be revealed.'

[780] ROYER, C., 'The International Criminal Court as a Bulwark Against Evil', in *Evil as a Crime Against Humanity: Confronting Mass Atrocities in a Plural World*, Cham (2023), p. 132. Arguably, though, it would seems that the true role of the ICC, rather than being a fortress -though perhaps bearing some resemblances with Buzzati's Bastiani Fortress- would seem to be closer to a lighthouse warning incoming ships of the dangers of the surrounding waters. Metaphor aside, the ICC has gained a formidable symbolic and expressivist function, representing the embodiment of international criminal law itself. In this sense, from a constructivist perspective see DANCY, G.T., The hidden impacts of the ICC: An innovative assessment using Google data, *Leiden Journal of International Law* 34(3)(2021), pp. 729-47.

[781] The date is significant since on the 8th of May 1945 the Third Reich had unconditionally surrendered to the Allies, and there was the question of what to do with the perpetrators of the Axis atrocities. It was, to put it differently, the dawn of a formidable Grotian moment.

[782] 'The holding is that an independent State has legal power to vest jurisdiction in its courts to hear and determine any criminal matter which is not prohibited by international law. Our subject may be stated in the same terms: An independent State has legal power to vest jurisdiction in its courts to hear and determine alleged war crimes unless it is prohibited from so doing by international law.' COWLES, W.B., Universality of Jurisdiction over War Crimes, *California Law Review* 33(2)(1945), p. 180.

practice expressing a rule of law, have consented not to exercise jurisdiction over such cases. As independent States are involved, any such restriction must be conclusively proved'.[783]

In primis, according to him, there was a parallelism between piracy and war crimes, as the chaos of war is not less perilous than the *de facto* anarchy of the high seas: in both cases, there is no guarantee of enforcement.[784] Cowles' key argument in support of extraterritorial jurisdiction for crimes not perpetrated by or against the citizens of a given state or against its interest, however, appears to be another: *even when they are not affecting the interests of specific, identifiable states, it is possible to prosecute and punish crimes 'when serious enough'*.[785]

The 'gravitational'[786] foundation of a universal right of punishment, though, predated WWII and the crimes associated to it.[787] For instance, Donnedieu de Vabres[788] already in 1923 had affirmed that 'la commission de certains crimes, d'une *exceptionnelle gravité, est une source de compétence universelle*. Cette compétence devient effective au profit des juridictions de l'Etat sur le territoire duquel le malfaiteur est arrêté […] ' Il existe, dit-il, une société universelle des hommes, societas generis humani. Le crime, envisagé comme une violation du droit naturel qui la régit, droit non écrit, mais *gravé dans la conscience individuelle, est une offense à l'humanité tout entière*. L'*obligation de punir* qu'il engendre est universelle. Elle se traduit, pour l'Etat dans le pouvoir duquel le criminel est tombé, par l'alternative fameuse d'extrader ou de punir: aut dedere, aut punire.'[789]

---

[783] *Ibid*. p. 181. In the same sense, WRIGHT, Q., The Law of the Nuremberg Trial, *The American Journal of International Law* 41(1)(1947), pp. 49-50.

[784] *Ibid*. p. 194.

[785] *Ibid*. p. 204.

[786] In the sense of gravity, seriousness.

[787] In this sense LEMKIN R. *Les Actes Constituant Un Danger Général Interétatique Considérés Comme Délits De Droit Des Gens …: Rapport Spécial Présenté À La 5me Conférence Pour L'unification Du Droit Pénal À Madrid 14-20 Oct. 1933*, Paris (1933).

[788] who served as the French judge in Nuremberg two decades later.

[789] DONNEDIEU DE VABRES, H., Le Systeme de la Repression Universelle, *Revue de Droit International Privé* 18(1923), p. 534. Emphasis added. According to Donnedieu de Vabres, these offences were 'La traite des noirs (1), la piraterie (2), la traite des femmes et des enfants (3), les attentats anarchistes commis au moyen d'explosifs (4) sont les manifestations variées de cette « criminalité universelle » que Voltaire savait opposer déjà, en termes lapidaires, « aux délits de temps et de lieu »'(5).' *Ibid*. p. 559. To these crimes he later added the 'trafic des boissons toxiques'. P. 146. In the same sense also Mittermaier, *quoted in* SALDAÑA, Q., La Justice Pénale Internationale, *Collected Courses of the Hague Academy of International Law* 10(1925), p. 290, according to whom the jus puniendi is not limited to the crimes identified by positive law 'car ils sont nécessairement punissables d'après les lois rationnelles, même à défaut d'une loi positive.' Lemkin, on the contrary, doubted that terrorism was a real crime, claiming that it was an umbrella name used to cover far too diverse notions. Conversely, he argued that other crimes should be included in the list, namely 'a) actes de barbarie, b) actes de vandalisme, c) provocation de catastrophes dans la communication internationale […] e) propagation de la contamination humaine, animale ou végétale'. LEMKIN, *Ibid*.

This comparatively vague petition of principle was confirmed two decades later, more compellingly than by any theoretical argument, by the scale and depth of the atrocities of the Axis.[790] Explaining the *law of the Nuremberg trials*, Wright relied on an almost sequacious paraphrasis of Donnedieu the Vabres: 'from a consideration of [...] the fundamental interests of states and of the community of nations protected by international law, of the acts which violate these obligations and threaten these interests, and of the circumstances which are likely to prevent punishment of such acts by the exercise of the normal jurisdiction of states, it is possible to determine whether a given act is a crime against the law of nations.'[791]

After Nuremberg, the definitions of international crimes and universal jurisdiction became mutually interdependent in the legal discourse: universal jurisdiction was the jurisdictional regime applicable to international crimes, and international crimes were those falling under universal jurisdiction, the rationale being the offensiveness to fundamental rechtsgüters and rules as well as the avoidance of impunity!

Although genocide is primarily (if not exclusively) a land-based crime, as previously noted, the discussion surrounding its jurisdiction is still important because it highlights many of the inconsistencies and weaknesses in the larger framework of international criminal jurisdiction.[792]

---

[790] Jackson, having been appointed as Prosecutor at Nuremberg, recognised both the unique -Grotian or Copernican- historical conjunction allowing, *rectius*, mandating a radical change of paradigm in international criminal justice: 'JACKSON, R. H., HOLMES, J. C., Addresses, *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 39(1945), P. 12

[791] *Ibid*. p. 58.

[792] BLANCO CORDERO, I., Universal jurisdiction. General report, *Revue internationale de droit penal* 79(1-2)(2008)Para. 8 p. 66. With regard to *the piracy analogy as the justification for universal jurisdiction over the post-Nuremberg crimes* see: CHADWICK, M., *Piracy and the Origins of Universal Jurisdiction*, Leiden (2019); KONTOROVICH, E., The piracy analogy: modern universal jurisdiction's hollow foundation, *Harvard International Law Journal* 45(1)(2004), note 62 p. 194; GOULD, H.D., 'Cicero's Ghost: Rethinking the Social Construction of Piracy', in Struett, M.J., et al. (eds.), *Maritime Piracy and the Construction of Global Governance*, New York (2013), pp. 23-47, O'SULLIVAN, A., *Universal jurisdiction in international criminal law: the debate and the battle for hegemony*, New York (2017); ISRAELI SUPREME COURT, *Adolf Eichmann v. The Attorney General*, Criminal Appeal No. 336/61, 29.05.1962, paras. 11(b)-(c). In the same sense BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, case no. 3, *The Almelo Trial Trial Of Otto Sandrock And Three Others*, in UN War Crimes Commission, Law Reports V·L Of Trials Of War Criminals Selected And Prepared By The United Nations War Crimes Commission, English Edition, volume I, London (1947), p. 42; *Washington Treaty relating to the Use of Submarines and Noxious Gases in Warfare* (1922), Article 3; Washington, 25 L.N.T.S. 202. On 'exceptional gravity that they affect the fundamental interests of the international community as a whole' as the basis for the exercise of universal jurisdiction, see: PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *The Princeton Principles On Universal Jurisdiction*, Princeton (2001), principle 1.1, p. 28; LEMKIN R. *Les Actes Constituant Un Danger Général Interétatique Considérés Comme Délits De Droit Des Gens...: Rapport Spécial Présenté À La 5me Conférence Pour L'unification Du Droit Pénal À Madrid 14-20 Oct. 1933*. Paris (1933); Mittermaier, *quoted in* SALDAÑA, Q., La Justice Pénale Internationale, *Collected Courses of the Hague Academy of International Law* 10(1925), p. 290. DONNEDIEU DE VABRES, H., Le Systeme de la Repression Universelle, *Revue de Droit International Privé* 18(1923), p. 534; JACKSON,

The applicability of universal jurisdiction to the very crime of *barbarity* (as genocidal acts were referred to before Lemkin's lexical intuition), however, was paradoxically met by the opposition of large sways of the international community during the *travaux préparatoires* for the 1948 Convention.[793]

The fear of the states engaged in the first Cold War, as explained in Gaeta's *Commentary to the UN Genocide Convention* (1948), was that such a sacrosanct principle could have been 'weaponised' for political purposes, opening the door to vengeances from the past and other foreign interventions in their domestic affairs. Besides these historical trivialities, some states felt an uneasiness in shifting their traditional jurisdictional paradigm abandoning or weakening the territoriality of jurisdiction. As a result, no mention of universal jurisdiction can be found in Article VI of the Convention.[794] Disregarding these arguments, o*pinio juris* and -less univocally- *practice* have radically deviated from the idiosyncratic stance taken by the Genocide Convention.

In the *Genocide Convention Advisory Opinion* (1951), the ICJ recognised the *praeter legem* existence of universal condemnation and duty to cooperate to repress it, implicitly preparing the ground for its subjection to universal jurisdiction.[795]

Half a century later, Judges Higgins, Kooijmans and Buergenthal *Arrest Warrant Joint Dissenting Opinion* (2000), on the one hand, recognised heinousness as the justification of universal jurisdiction over the most serious crimes of international concern (reasonably encompassing genocide) and, on the other one, *affirmed the extension of universal jurisdiction*[796] -

---

R. H., HOLMES, J. C., Addresses, *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 39(1945), p. 12; LUBAN, D., "The Enemy of All Humanity", *Netherlands Journal of Legal Philosophy* 2(2018), pp. 122-5; FINCH, G.A., The Nuremberg Trial and International Law, *The American Journal of International Law* 41(1)(1947), p. 22.

[793] POWDERLY, J., 'The trials of Eichmann, Barbie and Finta', in Schabas, W., Bernaz, N. (eds.), *Routledge handbook of international criminal law*, Abingdon (2011), p. 38.

[794] See THALMANN, V., '11. National criminal jurisdiction over genocide', in Gaeta, P. (ed.), *The UN Genocide Convention – A Commentary*, Oxford (2009), pp. 231-58. See also *ibid.*, ZAPPALÀ, S., '12. International criminal jurisdiction over genocide', pp. 259-77; REYDAMS, L., *Universal jurisdiction: International and municipal legal perspectives*, Oxford (2003), pp. 48-53; KITTICHAISAREE, K., *The Obligation to Extradite or Prosecute*. First ed. Oxford (2018), pp. 223-5; METTRAUX, G., *International Crimes: Law and Practice: Volume I: Genocide*, Oxford (2018), pp. 57-66.

[795] 'The […] principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge"'. ICJ, *Reservations to the Convention on Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 23.

[796] Remarkably, in the name of collective interest.

or their 'aut dedere aut prosequi variation'- over: 1) piracy; 2) war crimes; 3) hijacking; 4) hostage taking; 5) torture and 6) crimes against humanity.[797]

In light of the above, it is hard to come up with any reason to *deny the applicability of universal jurisdiction to genocide.*[798] In this sense, it should also be registered that the ICJ, discussing state duties of *aut dedere aut judicare* in case of torture, declared that regardless of the nationality of the alleged offender or the victims, or of the location where the alleged offenses occurred, a State party's obligations to carry out a preliminary investigation into the facts and to submit the case to its competent authorities for prosecution are triggered by the offender's presence on its territory. Complying with these obligations by the State whose territory the accused offender is present is of common interest to all the other States parties. Owing to this shared interest, it follows that every State party to the Convention owes the aforementioned obligations to every other State party: '[t]hese obligations may be defined as "obligations erga omnes partes" in the sense that each State party has an interest in compliance with them in any given case. In this respect, *the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide*'.[799]

While this *obiter* does *not* affirm (either explicitly or implicitly) the applicability of universal jurisdiction to the crime of genocide -irrespective of the absurdity of any opposite argument- it certainly highlights *the stark similarities between torture and genocide* (in terms of

[797] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint Separate Opinion Of Judges Higgins, Kooijmans And Buergenthal, para. 51 p. 79; para 60, p. 81. From a *Leuterpachtian* viewpoint, the lack of references to genocide may actually be irrelevant, as he considered genocide absorbed by the notion of crimes against humanity. Adopting such a perspective it might theoretically be argued that Judges Higgins, Kooijmans and Buergenthal opinion extends to genocide as well. See IRVIN-ERICKSON, D., *Raphaël Lemkin and the Concept of Genocide*, Philadelphia (2017), p. 141. BLANCO CORDERO, I., Universal jurisdiction. General report, *Revue internationale de droit penal* 79(1-2)(2008), *ibid.*

[798] ILC, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (1996), Draft Article 8, para. 8 p. 29: 'The Commission considered that such an extension was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein. Unfortunately, the international community had repeatedly witnessed the ineffectiveness of the limited jurisdictional regime provided by the Convention for the prosecution and punishment of individuals responsible for the crime of genocide during the last half century since its adoption. The impunity of such individuals remained virtually the rule rather than the exception notwithstanding the fundamental aims of the Convention. Moreover, this impunity deprived the prohibition of the crime of genocide of the deterrent effect that was an essential element of criminal law due to the absence of any real prospect of enforcing the principles of individual responsibility and punishment for this crime in most instances.'

[799] ICJ, *Obligation to Prosecute or Extradite (Senegal v. Belgium)* Judgment (2012), para. 68 p. 449. Emphasis added.

heinousness and conventional framework), bringing -by analogy- weight to the subjection of universal jurisdiction to the *crime of crimes*.[800]

Furthermore, it is generally recognised that, in IHL, states have not only the faculty but are *legally bound to exercise their jurisdiction* (territorial, personal or universal) on grave breaches of international humanitarian law[801] and, *ex multis,* in UNCAT.[802]

3.1 The ICC and its jurisdiction. A few notes

One of the most delicate points during the negotiations of the Rome Statute was the question of the kind of jurisdiction the Court should have or, more precisely, on what grounds the Court's jurisdiction should have been based. The result was a compromise between two opposing forces, localism and universalism. [803]

---

[800] albeit with a rather cryptic formulation, in ICJ seemed to have at least *unlocked* (though not explicitly opened) the door to universal jurisdiction, since, after having acknowledged the universal reprobation of Genocide, holding that '[i]t follows that the rights and obligations enshrined by the Convention are rights and obligations erga omnes. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide *is not territorially limited by the Convention*.' ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections,* Judgment (1996) para. 31, p. 616. Emphasis added. Eleven years later, though, the Court vacated this interpretation by declaring that '[t]he Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention'. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, para. 154, p. 68.

[801] ICRC DATABASE, *Customary IHL, Prosecution of War Crimes*, https://ihl-databases.icrc.org/ein n/customary-ihl/v1/rule158 (Last accessed on 14.12.2022): 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.' As explained in the Commentary, 'State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. This rule, read together with Rule 157, means that States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches.'

[802] ROBERTI DI SARSINA, *ibid.* pp. 53-8. In the same sense, AMBOS, K., 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Ambos, K., Large, J., Wierda, M. (eds.), *Building a Future on Peace and Justice,* Berlin (2009), para. 8 pp. 29-30.

[803] As explained by Schabas, during the negotiation 'Germany argued that States Parties should be able to delegate to the Court the jurisdiction that they are already entitled to exercise, under customary international law. Thus, to the extent they may exercise jurisdiction over the 'core crimes' of genocide, crimes against humanity, and war crimes, wherever they are committed, they could also legitimately delegate this jurisdiction to an international tribunal of which they were members'. SCHABAS, W., 'Part 2 Jurisdiction, admissibility, and applicable law: compétence, recevabilité, et droit applicable, Art. 12 Preconditions to the exercise of jurisdiction/ conditions préalables à l'exercice de la compétence', in *The International Criminal Court (2nd Edition): A Commentary on the Rome Statute,* Oxford (2016) p. 346; SCHABAS, W., PECORELLA, G., 'Article 12. Preconditions to the exercise of jurisdiction', in Triffterer, O., Ambos, K. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Baden-Baden (2016), pp. 675-80.

Under Article 12 ICC St., the Court enjoys jurisdiction with regard to state parties to the Rome Statute on the ground that: a) the criminal conduct took place on the *territory of the member state* or,[804] b) if the crime was committed on board a *vessel or aircraft*, the State of *registration* of that vessel or aircraft is a party to the Rome Statute; or c) the person *accused* of the crime is a national of a member state.[805] Furthermore, *ex* Article 12(3) non-member states[806] may accept the exercise of jurisdiction by the Court with an *ad hoc declaration lodged with the Registrar* (*e.g.* the one filed by Ukraine with respect to the 24th February 2022 Russian invasion).[807]

Problems may arise in case of unflagged or unidentifiable vessels, as Article 12(2)(a) merely refers to vessels or aircrafts under the jurisdiction of a member state. While the hypothesis of the ICC exercising jurisdiction over crimes perpetrated on a stateless vessel may not be too probable (especially in light of the unreasonably high gravity threshold[808] set by the Prosecutor in the *Freedom Flotilla* incident), the almost complete lack of literature on the point is extraordinary.[809] Far from being a comparatively simple (and it is not) matter of flags and emblems, the jurisdictional gap of the ICC is much broader than it appears *prima facie*, as the Statute, all concerned with being complementary and not overstepping state sovereignty, forgets about the existence of *stateless*[810] or *double-nationality* individuals[811] and entities.

---

[804] even though the current *opinio juris* and practice deny the territoriality of flag state jurisdiction. On the principle of territoriality under the Rome Statute, see VAGIAS, M., *The Territorial Jurisdiction of the International Criminal Court*. Cambridge (2014).

[805] See ALMASRI, T., Territorial Jurisdiction at the International Criminal Court for Deportation Across the High Seas, *EJIL:Talk!* 25 september 2023 https://www.ejiltalk.org/territorial-jurisdiction-at-the-international-criminal-court-for-deportation-across-the-high-seas/.

[806] Hereinafter, NSP (Non-State Party).

[807] GALAND, A.S., *UN Security Council Referrals to the International Criminal Court. Legal Nature, Effects and Limits*, Leiden (2019); BUFALINI, A., *I rapporti tra la corte penale internazionale e il consiglio di sicurezza*, Napoli (2018), pp. 41-142.

[808] See SCHABAS, W., *An Introduction to the International Criminal Court*, Cambridge (2017), pp. 202 ff.

[809] With regard to the overinflation of academic production *on* and the allegedly modest successes *of* international criminal law, see VAN SLIEDREGT, E., International Criminal Law: Over-Studied and Underachieving?, *Leiden Journal of International Law* 29(1)(2016), pp. 1–12.

[810] While in the great catalogue of absurdities we usually refer to as history, the deprivation of nationality has been used many times to weaken the position of victims in order to allow for greater violence to be inflicted upon them (*e.g.* in the case of Nazi Germany, where Jews were deprived of their citizenship rights and subsequently systematically and scientifically exterminated), it would not be impossible to conceive a situation in which the state of nationality of the offenders of heinous crimes (*who may hence apply for asylum as apolids*?) to shield them from justice or de-register (*retroactively*?) aircrafts and vessels to escape the chains of law. more likely, though, states could simply *withdraw from the Rome Statute* or, with even lesser inconveniences, simply *refuse to comply* with their duties. see *ex multis* BARTROP, P.R., GRIMM, E.E., *Perpetrating the Holocaust: Leaders, Enablers, and Collaborators*. Santa Barbara (2019), pp. 326 ff; LEMMONS, R., HILTON, L.J., 'Legislation as a Path to Persecution', in Hilton, L. J., & Patt, A. J. (eds.), *Understanding and teaching the Holocaust*, Madison (2020), pp. 45-59; MICHALCZYK, J.J. (ed.), *Nazi Law from Nuremberg to Nuremberg*. London (2018).

[811] Graciously enough, Article 12 (and more in general the ICC Statute) forgets or otherwise fails to provide any definitions of nationality despite making several references to it. The problem of nationality, though, is not limited

According to Wagner, in this case, the only way for the ICC to exercise its jurisdiction (complementary to the state parties one) would consist in an (unlikely) UNSC referral under Article 13(b).[812] As a preliminary *caveat*, the text of the Statute is notably silent on the impact *extra partes* UNSC referrals,[813] as it merely refers to the UNSC as a *trigger* (Article 13(2)) or *paralyser* (at least temporarily)[814] of investigations and prosecutions, though the 'elastic' or expansive impact *extra partes* of UNSC referrals is often described in the literature as a form of 'treaty-based 'universal jurisdiction''.[815] Differently put, Article 12 *reassures* states that *only with their consent* the Court will be endowed with jurisdiction over their territory and nationals. On the other, the following Article 13(b) -and the *order of precedence*, although purely textual, is of great significance in this context- provides that pursuant to a Chapter VII resolution (*action with respect to threats to the peace, breaches of the peace, and acts of aggression*), the ICC may exercise its

---

to the perpetrators or alleged so, but it also extends to the nationality of registrar and judges, as observed by WOLMAN, A., Dual Nationality and International Criminal Court Jurisdiction, *Journal of International Criminal Justice* 18(2020), pp. 1081–102. With regard to the alleged perpetrators nationality, according to Tsilonis 'we must accept that the ICC has jurisdiction over the case, since the alleged perpetrator […] holds dual nationality […] and thus he is subject to rights and obligations provided for in both States. The fact that the American nationality appears to be his principal nationality and Greek his secondary one is not critical here, since as a dual national he enjoys all the rights that arise from being a national of each country separately, and actually has additional privileges and capabilities at an international level over and above any person who holds only one nationality.' TSILONIS, V., *The Jurisdiction of the International Criminal Court,* Cham (2019), pp. 68-9. In an attempt to districate the bundle, Schabas (partially disagreeing with Tsilonis in this sense) suggests that in case of multiple nationalities, the candidates shall be 'deemed to be nationals of the state in which they ordinarily exercise civil and political rights'. SCHABAS, *supra* note 454, pp. 693, 754, 767 See also DEEN-RACSMANY, Z., The Nationality of the Offender and the Jurisdiction of the International Criminal Court, *The American Journal of International Law* 95 (3)(2001), pp. 606-23.

[812] WAGNER, M., The ICC and its jurisdiction - myths, misperceptions and realities, *Max Planck Yearbook of United Nations law* 7 (2003), pp. 485-6.

[813] The norms on the ICC jurisdiction are *irritatingly* scattered all over the Statute. There is no order, no logic behind its utterly confused structure, described by some authors as a *reductio ad absurdum*. See TSILONIS, *ibid*.,, pp. 209-10: 'The complementarity principle was initially included in the ICC Rome Statute three times: (a) verbally in a way that resembles reductio ad absurdum the 6th paragraph of the Preamble of the ICC Rome Statute, (b) expressly in the 10th paragraph of the Preamble of ICC Rome Statute, and (c) expressly in Article 1 ICC RSt, where it is mentioned that the ICC "shall be supplementary to the national criminal courts' jurisdictions"'.

[814] for a period of 12 months after a UNSC deferral (renewable under the same conditions) pursuant to Chapter VII UN Charter (Article 16 ICC St.).

[815] *Ex multis* CORMIER, M., 'Universality as a Legal Basis for ICC Jurisdiction', in *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties,* pp. 159-95; Cambridge GALAND, A., The nature of the Rome Statute of the International Criminal Court (and its amended jurisdictional scheme), *Journal of International Criminal Justice* 17(5)(2019), pp. 934-5. See more in general *ibid*, pp. 934-9; STRAPATSAS, N., Universal jurisdiction and the international criminal court, *Manitoba Law Journal,* 29(1)(2002), pp. 1-32; PHILIPPE, X., The principles of universal jurisdiction and complementarity: How do the two principles intermesh? *International Review of the Red Cross, 88*(862)(2006), pp. 375-98; O'KEEFE, R., *International Criminal Law,* Oxford (2015), para. 14.34, p. 541; CRYER, R., ROBINSON, D. AND VASILIEV, S., 'The International Criminal Court,' in *An Introduction to International Criminal Law and Procedure. 4th edn*., Cambridge (2019), pp. 154-69; ROBINSON, D., The Mysterious Mysteriousness of Complementarity, *Criminal Law Forum* 21(2010), pp. 67–102.

jurisdiction over a '*situation* […] referred' by the UNSC. The expression used in the Statute is revealing: there is no mention of states or nationalities.

As observed by Judge Mindua, whereas the Court is an exceptional historical achievement and a masterpiece of diplomacy, its statute appears to be congenitally schizophrenic. On the one hand, it relies on the comfortably constrained *pacta tertiis* principle. On the other one, though, the UNSC power to refer and defer situations to the Court, allows third, non-member states to extend (or restrict) the *ratione personae* and *ratione loci* jurisdiction of the ICC virtually everywhere,[816] though its effectiveness may be somehow diminished by the subordination of the *jus dicendi* of the courts and tribunals to the presence of the accused in the courtroom.[817]

4. Transnational crimes

Whereas, at least in principle, international criminal justice may be defined as the legal codification and *proceduralization* of the commitment of the international community towards the eradication of the most egregious crimes and the rejection of any form of impunity over them – the traditional rationale of universal jurisdiction– the regime applicable to transnational crimes is characterised by an even greater degree of fragmentation and faultiness, being established in a constellation of disparate treaties.[818]

---

[816] MINDUA, A.K.M., Universal justice for a globalized world, *Comparative Law Comparative Law* 23(2017), p. 43.

[817] *Ex multis*, LULU, Z., 'Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law', in Bergsmo, M., Yan, L. (eds.), *State Sovereignty and International Criminal Law*, Beijing (2012), pp. 40, 65; ICC, Situation In The Republic Of Kenya In The Case Of The Prosecutor V. William Samoei Ruto And Joshua Arap Sang, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"*, 25 October 2013, para. 62, p. 26; GURMENDI, A., Tracking State Reactions to the ICC's Arrest Warrant against Vladimir Putin, *Opinio Juris* 29 march 2023 https://opiniojuris.org/2023/03/29/tracking-state-reactions-to-the-iccs-arrest-warrant-against-vladimir-putin/. In this sense, though, it should be underlined that there seem to be some indications of the weakening of the requirement of the presence of the accused as a precondition for the exercise of jurisdiction. See ICC, Pre-Trial Chamber II, Situation in Uganda, in the case of the *Prosecutor V. Joseph Kony*, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, No. ICC-02/04-01/05, 23 November 2023; ITALY, CONSTITUTIONAL COURT, judgment 192/2023 (ECLI:IT:COST:2023:192), 27 september 2023 (*c.d. Regeni case*).

[818] *Infra* Introduction. On a comprehensive account of the substantive and jurisdictional rules concerning transnational crimes, see *ex multis* BOISTER, *supra* note 323; STROBEL, K., *Organized Crime and International Criminal Law*, Leiden (2021); OTTO, L. (ed.), *Global Challenges in Maritime Security: An Introduction*, Cham (2020); PAPASTAVRIDIS, E., Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas, *The International Journal of Marine and Coastal Law* 25 (2010), pp. 569–99; BASSIOUNI, M., Effective national and international action against organized crime and terrorist criminal activities. *Emory International Law Review*, 4(1)(1990), pp. 9-42; WYATT, T., *Wildlife Trafficking: A Deconstruction of the Crime, Victims and Offenders, Second Edition*, Cham (2022); MINDUA, *ibid.*, Note 43 p. 24.

4.1 The UN Drug Convention and the SUA

The UN Drug Trafficking Convention (1988) and the SUA (1988) present almost identical jurisdictional frameworks justifying their joint analysis in a single paragraph.

Under Article 4 of the UN Drug Convention, states shall -imperatively- exercise jurisdiction over trafficking offences perpetrated: 1) on their territory; 2) on their registered transport devices (aircraft and vessels).[819] Member states *may* also -facultatively- exercise their jurisdiction if: 1) the offence was committed by a national or a habitual resident in the state; 2) the offence was committed on a member state's vessel according to the latter's authorization; 3) on the basis of the principle of *teleological territoriality* (Article 4(1)). An identical principle -of potential/teleological territoriality- can be found in Article 4 of the SUA (1988) pursuant to which a state can exercise jurisdiction if: 'the ship is navigating or is *scheduled to navigate into*, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.' (para. 1). Differently put, even if the vessel does not have any *actual*, physical relationship with the state claiming jurisdiction, but merely a *potential*, teleological, inertial one, based on the *route* followed by the ship.[820]

Furthermore, the SUA also dilatates its territorial requirement '[i]n cases where the Convention does not apply pursuant to Paragraph 1, it nevertheless applies *when the offender or the alleged offender is found in the territory of a State Party* other than the State referred to in paragraph 1.' Two completely different jurisdictional grounds can, on the contrary, be found in Artt. 6(2)(2) and 6(2)(3), respectively concerning the state of *nationality of the victims* (passive personality) and the *targeted state* ('it is committed in an attempt to compel that State to do or abstain from doing any act').

[819] Art. 6(1) SUA (1988) includes among the situations giving rise to compulsory jurisdiction the nationality of the offender (active personality).

[820] As underlined by Jeßberger, the Drug Convention (1988) brought a significant innovation with regard to territoriality, by extending its notion to an effectual or teleological understanding of *locus commissi delicti*. JEßBERGER, F., 'A Short History of Jurisdiction in Transnational Criminal Law', in Boister, N., Gless, S., Jeßberger, F. (eds.), *Histories of Transnational Criminal Law,* Oxford (2021), p. 270.

Filling an enforcement gap of its weak and scarcely successful pre-World War II predecessors, Article 4(2) SUA establishes, in imperative terms, the duty to *aut dedere aut judicare*,[821] *i.e.* quasi-universal treaty-based jurisdiction.[822]

Moving onto the specific rules concerning maritime traffic, Article 17 (almost identically copied in Article 8 of the Palermo smuggling Protocol),[823] details the measures[824] available to states '*in conformity with the international law of the sea*.'

This is a critical argument not just for the analysis of the UN Drug trafficking convention and the Palermo system but, anticipating some later developed issues, the *Holy Graal* painfully searched in this dissertation, *i.e.* whether and how the maritime element interacts with criminal jurisdiction.[825] In this perspective, the reference made to the law of the sea in the UN Drug Convention and the Palermo system seems to acknowledge the necessity of adopting a carefully drafted mechanism capable of building bridges between the law of the sea and crimes of international concern.

Under Article 108(1) UNCLOS, '[a]ll States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.'[826]

---

[821] On the evolution of the UN Drug Convention, see: BOISTER, N., The historical development of international legal measures to suppress illicit drug trafficking, *Comparative and International Law Journal of Southern Africa* 30(1)(1997), pp. 1-21. In this sense Art. 7(1) SUA (1988) and Art. 10 SUA (2005).

[822] ST. MARTIN, C., Piracy and terrorism: an unholy alliance, *Loyola Maritime Law Journal* 18(2)(2019), p. 373.

[823] Analogous provisions can be found in Art. 8(4)–(8) SUA (2005).

[824] In this sense it has been pointed out in the literature that *-strictly speaking-* maritime interdiction and the subsequent prosecution of the alleged suspects pertain to two separate categories. As explained by CORTHAY, E. L., Legal bases for forcible maritime interdiction operations against terrorist threat on the high seas. *Australian and New Zealand Maritime Law Journal,* 31(2)(2017), p. 56: 'Maritime interdiction is […] classified as a 'control' measure distinct from the subsequent exercise of enforcement jurisdiction (ie sanction). […], immediate seizure and temporary detention of a ship, cargo and person on board by the interfering State could seem to fall within the concept of maritime interdiction. In contrast, forfeiture and prosecution rather fall within the realm of 'sanction' measures, and as such they should not be included in the concept of maritime interdiction. That being said, whatever the interdiction measures implemented by the interfering State - and not only board and search actions -, none of them can be taken without proper legal basis.'

[825] or at least introduced with the intention of discussing the perspectives and methodologies relating to maritime crime, and in particular the 'land-centrism' or, vice-versa, consideration and valorization of the peculiarities of maritime crime and its repression.

[826] Two brief comments on this topic: first, the duty of cooperation depends upon the Drugs Conventions referred to by Article 108 and, secondly, Article 108 contains an obligation of conduct rather than result, as it does not call for the eradication of the trafficking but, more modestly or at least indirectly, for the cooperation towards it. See PAPASTAVRIDIS, E., 'Part II Maritime Security Law, 15 The Illicit Trafficking of Drugs', in Attard, D.J. et al (eds.), *The IMLI Manual on International Maritime Law: Volume III: Marine Environmental Law and International Maritime Security Law*, Oxford (2016), p. 467.

In this regard, a move to broaden universal jurisdiction to include the illegal trafficking of psychotropic and narcotic drugs was made during the LOS conference. This endeavour was impeded by the fact that many of these drugs and substances are used lawfully, that some may be transported for therapeutic purposes of the people onboard the vessels, and that the definition of 'narcotic drugs' and 'psychotropic substances' has been expanded to the point where it is likely that, without the knowledge of the ship's management, some of these substances may be in the hands of crew members or passengers on a significant number of ships, whether for personal use or traffic. This would have patently exposed seafarers to excessive, either intentional or unintentional, risks of harassment or abuse risks.[827]

Still, in this case, Article 17(3)-(4) of the 1988 UN Drug Convention[828] may provide some help as they establish that '[a] Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic *may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures* in regard to that vessel. 4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, *the flag State may authorize the requesting State to, inter aria: 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.'[829]

While the mechanism under the UN Drug Convention is purely facultative, this faculty must be exercised consistently with the first paragraph of Article 17, providing in imperative terms that the state parties '*shall co-operate to the fullest extent possible* to suppress illicit traffic by

---

[827] OXMAN, B.H., The Regime of Warships Under the United Nations Convention on the Law of the Sea, *Virginia Journal Of International Law* 24(4)(1984), p. 829. See in this sense the genesis of article 'Article 110', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume III, Dordrecht (1995), paras. 110.5-9, pp. 240-4. Two brief comments on this topic: first, the duty of cooperation depends upon the Drugs Conventions referred to by Article 108 and, secondly, Article 108 contains an obligation of conduct rather than result, as it does not call for the eradication of the trafficking but, more modestly or at least indirectly, for the cooperation towards it. See PAPASTAVRIDIS, E., 'Part II Maritime Security Law, 15 The Illicit Trafficking of Drugs', in Attard, D.J. et al (eds.), *The IMLI Manual on International Maritime Law: Volume III: Marine Environmental Law and International Maritime Security Law*, Oxford (2016), p. 467.

[828] *Infra* Chapter IV.

[829] Emphasis added. See *infra* UN, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, done at Vienna on 20 December 1988*, New York (1988), pp. 100-17 and 323-46.

sea'.[830] Still, it is not exactly evident how these rules should apply *in concreto*. Whereas and how do states have jurisdiction upon drug trafficking at sea *ultimately depends upon the specific rules in force within each domestic jurisdiction*. Whereas compiling a systematic review of domestic practice concerning drug trafficking at sea patently falls outside the object and purpose of this Dissertation, a few references may nevertheless be usefully provided.

In Spain, for instance, the Supreme Court (*Tribunal Supremo*) in judgment *593(2014)* affirmed that in the case of trafficking of toxic drugs, narcotics and psychotropic substances[831] perpetrated at sea, pursuant to Article 23.4(d) of the *Ley Orgánica del Poder Judicial,*[832] Spanish authorities have jurisdiction with respect to the boarding, inspection, seizure of substances and detention of the crew of any vessel flying the flag of another State, provided that it obtains the authorisation of the vessel's flag State under Articles 17(3)-(4) of the UN Drug Convention. In the case of flagless or fraudulently flagged vessels, it is held in the judgment that the Spanish authorities also enjoy *adjudicative* jurisdiction. On the contrary, with regard to *genuinely flagged vessels,* adjudicative jurisdiction falls upon: a) on a preferential basis, *the flag state*; b) '*solamente de forma subsidiaria',* the country that carried out the boarding and inspection.[833]

It may be wondered whether the principles affirmed by the Spanish court reflect a general principle or rather stem from the specific circumstances of the case, *i.e.* conducts located on the high seas without any obvious link with Spain (boarding aside).[834] By comparison, on land the minimum requirement set by Article 23.4(i) is simply a teleological nexus with Spanish territory: '*realización de actos de ejecución de uno de estos delitos* […] *con miras a su comisión en territorio*

---

[830] In response to this, several ship-riding agreements have been signed amongst states granting rights to visit foreign warships and state-owned vessels to exercise the right to visit with respect to their vessels when they have reasonable grounds to suspect the involvement of the latter in drug trafficking operations. GALANI, S., EVANS, M.D., 'Chapter 1: The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?', in *Maritime Security and the Law of the Sea: help or hindrance?*, Cheltenham (2020), p. 17; s*upra* note 527; GARCÍA LLAVE, R., *Tráfico de drogas por mar y justicia universal*, Madrid (2019), pp. 166-8.

[831] To be more precise, the provision not only concerns drug trafficking, but also '[*d]elitos de piratería, terrorismo, […] trata de seres humanos, contra los derechos de los ciudadanos extranjeros y delitos contra la seguridad de la navegación marítima que se cometan en los espacios marinos, en los supuestos previstos en los tratados ratificados por España o en actos normativos de una Organización Internacional de la que España sea par*te.'

[832] SPAIN, *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, Article 23.4(d), amended by the Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal, publicada en el Boletín Oficial del Estado, el 14 de Marzo de 2014*.

[833] TRIBUNAL SUPREMO, Sala de lo Penal, Sección 1, Sentencia Penal Nº 593/2014, Rec 10435/2014 de 24 de Julio de 2014, para. 9.

[834] See in this sense CARNERO ROJO, E., Crónica de una muerte anunciada: la jurisdicción de los tribunales españoles sobre crímenes internacionales antes y después de la Ley Orgánica 1/2014 relativa a la justicia universal, *Anuario Iberoamericano de Derecho Internacional Penal* 3(2015), p. 64: 'La conexión entre intereses concretos identificados en la ley y crímenes de terrorismo, tráfico de drogas y delitos de constitución, financiación o integración en un grupo u organización criminal es suficiente para que los tribunales españoles puedan actuar.'

español.'[835] As it can be seen from the formulation of letter (i), it is not *stricto sensu* necessary for the acts to take place within Spanish territory, being, on the contrary, sufficient that these acts of execution are directed towards Spain, *i.e.* their consequences or some of the constitutive elements of their *actus reus* should extend (at least teleologically) to its territory.

Amongst the states more active with respect to anti-smuggling maritime operations, the US vests its courts with the broadest jurisdiction since the *Maritime Drug Law Enforcement Act (MDLEA)*[836] extends US adjudicatory jurisdiction over *any flagless vessels* involved in drug trafficking activities.[837]

More radically, under the MDLEA and the copious jurisprudence flourished onto it,[838] there is no requirement for 'a nexus between a defendant's conduct and the United States'[839] as a consequence of which the US authorities virtually basically enjoy *carte blanche*[840] when it comes

---

[835] See ÍÑIGO ÁLVAREZ, L., Prosecutor v Central Criminal Court No 5, Appeal decision, ILDC 2678 (ES 2014), Order No 41/2014, AAN 225/2014, 4th July 2014, Spain; National Court; Criminal Chamber, *Oxford Reports on International Law [ORIL], International Law in Domestic Courts [ILDC],* 13 september 2017, Para. 19.

[836] US, *Maritime Drug Law Enforcement Act (MDLEA*), codified in Title 46, Chapter 705 of the U.S. Code, Sections 70501 through 70508, 1986.

[837] Under § 70502(c)(1), 'the term "vessel subject to the jurisdiction of the United States" includes— (A) a vessel without nationality; (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas; (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States; (D) a vessel in the customs waters of the United States; (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and (F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that (i) is entering the United States; (ii) has departed the United States. […] § 70503 - Prohibited acts (a) Prohibitions.—While on board a covered vessel, an individual may not knowingly or intentionally—(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance; […] (b) Extension Beyond Territorial Jurisdiction.— Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.'

[838] *Ex multis,* UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, *United States v Marin et al.,* No.22-50154, No.22-50155, January 17, 2024; US, COURT OF APPEALS, FIRST CIRCUIT, *United States v Dávila-Reyes, Appeal judgment*, 937 F 3d 57 (1st Cir 2019), ILDC 3083 (US 2019), 3rd September 2019; DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, *United States v Clark and ors,* Trial court judgment, ILDC 2999 (US 2017), 266 F Supp 3d 573 (DPR 2017), 20th July 2017; US COURT OF APPEALS, FIRST CIRCUIT, *United States v. Angulo-Hernandez, et al.,* 565 F.3d 2, 4, Nos. 07-2428, 07-2497, 07-2453, 07-2460, 5 may 2009; UNITED STATES COURT OF APPEALS, FIRST CIRCUIT, *United States v. Matos-Luchi, et al.,* 627 F.3d 1, 4, 1 December 2010; US, DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *United States v Carvajal and Miranda,* Reconsideration of motion to dismiss, 924 F Supp 2d 219 (DDC 2013), ILDC 2006 (US 2013), 20th February 2013; UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, *United States v Bellaizac-Hurtado and ors, Appeal judgment*, 700 F3d 1245 (11th Cir 2012), ILDC 1949 (US 2012), 6th November 2012.

[839] US DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, *United States v Rosario and Martinez, Trial judgment*, 17 F Supp 3d 144 (DPR Apr 30, 2014), ILDC 2356 (US 2014), 30th April 2014, para. 12 quoting from US COURT OF APPEALS, FIRST CIRCUIT, *United States v. Nueci-Peña*, 711 F.3d 191, 197, 19 March 2013.

[840] See AQUILA, E., Courts have gone overboard in applying the maritime drug law enforcement act, *Fordham Law Review* 86(6)(2018); CHINCHILLA, A., Out of reach: the MDLEA's impermissible extraterritorial reach on maritime drug-traffickers, *University of Miami Inter-American Law Review* 53(1)(2021).

to maritime drug trafficking (frequently involving flagless vessels).[841] As noticed in Judge Torruella Dissenting Opinion in *United States v Del Carmen Cardales-Luna* (2011),[842] this unlimited jurisdiction over drug trafficking establishes a form of (absolute) universal jurisdiction, traditionally reserved to piracy,[843] and more recently to the most 'egregious, violent human rights abuses',[844] highlighting the absence of any non-US state practice establishing (absolute) universal jurisdiction over drug trafficking (excluded, *inter alia*, by Article 108 UNCLOS).[845]

As mentioned on several occasions in this Dissertation, such an unbridled approach to transnational jurisdiction seems to contradict the more cautious, approach requiring the existence of a *nexus* between the alleged crime and the state(s) seeking to take actions against it.[846]

A particularly clear statement of this requirement can be found in two comparatively recent pronouncements by the Italian Supreme Court. In the 2019 cases no. 269 (*Leucothea*) and 27691 (*Jupiter*), the Cassation draw a double distinction between: a) purely extraterritorial cases and cases having some elements of territoriality (the *justification* of Italian jurisdiction); b) flag state authorization *ex* Article 17 to take appropriate measures *limited to* boarding and searching the vessel *or, if* 'evidence of involvement in illicit traffic is found', measures encompassing the taking of 'appropriate action with respect to the vessel, persons and cargo on board' (the *source* - in the sense of *legitimacy*- of Italian jurisdiction).

As to the territoriality/extraterritoriality of the conducts, in both cases, the vessels were inspected on the high seas and escorted to Italian ports. Whereas, however, in the *Leucothea* case, the illicit substances (identified as such once the vessel was berthed inside the port) had already been found on the high seas, the *Jupiter* required a rather prolonged and burdensome inspection in port before the discovery of the illicit substance which was, therefore, able to reach the Italian

---

[841] See KONTOROVICH, E., Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes, *Minnesota Law Review* 544(2009).

[842] US COURT OF APPEALS, FIRST CIRCUIT, *United States v Del Carmen Cardales-Luna*, Appeal judgment, 632 F3d 731 (1st Cir 2011), ILDC 1777 (US 2011), 20th January 2011.

[843] Although, as noticed in the Dissenting Opinion, 'since the enactment of the MDLEA the United States has negotiated twenty-six bilateral agreements with Caribbean and Latin American countries which implement this statute in various degrees and forms allowing the enforcement of American criminal laws aboard foreign vessels, with the prior approval of the national government in question' (para. 34); hence it may also be seen as an exercise of a *delegated power* (by the flag states).

[844] *Ibid.* para. 42.

[845] *Id.* paras. 45 and 53.

[846] See ZUGLIANI, N., Georgiev, Final appeal judgment, No 13596/2019, ILDC 3009 (IT 2019), 28th March 2019, Italy; Supreme Court of Cassation; 4th Criminal Section, *Oxford Reports on International Law [ORIL], International Law in Domestic Courts [ILDC]*, 28 august 2019.

territory *in incognito*. It is this very element of the *Leucothea* -namely the unacknowledged presence of the drug in an area under Italian jurisdiction- that establishes an *objective territoriality nexus* with Italy, missing instead in the *Jupiter* case. As for the second aspect, namely the *breadth of the flag state authorization*, it should be noticed that where Dutch authorities only allowed Italy to board and inspect the vessel, they reserved to themselves any subsequent development (*i.e.* adjudication over the crime), contrary to the *Jupiter* where the Cook Islands provided Italy with wider permissions, including the possibility to take all appropriate measures in regard to the suspect vessel and its crew (including adjudicatory jurisdiction over the crime).[847] In synthesis, these cases allow us to grasp at their fullest two of the key problems relating to maritime jurisdiction: its *source* and *justification*.

In this respect it is necessary to mention, albeit fairly quickly, a potential problem in the application of the aforementioned legal framework. Whereas UNCLOS and the Smuggling Protocol have been ratified by a large number of states (and particularly UNCLOS has either codified already existing customary principles or contributed to their developments), there are still states not parties to the above instruments as highlighted by the ECHR in *Medvedyev* (2010).[848] Amongst the many notable issues touched on in the judgment[849] which would deserve not so breviloquent commentaries, two points need to be mentioned, namely a) the extreme faultiness and fragmentation of the rules relating to drug trafficking at sea and the existence or absence of customary rules thereon;[850] b) the form and substance of flag-state authorization to third-state interventions.

With regard to the first issue, according to the Court -fourteen years ago- 'the provisions of the Montego Bay Convention concerning illegal drug trafficking on the high seas appear[ed] to suggest that the issue was not a part of customary law when that Convention was signed. [in the meantime,], the Government have not shown that there has since been any constant practice on the part of the States capable of establishing the existence of a principle of customary international law generally authorising the intervention of any State which has reasonable

---

[847] BEVILACQUA, G., Law of the Sea: Illicit Drug Trafficking on the High Seas: A Matter of Jurisdiction and Cooperation between Flag and Coastal States, *The Italian Yearbook of International Law Online* 29(1)(2020), pp. 427-30.

[848] ECHR, GRAND CHAMBER, *Medvedyev and others v. France*, Application no. 3394/03, judgment, 29 March 2010.

[849] From the breadth of flag-state authorization to the essence of jurisdiction as a *de jure* or *de facto* control exercised by a state in certain circumstances. *Id.*, paras. 67-81.

[850] Cambodia, the flag state of a vessel engaged in drug trafficking on the high seas was party neither to the Montego Bay Convention nor to the Vienna Convention. *Id.*, para. 84.

grounds for believing that a ship flying the flag of another State is engaged in illicit traffic in drugs.'[851] A critical point in the case is that while, on the one hand, the ECHR correctly indicates the highly fragmented status of the law and highlights its limits; on the other, it does not seem to offer any alternative reconstruction of the law. Differently put, whereas the Court clearly states what rules *do not* apply, beyond the generic restatement of the principle of flag-state jurisdiction the judgment *does not say* exactly -in *positive terms- what states could do*.[852]

The second problem highlighted by this case relates to the form and content of flag-state authorizations to non-flag-state interventions. As seen in the Italian *Leucothea* and *Jupiter* cases, whereas cautiously circumscribed authorizations pose a lesser hermeneutical challenge, very generic or broadly framed consents do not allow to discern the exact limits of the powers conferred upon non-flag states. Strictly literal interpretation may not only jeopardise the anti-trafficking effort, but may also bring to illogical conclusions, as observed in *Judges Costa et al., Dissenting Opinion: 'it is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas*. The actions expressly authorised by Cambodia (interception, inspection, legal action) necessarily concerned the crew members.'[853]

4.2 The 'Palermo system'

Turning to the UNCAC, the last preambular paragraph of UNGA Resolution 55/25 (2000), adopting the UNCAC and its corollary Protocols,[854] acknowledges that, rather than seeking to provide a detailed (lengthy and perilous to negotiate) discipline for the repression of transnational and organised crime, the *Palermo Convention and Protocols*[855] are meant as a 'necessary legal framework for international cooperation'.[856] The Convention's comparatively minimalistic and

---

[851] *Id.*, para. 85.

[852] On the contrary, the *Joint Partly Dissenting Opinion of judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou* (para. 8) argues that '[i]t may be too soon to affirm that new principles of customary international law exist in the field of international drug trafficking […]. But all civilised nations clearly agree that drug trafficking is a scourge, that States must work together to combat it, and that offenders must be arrested and punished, at least where the applicable domestic law so provides, which is evidently the case here. Cambodia's diplomatic note reflects this will to cooperate and to take legal action against a ship flying its flag but sailing a long way from its coastline (off Cape Verde).'

[853] *Id.*, para. 7. Emphasis added.

[854] The UNCAC as such does not have any preamble of its own, hence, it is understood to rely on the preamble of UNGA Res. 55/25(2000).

[855] Hereinafter, Palermo laws or system or generically UNCAC.

[856] See in this sense UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, New York

unambitious approach[857] is further restated in its first article as it affirms that the 'purpose of this Convention is to *promote cooperation to* prevent and combat transnational organized crime more *effectively*.'[858]

This promotional ameliorative cooperation is disciplined under Articles 4 and 11. Pursuant to Article 11(2) state parties are bound to '*endeavour to ensure* that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to *maximize the effectiveness of law enforcement* measures in respect of those offences and with *due regard to the need to deter*'.[859]

Article 4 of the Convention delimitates the scope of these imperative enforcement activities by reiterating (unnecessarily?) the principles of sovereign equality, territorial integrity and non-intervention[860] in foreign matters without the consent of the involved states. Nothing remarkable. Along this line, Article 15 sets the grounds upon which state parties may exercise their jurisdiction over the offences covered by the Convention: 1) territoriality/flag;[861] 2) passive personality;[862] 3) active personality;[863] 4) *aut dedere aut judicare*.[864]

(2006), in particular, pp. XX-XXI. On the other hand, the minimalism and skeletal articulation of the Convention is the price paid for its unusually swift adoption (after only two years of negotiations). MCCLEAN, D., 'Introduction', in *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols,* Oxford (2007), p. 31.

[857] Meant to serve as a basis for detailed (or at least, more detailed) rules to be formulated in additional protocols.

[858] Emphasis added.

[859] Emphasis added. the paragraph, as explained in the literature, seeks to reinforce prosecutions in states adopting allowing for prosecutorial discretion, such as the US. See CALDERONI, F., 'United Nations Convention against Transnational Organized Crime, Art.11 Prosecution, Adjudication and Sanctions', in Schloenhardt, A. et al. (eds.), *UN Convention against Transnational Organized Crime: A Commentary*, Oxford (2023), pp. 114-5.

[860] See also Art. 9(2) and 9(3) of the Protocol, under which '[a]ny measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect: (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance withcoven the international law of the sea; or(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.'

[861] Art. 15(1)(a-b). In this regard, pursuant to Art. 15(c), the territorial *nexus* may be purely teleological ('committed outside its territory *with a view to the commission of a serious crime within* its territory') or, to use another terminology, objective. *ibid*., p. 163. By using the verb 'shall', the Convention indicates the cogent duty to act under the territoriality principle. With regard to *teleological territoriality* (hereinafter, TT), it is believed to encompass all those preparations or ancillary conducts susceptible to impact on the commission of the crime (thus aiding and abetting, planning etc.). STROBEL, K., *Organized Crime and International Criminal Law*, Leiden (2021); BRUWER, C., 'Chapter 4. Smuggling and Trafficking of Illicit Goods by Sea,' in Otto, L. (ed.), *Global Challenges in Maritime Security: An Introduction*, Cham (2020), p. 57. In this sense, para. 2.1: '[c]ostituisce [...] valido criterio di collegamento per l'operare incondizionato della giurisdizione penale italiana (rectius: per l'applicazione universale della legge penale italiana) il traffico organizzato di migranti commesso fuori dal territorio nazionale, ma che fin dalla sua programmazione è destinato ad avere effetti sul territorio nazionale per mezzo dell'approdo sulle coste italiane, eventualmente conseguito tramite il salvataggio da parte delle autorità preposte.'

[862] Art. 15(2)(a). As indicated by the *chapeau* of the paragraph, this is a merely facultative ground of jurisdiction, and it is subject to the limits established under Art. 4 ('Subject to article 4 of this Convention, a State Party *may')*.

[863] Which includes, under Art. 12(2)(b), 'stateless person[s] who ha[ve their] habitual residence in its territory'.

[864] Art. 15(3-4) ('jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals. [...] Each

With regard to the smuggling of migrants at sea, the concerned Protocol after having asserted in Article 7 the general, *imperative*, duty of states to 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea'[865] (a duty that must be performed 'in accordance with the international law of the sea'),[866] Articles 8 (Measures against the smuggling of migrants by sea) and 9 (Safeguard clauses) articulate what measures should be by states in compliance with the Protocol.

Whenever a state party to the Protocol has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and desires to take measures against the ship must do it according to the various passages of procedure *ex* Article 8 which, far from providing anything radically new,[867] streamlines the rights and duties established under the UNCLOS:[868] 1) ***Request of assistance*** (same flag). Every (member) state may require its fellows to assist it in a variety of circumstances: if the suspected ship is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party. When the suspecting state and the suspected vessel share the same nationality, the state could operate *jure vessilii*. The request thus allows non-flag states to surrogate it by undertaking whatever measure may be deemed necessary (art. 8(1);[869] 2) ***Request of confirmation of nationality and/or authorization to act*** (different flags). As states enjoy exclusive

---

State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.'). *ibid.* pp. 167-72. The substantive rules on extradition and judicial cooperation are provided under Articles 16-7 ff.

[865] A provision taken from Article 17(1) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which, too, is drawn from Art. 108(1) UNCLOS. LELLIOTT, J., 'Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Part II Smuggling of Migrants By Sea, Art. 7 Cooperation, in Schloenhardt, A. et al. (eds.), *UN Convention against Transnational Organized Crime: A Commentary*, Oxford (2023), p. 589.

[866] *Infra* Chapter II. See UNGA, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum. Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto,* 3 November 2000, A/55/383/Add.1, para. 98 p. 18: 'it is understood that the measures set forth in chapter II of the Protocol cannot be taken in the territorial sea of another State except with the permission or authorization of the coastal State concerned. This principle is well established in the law of the sea and did not need to be restated in the Protocol. The travaux préparatoires should also indicate that the international law of the sea includes the United Nations Convention on the Law of the Sea as well as other relevant international instruments.'

[867] As observed by MALLIA VELLA DE FREMEAUX and ATTARD (*supra* note pp. 374 ff.), 'While smuggling of migrants is not considered to be a specific ground for which the right of visit may be exercised under UNCLOS, the Convention does contemplate occasions where this right may 'derive from powers conferred by treaty'.

[868] See LELLIOTT, J., 'Organized Crime, Part II Smuggling of Migrants By Sea, Art.8 Measures to Combat Smuggling of Migrants by Sea', in Schloenhardt, A. et al. (eds.), *UN Convention against Transnational Organized Crime: A Commentary,* Oxford (2023), pp. 597-607. See also in the same sense the procedure under Art. 8bis SUA (2005). CORTHAY, *supra* note 543, p. 62.

[869] In this sense MCCLEAN, *ibid.*, p. 402.

jurisdiction over their vessels on the high seas, with only extremely limited (allegedly anachronistic and insufficient) exceptions, any action concerning foreign-flagged vessels may be undertaken only pursuant to the latter's authorization. Hence, under Article 8(2), suspecting states willing to act upon their suspicions should ('may'): a) notify the flag State; b) request confirmation of registry and c) [only] if confirmed, request authorization to take appropriate measures with regard to that vessel. Synallagmatically, flag states may, with flag state consent,[870] *inter alia*, board the vessel, search the vessel, and, if there is evidence of the vessel's involvement (*rectius* 'engagement') in smuggling, 'take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.';[871] 3) *Additional measures*. Coherently with the principle *'is demum iurisdictionem mandare possit, qui eam suo iure, non alieno beneficio habet'*,[872] under Article 8(5),[873] the suspecting non-flag states shall take no additional measures without the express authorization of the flag State. This prohibition, however, has two exceptions: when the non-authorised measures are 'necessary to relieve imminent danger to the lives of persons' (state of necessity) or those 'derive from relevant bilateral or multilateral agreements.'[874]

In the case of flagless vessels or vessels registered in two jurisdictions under Article 92(2) UNCLOS[875] -or suspected to be so- on the contrary, the suspecting states may, under Article 8(7) *Smuggling Protocol*, 'board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law'.

While the Protocol does not specify the available measures or -differently put- what actions can be *in concreto* be undertaken pursuant to Article 8(7), according to the Italian Supreme Court, the sole condition for the adoption of repressive and authoritative acts their compliance

---

[870] With regard to which, under Art. 8(4), the requested states are bound to ('shall') respond expeditiously.

[871] Under Art. 8(3), prompt notification of the undertaken measures must be given to the flag-state.

[872] IUSTINIANUS, *Digesta*, 2.1.5 (Iulianus libro primo digestorum). Also, in *Digesta* 50.17.54: '*nemo plus iuris ad alium transferre potest, quam ipse haberet*.' See LONGCHAMPS DE BÉRIER, F., Remarks on the methodology of private law studies: The use of Latin maxims as exemplified by nemo plus iuris, *Fundamina* 21(1)(2015), pp. 67-8.

[873] allowing the authorising state to 'subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken.'

[874] Emphasis added.

[875] As a consequence of which it 'may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.' *Infra*, Chapter II. GALLAGHER, A., DAVID, F., 'Migrant Smuggling by Sea: Interdiction and Rescue', in *The International Law of Migrant Smuggling*, Cambridge (2014), p. 431. As observed by Schwarzenberger some time ago, '[p]irate ships are not under the protection of any subject of international law, but are *res nullius*, floating chattels which are not allocated to any subject of international law.' SCHWARZENBERGER *supra* note 6, p. 269.

with the relevant domestic law and international legal frameworks. As jurisdiction encompasses both the adoption of precautionary and pre-precautionary jurisdictional and police measures (both expressions of sovereignty), it then follows that the arrest of an unflagged vessel involved in migrant trafficking on the high seas and the prosecution of those on board it are not unlawful in the absence of a conflict with a superior principle of international law.[876] In the case at stake (a flagless vessel) the exercise of Italian jurisdiction does not clash with any other authority over the vessel. On these grounds, Italy enjoys full jurisdiction over the situation, including adjudicatory jurisdiction.[877]

5. Piracy (and armed robbery at sea): THE maritime crime between history and *rechtsgüter theorie*

'Near the end of the last century, two new security threats began to get the world's attention: terrorism, now mostly on land; and piracy, on the world's sealanes'.[878] Grossly misunderstanding[879] a famous passage from Cicero,[880] the forefathers of international law between

[876] ITALY, CASS. I PEN., No 36052, 20th August 2014, para. 5.
[877] In the same sense, SPAIN, TRIBUNAL SUPREMO, Sala de lo Penal, Sección 1, Sentencia Penal Nº 582/2007, Rec 183/2007 de 21 de Junio de 2007.
[878] CARPENTER, W.M., Terrorism and Piracy: Converging Maritime Threats in East and South Asia, *American Journal of Chinese Studies* 11(2)(2004), p.120.
[879] INSTITUT DE DROIT INTERNATIONALE, *Report. Preliminary Note On The Work Of Commission 11 – "Piracy, Present Problems*"(2022), p. 160; SPENCER, W.E., Conspiracy Rhetoric in Cicero's *Verrines*, *Illinois Classical Studies*, *35–36*(2011), pp. 121–41.
[880] CICERO, M.T., *De Officiis* para. 107. In the same sense, though, Seneca the Elder: '*Non est credibile temperasse a libidine piratas omni crudelitate efferatos, quibus omne fas nefasque lusus est, simul terras et maria latrocinantes, quibus in aliena impetus per arma est; iam ipsa fronte crudeles et humano sanguine adsuetos, praeferentes ante se vincula et catenas, gravia captis onera, a stupris removere potuisti, quibus inter tot tanto maiora scelera virginem stuprare innocentia est?*'. SENECA, L.A. (PATER), Controversiarum, LIB. I 2, 3-7, 8 in *L. Annaei Senecae Patris scripta qvae manservnt, edidit H. J. Müller*, Vindobonae (1887), p. 34.

the XVI and XVIII centuries[881] referred to pirates as *hostes humani generis*.[882] A tendency consolidated and developed in the literature[883] and jurisprudence until the early 1900s.[884]

In recent years, however, the acceptance of piracy as a crime under international law has slightly faltered[885] and, as noticed in literature, whilst article 101 UNCLOS contains a largely

[881] *Ex multis* GENTILI, A., *Alberici Gentili De Jure Belli Libri III*, Hanvoviae (1598), Liber I para. IV, pp. 32-4; GROTIUS, H., *Hvgonis Grotii De Ivre Belli Ac Pacis Libri Tres, In Quibus Jus Naturæ & Gentium, Item Juris Publici Præcipua Explicantur. Editio Nova Cum Annotatis Auctoris, Ex Postrema Ejus Ante Obitum Cura Multo Nunc Auctior. Accefferunt & Annotata In Epiftolam Pauli Ad Philemonem*, Amstelodami (1663), Lib. II, CAPVT XVII, De damno per injuriam dato, & obligatione quæ inde oritur, para. XIX, p. 292; MALLOY, C., *De Jure Maritimo Et Navali: Or A Treatise Of Affairs Maritime And Of Commerce In Three Books, The Third Edition Enlarged*, London (1682), Chapter IV Of Piracy, paras. I-III, pp. 52-4; HEINECCIUS, G., *Gottl. Heineccii, Ic. Et Antecess Praelectiones Academicae In Hvgonis Grotii De Jure Belli Ac Pacis Libros III*, Berolini (1744), Lib. II, Cap. XX, n. 3., p. 673; LOCCENIUS, I., 'De Jure Maritimo et Navali Libri Tres' in Heinecke, J.G. (ed.), *Scriptorum de iure nautico et maritimo fasciculus Io. Franc. Stypmanni Ius Maritimum et Nauticum, Reinoldi Kuricke De diatriben et Io. Loccenii Ius Maritimum complexus. Prefationem de jurisprudentia, divinarum humanarumque rerum notitia, praemisit Io. Gottl. Heineccius, ic*, Halae Magdeburgicae (1740), Lib. II, cap. III De piratis, para. I, p. 963; BÖECKEL, M., *Martini Böeckell Megapolitani Jur. Utr. Doct. de Jure Protectionis Clientelaris Commentarius Academicus In quo non solum juris hujus principia eruuntur, sed & de foederibus contrahendis, de religione defendenda, de vicinitate … disseritur: Ante XVI. & quod excurrit annos in Gryphisvvaldensi Academia, publicis lectionibus … propositus; Nunc autem Repetita lectione quibusdam locis emendatus, nonnullis auctior redditus, Cum Praefatione, Summariis & Indice. Adjecta sunt occasione capitis 7. part. 3. Trutina Statuum Europae; & ex Thoma Campanella quaestio: de Monarchia Orbis universali*, Lubeca (1656), Lib. II, Cap. IV, paras. 33, 39, pp. 72-3; VAN BYNKERSHOEK, C., *Questionum Juris Publici libri duo, quorum primus est de rebus bellicis, secundus de rebus varii argumenti*, Lugduni Batavorum (1737), Liber I caput XVII, p. 122.

[882] 'pirates had to defend themselves not only from the navies and courts […] but also from the rhetorical invectives of Cicero and Grotius who had depicted them as people responsible for the most heinous crimes, enemies of humankind and abhorrent beings, standing midway between men and beasts'. IDI, 11e Commission Piracy, Present Problems Piraterie, Problèmes Actuels Rapporteurs: Tullio Scovazzi & Tullio Treves, *Preliminary Note On The Work Of Commission 11 – "Piracy, Present Problems"* Https://Www.Idi-Iil.Org/App/Uploads/2023/06/Onzi%C3%A8me-Commission-155-238.Pdf, P. 164.

[883] *Ex multis* AZUNI, D.A., *Dizionario Universale Ragionato Della Giurisprudenza Mercantile Del Senatore D. A. Azuni*, terza edizione, nella quale è fusa la nuova giurisprudenza dall'avvocato Giuliano Ricci, Tomo I, Livorno (1834), para. 2 p. 889; KENT, J., *Kent's Commentary on International Law, Revised with Notes and Cases Brought down to the Present Time*. Cambridge, (1866), p. 428; LAWRENCE, T., *Handbook of Public International Law*, Cambridge (1885), p. 58; RUSSELL, W., *Russell on Crime, Treatise on Felonies and Misdemeanors*, ninth edition, London (1936), pp. 52-5, 'Extradition of criminals', in *Justice Of Peace, And County, Borough, Poor Law Union, And Parish Law Recorder*, London: Saturday, September 3, 1864, 36(28)(1864), p. 563.

[884] HOUSE OF LORDS, *Joyce Appellant; And Director Of Public Prosecutions Respondent*, 1 february 1946, 01 Feb 1946 [1946] AC 347, HL, p. 351; COURT OF QUEEN'S BENCH, May 24 And 25, 1864, *Re Tervan And Others, Before Cockburn, C.J., Crompron, Blackburn, And Shee, JJ.*, reported in Cox, E., Record of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland (1864), pp. 525-40; US SUPREME COURT, *The United States v. Smith* (1820), in Williams, S.K. (ed.), *Cases Argued And Decided In The Supreme Court Of The United States, 5,6,7,8 Wheaton, Vol. 5*, Rochester (1926), p. 160.

[885] *Supra* note 146 ff. The classification of piracy as an international crime is highly disputed in literature. See: PETRIG, *supra* note 395, p. 859 note 76.

accepted definition of piracy, it does not define *stricto sensu the crime of* piracy,[886] but rather *the acts* of piracy to establish an exception to the freedom of navigation.[887]

To properly understand piracy and its archetypical regime as THE maritime crime par excellence and the prototype of universal jurisdiction, it is necessary to jump into its history and question what are the *rechtsgüters* vulnerated by it in search of their rationale.

Whether or not Article 101 UNCLOS defines the crime or simply the acts of piracy, it is widely agreed that it requires four cumulative elements: (1) an act of violence, detention or depredation; (2) committed for private ends; (3) on the high seas or in a place outside the

[886] 'Article 101 of the LOSC […] do[es] not explicitly prohibit the commission of acts of piracy nor state what specific punishment attaches (in not being addressed to individuals, as criminal norms are, but rather to states […])'. *Ibid.* in the same sense FEDOROVA, M., VAN KEMPEN, P.H., 'Chapter 8. A History of Maritime Piracy. A Transnational Crime in Need of Transnational Substantive Criminal Law', in Boister, N., Gless, S., & Jeßberger, F. (Eds.), *Histories of Transnational Criminal Law,* Oxford (2021), p. 117: 'the 1982 UN Convention on the Law of the Sea (UNCLOS). It holds first of all a duty for states in article 100 to cooperate to the fullest possible extent in the repression of piracy on the high seas. However, this article does not expressly and unambiguously obligate states to criminalize piracy, nor does any other provision in the UNCLOS. […] Secondly, […] the definition refers to 'acts' of piracy rather than 'crimes' or 'offences', in contrast to article 113 of the UNCLOS (breaking or injury of a submarine cable or pipeline) or as is common in transnational criminal law treaties in other areas, such as narcotic drugs, terrorism, corruption and human trafficking'.

[887] *Ibid.* in the same sense NORDQUIST, NANDAN, KRASKA, *supra* note 395; O'KEEFE, *supra* note 141, p. 51: 'the crime of piracy *jure gentium* does not give rise to criminal responsibility under international law. That is, customary international law does not itself embody a prohibition on piracy. What it posits, rather, is merely a special jurisdictional rule permitting each state to apply its municipal criminal law on the basis of universality to conducts amounting to piracy'. *Contra*: VAN HESPEN, *supra* note 395, p. 287, as he refers to 'the crime prohibited by Article 101(a) LOSC'; GUILFOYLE, *supra* note 395, p. 27: 'piracy is a crime of individual liability under general (or customary) international law'. See in the same sense Jeβberger (with regard to the analogous crimes included in the Statute of the African Court of Justice and Human Rights, whose definitions appear to be 'copy and paste' of the existing conventions'): 'the treaty provisions were never meant to define crimes, i.e. to establish individual criminal responsibility for unlawful behaviour. Rather, their purpose is to describe certain conduct which should then be criminalized under domestic law in order to enable enhanced judicial cooperation between the States Parties to the treaty.' JEßBERGER, F., 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)', in Werle, G., Wormbaum, M. (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol,* The Hague (2017), p. 77.

jurisdiction of any state;[888] and (4) by the crew or passengers of a private ship against another vessel[889] or persons or property aboard.[890]

The first of the four elements refer to the *actus reus* of piracy, the second to the *dolus specialis*, the third to the contextual element. Whilst neither the *actus reus* nor the context seem particularly problematic, doubts have arisen on the meaning to be given to 'committed for private ends' mean.[891]

5.1 A history of piracy (brief notes)

Roman law already criminalised piracy imposing to the allies of the Republic *a general duty to take the measures necessary to debellate* the piratical plague[892] under the *Lex de piratis*.[893]

---

[888] *Contra* PHILIPPINES, SUPREME COURT, *People of the Philippines v Tulin and ors, Appeal*, GR No 111709, ILDC 1309 (PH 2001), 30th August 2001. Pursuant to section 2(d) of the Presidential Decree No. 532 August 8, 1974, piracy is defined as '[a]ny attack upon or seizure of any vessel, or the taking away of the whole or part thereof or its cargo, equipment, or the personal belongings of its complement or passengers, irrespective of the value thereof, by means of violence against or intimidation of persons or force upon things, committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy. The offenders shall be considered as pirates and punished as hereinafter provided.'. As it can be seen, there is no *ship2ship* requirement, and piracy can be perpetrated inside the Philippines' territorial waters, contrary to its customary definition. See also LIJIANG, Z., CHINA (PRC), GUANGDONG SHANTOU, INTERMEDIATE PEOPLE'S COURT, CRIMINAL DIVISION, *Shantou Municipal People's Prosecutor v Naim (Atan) and ors*, Decision of first instance, No 22, ILDC 1161 (CN 2003), 15th January 2003, *Oxford Reports on International Law [ORIL], International Law in Domestic Courts [ILDC]*. While the case concerned a Thai oil tanker boarded and robbed by Indonesian robbers within Malaysian territorial waters, as the robbers attempted to sell the Thai tanker's diesel oil to a Chinese ship inside Chinese territorial waters, the Chinese PRC established its jurisdiction on the case pursuant to Article 6 of the *Criminal Law Of The People's Republic Of* China (i.e. territorial jurisdiction instead of universal jurisdiction): 'Article 6. 1. This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the People's republic of China, except as otherwise specifically provided by law. 2. This Law shall also be applicable to anyone who commits a crime on board a ship or aircraft of the People's Republic of China. 3. If a criminal act or its consequence takes place within the territory or territorial waters or space of the People's Republic of China, the crime shall be deemed to have been committed within the territory and territorial waters and space of the People's Republic of China.' https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china. See also on this topic CHANG, Y.-C., Clarifying Maritime Criminal Cases Jurisdiction and its International Implications—Current Legal Developments in China, *Crime, Law and Social Change* 77(2022), pp. 451–8.

[889] The so-called ship2ship requirement. In this sense, *ex multis*, PCA, *The Arctic Sunrise Arbitration, Netherlands v Russia, Award on the Merits*, PCA Case No 2014-02, ICGJ 511 (PCA 2015), 14th August 2015, paras. 240-1.

[890] GUILFOYLE, *ibid*, pp. 29-30.

[891] VON HEINEGG, W.H., Repressing Piracy and Armed Robbery at Sea - Towards a New International Legal Regime, *Israel Yearbook on Human Rights* 40(2010), pp. 223-4.

[892] Their ruthlesness is enfatically illustrated by Seneca the Elder: 'Non est credibile temperasse a libidine piratas omni crudelitate efferatos, quibus omne fas nefasque lusus est, simul terras et maria latrocinantes, quibus in aliena impetus per arma est; iam ipsa fronte crudeles et humano sanguine adsuetos, praeferentes ante se vincula et catenas, gravia captis onera, a stupris removere potuisti, quibus inter tot tanto maiora scelera virginem stuprare innocentia est?'. SENECA, L.A. (PATER), *Controversiarum*, LIB. I 2, 3-7, 8 in L. *Annaei Senecae Patris scripta qvae manservnt, edidit H. J. Müller*, Vindobonae (1887), p. 34.

[893] According to the Delphic version of the law, 'ὁμοίως τ]ε καὶ πρὸς τὸν βασιλέα τὸν ἐν τ̣[ῇ ν]ήσῳ Κύπρωι βασιλεύοντα καὶ πρὸς τὸν βασιλ[έα τὸν ἐν Ἀλε]-|ξανδρείαι καὶ Αἰγύπ̣[τωι βασιλεύοντα καὶ πρὸς τὸν βασιλέα τὸν ἐπὶ Κυ]ρήνῃ

These measures were to be taken *not just* in the name of Roman interest, but, significantly, of the (Mediterranean) community *as a whole*,[894] as pirates endangered maritime trafficks and navigation as well as the lands facing the sea.[895]

Whilst it has been argued that Rome used the piracy argument as a justification for its thalassocratic hegemony in the Mediterranean, it remains that -formally- it claimed to act for a *non-individual purpose* (shared interests of the international community *ante litteram*). The protection of the safety of the seas and the coasts facing them against the existential threat of the *hostes communes omnium* also legitimised the existence of sanctioning measures against states non-complying with the Roman-lead anti-piracy efforts, hence subject to (indirect) extraterritorial Roman jurisdiction. In this sense, although during the Roman times, the entire Mediterranean was a 'Roman lake' or, more correctly, an enclosed sea the shores and waves of which felled entirely under its rule, Roman law still regarded the sea amongst '*quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare*'.[896]

Several centuries later, in the Commentary to the 1932 *Harvard Draft Convention on Piracy*,[897] it was affirmed that '[p]iracy is by the law of nations a special, common basis of jurisdiction *beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to interests under the state's protection*. […] piracy is not a crime by the law of nations. *It is*

βασιλεύοντα καὶ πρὸς τοὺς βασιλεῖς τοὺς ἐν Συρίαι βασιλεύον[τας, *πρὸς οὓς] | φιλία καὶ συμμαχία ἐ[στὶ τῶι δήμωι τῶι Ῥωμαίων, γράμματα ἀποστελλέ]τω καὶ ὅτι δίκαιόν ἐστ[ιν αὐ]τοὺς φροντίσαι, μὴ ἐκ τῆς βασιλείας αὐτ[ῶν μήτε] τῆ[ς] | χώρας ἢ ὁρίων πειρατὴ[ς μηδεὶς ὁρμήση, μηδὲ οἱ ἄρχοντες ἢ φρούραρχοι οὓς κ]αταστήσουσιν τοὺ[ς] πειρατὰς ὑποδέξωνται, καὶ φροντίσαι, ὅσον [ἐν αὐ]τοῖς ἐσ[τι] | τοῦτο, ὁ δῆμος ὁ Ῥωμαίω[ν ἵν' εἰς τὴν ἁπάντων σωτηρίαν συνεργοὺς ἔχῃ.*' Emphasis added. Delphi Copy, Block B. lin 8-12, reported in MATAIX FERRÁNDIZ, E., A Sea of Law: The Romans and their Maritime World, *The Ancient Near East Today* 11(5)(2023). See also JONES, H., A Roman law concerning piracy. *The Journal of Roman Studies, 16*(2)(1926), pp. 155-73; SUMNER, G.V., The 'Piracy Law' from Delphi and the Law of the Cnidos Inscription, *Greek, Roman and Byzantine Studies* 19(3)(1978).

[894] 'The term *πειρατής* was used to define maritime bandits. It was emphasised that the missions of Rome were acting as the saviour of other nations and the guardian of freedom. Furthermore, an indirect implication is important – that all who failed to combat the pirates could be accused of maritime banditry or of supporting piracy'. TARWACKA, A., Piracy in Roman Law and the Beginnings of International Criminal Law, *Polish Review Of International And European Law* 1(1-2)(2012), p. 65.

[895] GIOVANNINI, A., La lex de piratis persequendis, *Museum Helveticum* 35(1)(1978), p. 41. TARWACKA, *ibid.* pp. 60, 64.

[896] IUSTINIANUS, *Digesta*, I.8.2.

[897] Part 4. Piracy. *The American Journal of International Law* 26(1932), Supplement: Research in International Law, pp. 739-885. The relevance of the 1932 Harvard Draft lies in the fact that, as recognised by the UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT, *United States v. Dire,* case no**.** 680 F.3d 446 (4th Cir. 2012), decided May 23, 2012, p. 11, the Harvard Research in International Law Draft Convention on Piracy, "which sought to catalogue all judicial opinions on piracy and codify the international law of piracy"', served as '[t]he "starting point" for the High Seas Convention", whose principles are now embedded in UNCLOS: 'the definition of general piracy under modern customary international law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS.' *Ibid.* p. 13.

the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.'[898]

5.2 The piratical evil

From a *deontic* perspective, piracy can hardly be described as heinous. While it patently contradicts the prohibition of robbing other individuals and exercise unjustified violence (even kill them), piracy, at least in our age, is comparatively *unbloody*, or at least not as bloody as other crimes of international concern.[899]

Shifting, however, from a Kantian viewpoint to a more *pragmatic* (or utilitarian) perspective, it is evident that -if piratical attacks manage to reach such a scale either in their numbers or in the losses inflicted upon navigation and trade- it may likely vulnerate maritime commerce (an 'agreed vital interest of [an] international community').[900] That being the case, however, pirates would not become *hostes humani generis*.[901] At the most, they could be considered as *hostes commerciorum, hostes navigantium, hostes ordinis maritimi*.

---

[898] *Ibid*. pp. 759-60.

[899] hatefully or shockingly evil; abominable'. "Heinous." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/heinous. The typical *modus operandi* of pirates comparatively rarely involves the injuring or killing of the attacked ships personnel and crew, as reported by Kim: '[o]verall, the degree of violence has tended to decrease over the past five years (2013– 2017), in comparison with the previous five years (2008– 2012), in terms of types of arm used and violence against crew members. Concerning the types of arm used during piracy attacks over the last five years, the share of incidents involving guns was 24 percent (266) of a total of 1,126 incidents, a significant reduction from 52 percent (983) of 1,884 cases over the previous five years'. KIM, S. K, 'Chapter 5 Contemporary Piracy: Nature and Reality', in *Global Maritime Safety & Security Issues and East Asia*, Leiden (2019), p. 168.

[900] CHADWICK, M., *Piracy and the Origins of Universal Jurisdiction. On Stranger Tides?,* Leiden (2018), p. 169. PAPASTAVRIDIS, *supra* note 374, p. 63: 'the rationale behind its [of piracy] suppression was never the heinousness or the contra bona mores character of the acta pirata, but the pragmatic consideration of the protection of navigation and commerce on the high seas.'

[901] As highlighted in the literature, the moralization of piracy and its labelling as *hostilitas humano generi* was a narrative expedient for European thalassocratic empires to legitimize themselves in the exercise of police functions over the high seas, repressing those elements that appeared incompatible with their hegemonic pursuits. *Ex multis*: 'the extreme categorization of pirates was partly a function of the space where they operated. International waters were outside the jurisdiction of any state and thus not subject to state punishment. *By globalizing the threat and moralizing the actions of pirates, powerful states gave themselves the right to police international waters and expected other states to do the same*'. DAXECKER, U., PRINS, B., *Pirate Lands: Governance and Maritime Piracy*, Oxford (2021), p. 27. Emphasis added.

Vessels sailing the seas are exceptionally vulnerable to natural and man-made crises, as the oceans' immense vastity and remoteness from human civilization emboldens criminals with the prize of impunity for their misdeeds.[902] Piracy is not an enmity of humanity due to its supposed cruelty nor an existential threat to navigation and trade *per se*. Piracy *subverts the fragile order of the seas,* already hinged upon the gracile framework of exclusive flag-state jurisdiction, further exacerbating the congenital risks of any maritime endeavour.[903]

When 'piracy' (with all its elements) is committed outside the high seas, despite still being referred to as piracy in the *vulgata,* is -in extreme synthesis[904]- a different yet cognate crime, *armed robbery at sea,*[905] which is basically the same crime[906] in a different geographic location.[907]

Anticipating a point more thoroughly discussed in Chapter III, the partitioning of the seas in different zones[908] basically determines the paradoxical situation according to which an identical

---

[902] INSTITUTE DE DROIT INTERNATIONAL, *ibid.* p. 167: 'The primary importance of navigation allows all States to intervene against piracy on the high seas and subsequently to bring pirates before national courts, without any specific connection of the intervening State to the ships or the persons involved in the crime. It has been remarked that "piracy on the high seas would be impossible to suppress or prosecute effectively if an attacked ship had to await the intervention of a naval vessel of either its flag state or that of its attacker"'.

[903] In this sense PELLA, *supra* note 242, p. 170: '*La piraterie est le fait de commettre, dans un esprit de lucre et pour son propre compte, des actes de violence contre les personnes et de déprédation contre les biens, dans des lieux ne relevant de la souveraineté d'aucun État déterminé et qui compromet ainsi en ces lieux la sécurité de la circulation.*' Partially *contra* BECKMAN, R.C., 'Chapter 1: The piracy regime under UNCLOS: problems and prospects for cooperation', in Beckman, R.C., Roach, A.J. (eds.), *Piracy and International Maritime Crimes in ASEAN,* Cheltenham (2012), p. 20.

[904] Other considerations will be provided in this paragraph with regard to the impact of the SUA Convention to the discipline of piracy and armed robbery at sea and, more in general, maritime crimes. Piracy and related crimes will also be discussed in connection with the principle of universal jurisdiction in Chapter II whereas the regime of the high seas and the exception to flag state jurisdiction will be examined in Chapter III..

[905] See: IMO, Resolution A.1025(26) Code Of Practice For The Investigation Of Crimes Of Piracy And Armed Robbery Against Ships, Adopted on 2 December 2009 (Agenda item 10), para. 2.2: '"Armed robbery against ships" means any of the following acts: .1 any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, *within a State's internal waters, archipelagic waters and territorial sea* [emphasis added]; .2 any act of inciting or of intentionally facilitating an act described above'. On the definition of armed robbery at sea see also: KATEKA, *supra* note 4, pp. 459-61; KONTOROVICH, E., "A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists, *Faculty Working Papers* 37(2010), p. 253.

[906] ADEMUNI-ODEKE, You Are Free to Commit Piracy and Armed Robbery against Ships but Please Do Not Do It in This Place: Geographical Scope of Piracy and Armed Robbery against Ships under UNCLOS and Related International Instruments, *Journal of Maritime Law and Commerce*, 50(4)(2019), pp. 411, 425. As noticed by Guilfoyle and McLaughlin, 'early definitions of piracy stressed that it was simply robbery on the high seas without letters of marque or other State sanction'. GUILFOYLE, MCLAUGHLIN, *supra* note 395, pp. 390-1.

[907] MURPHY, M., 'Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?', in Lehr, *supra* note 395, p. 155: 'The piracy provisions of UNCLOS are concerned solely with piracy on the high seas. They do not address piracy in territorial or inland waters. For this reason such acts have now come to be referred to as "armed robbery at sea" and, legally, are not acts of piracy at all. The problem of course is that, from the perspective of the victims, this is a distinction without a difference'; VON HEINEGG, *supra* note 406 p. 225. The regional agreements to prevent and punish practices of piracy and armed robbery at sea will be considered later in the dissertation.

[908] Also *infra* Introduction.

offence (as the *actus reus* and the *mens rea* are identical) is subject to two different jurisdictional regimes due to the mere occurrence of the attack on the high seas instead of the territorial waters and vice-versa, irrespectively of both 'the cross-border nature of piracy and the fact that it is committed in a homogenous and integrated physical environment.'[909]

As illustrated by Schabas and Pecorella (with regard to the enforcement jurisdiction over piracy and slavery), '[i]t has been well established in customary and conventional international law that *certain crimes are against the universal interest, offend against universal public policy and are universally condemned*. Thus, the perpetrators are considered hostis humanis generis, enemies of humankind and any State that obtains custody over them has a legitimate ground to prosecute in the interest of all States based on universal jurisdiction over the offence. The State needs no direct connection with the crime. It merges jurisdiction over the person with jurisdiction over the offence. In this way *such serious and heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement that any other States involved through territorial locus of the crime, nationality of the accused or victims must consent. The origins of universal jurisdiction can arguably be traced to international piracy on the high seas, the slave trade'.*[910]

Beyond heinousness or any similar consideration -though slave trade is, rather justifiably, considered an intolerable lesion of human dignity-[911] the most compelling reason behind their criminalization lies in the geography of such crimes, their *locus commissi delicti*, the high seas[912],

---

[909] ILC, *First report on prevention and repression of piracy and armed robbery at sea: International Law Commission 74th session Geneva, 24 April–2 June and 3 July–4 August 2023: by Yacouba Cissé, Special Rapporteur*, para. 45. The special rapporteur further highlights the robust confusion between the two crimes under domestic legislations.

[910] SCHABAS, W.A., PECORELLA, G., 'Article 12 Preconditions to the exercise of jurisdiction', in Triffterer, O., Ambos, K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary. Third Edition*, London (2016), para. 7, p. 675. Emphasis added.

[911] TOMUSCHAT, C., 'The Security Council and Jus Cogens', in Cannizzaro, E. (ed.), *The Present and Future of Jus Cogens*, Roma (2015), p. 36.

[912] *Partially contra*, Chadwick, who argues in favour of a re-evaluation of the concept of heinousness, *i.e.* not pure evil and gratuitous cruelty but indiscriminate aggression of the *libertas commerciorum*, see CHADWICK, M., *Piracy and the Origins of Universal Jurisdiction. On Stranger Tides?,* Leiden (2018), p. 169: 'The central issue appears to have been the *effect of piracy on maritime commerce*, itself an "agreed vital interest of [an] international community" increasingly committed to industry and diplomacy. Its vitiation threatened to undermine the State itself as the principal mode of human organisation. This central claim can then be built upon and complemented by related factors, so that piracy becomes a greater concern due to its indiscriminate nature and extraterritorial *locus delicti*. These are factors that, in turn, helped States to reach a consensus regarding the proscription of piracy and the right to exercise universal jurisdiction over it. The simple pragmatism of universal jurisdiction is also likely to have been a factor behind its emergence, yet should be seen as complementing the "heinousness" rationale rather than replacing it. These factors all flow from that initial violation of an internationally pervasive norm, that of the *libertas commerciorum*, without which the State and its peoples could not *be*. It is a *vital* and a *universal* interest, warranting the application of an innovative form of jurisdiction applied by the world at large. This appears to be how universal jurisdiction was conceived.' Emphasis added.

which also commands extraordinary measures to be undertaken to combat piracy[913] and slave trade.[914] In Bassiouni's words, 'universal jurisdiction is necessitated by the medium used by traffickers, namely, the high seas, since it is the most effective way to combat such traffic.'[915]

Historically, one of the rationales of the exceptional iniquity of piracy has been identified in the devious and disruptive potential of piracy, *i.e.* its intrinsic *anarchism*.[916] This anarchism in its essence is due to two fundamental elements: 1) piracy operates on the *mare liberum*, on the stretches of water resisting against the claims of the sovereignty of the land;[917] 2) pirates, as opposed to buccaneers, do not act on behalf or with the blessing of any state,[918] pursuing instead 'private purposes'. The idea, differently put, embodies the *private-public divide*, leading several scholars to interpret the piratical 'private purposes' more broadly as meaning 'other than public ends', *i.e.* beyond any state policy and control, allegedly encompassing 'freedom fighters, terrorists and environmentalists'.[919]

---

[913] PAPASTAVRIDIS, *supra* note 374, p. 63: 'the rationale behind its [of piracy] suppression was never the heinousness or the contra bona mores character of the *acta pirata*, but the pragmatic consideration of the protection of navigation and commerce on the high seas.'

[914] GUILFOYLE, *supra* note 414, para. 14, p. 771.

[915] BASSIOUNI, M., Universal jurisdiction for international crimes: historical perspectives and contemporary practice, *Virginia Journal of International Law* 42(1)(2001), p. 113. In the same sense, ABI-SAAB, *supra* note 334.

[916] DAWDY, S.L., BONNI, J., Towards a General Theory of Piracy, *Anthropological Quarterly* 85(3)(2012), pp. 695-6. HALL, W.E., *A Treatise On International Law*, third edition, Oxford (1890), p. 253: '[a] pirate either belongs to no state or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject.' He further adds that '[p]rimarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state.' *ibid.*, p. 255; CORBETT, P., *A modern plague of pirates modern piracy in the 21st century; protect your ship and your crew; a practical guide for avoiding contemporary piracy on the high sea*, East Mersea (2009), pp. 10-1. According to Alexandrowicz – discussing the differences between Freitas and Grotius- the idea of piracy as an anarchic problem for the *mare liberum* (*a res communis*) can be traced back to the XVII century practice in the Indian Ocean. ALEXANDROWICZ, C. H., 'Freitas *Versus* Grotius (1959)', in Armitage, D., Pitt, J., (eds.), *The Law of Nations in Global History,* Oxford (2017), pp. 132-3. RUSCHI, F., *Questioni di spazio. La terra, il mare, il diritto secondo Carl Schmitt*, Torino (2012), p. 85. Personal translation; HAKIM B., *T.a.z.: The Temporary Autonomous Zone Ontological Anarchy Poetic Terrorism*. 2nd edition with new preface, Brooklyn (2003).

[917] *Infra* Chapter III.

[918] HEINECCIUS, *supra* note 637.

[919] US COURT OF APPEALS, NINTH CIRCUIT, *Institute Of Cetacean Research, et al., v. Sea Shepherd Conservation Society, et al.*, No. 12-35266, D.C. No. 2:11-cv-02043-RAJ, 24 May 2013: '"private ends" include 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.' It should be noted that, *stricto sensu*, while the US Court questioned the *mens rea* of piracy, it did so pursuant to the Alien Tort Statute, *i.e.* it did so from the viewpoint of tort liability rather than criminal responsibility, hence it may be argued that the *obiter* from the US Court of appeals concerns piracy *as an act* rather than piracy *as a crime*. On the problem of the *mens rea* see: HONNIBALL, *supra* note 396; GUILFOYLE, D., Political Motivation and Piracy: What History Doesn't Teach Us About Law, *EJIL:Talk*, 17 june 2013 https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/; DINSTEIN, Y., International Criminal Law, *Israel Law Review* 20(1985), p. 208: 'The purpose of the offence: piracy must be committed for private ends. Any private intent will do (not necessarily *animus furandi*), but private it must be; political ends are excluded'.

5.3 Prosecuting pirates: the legal framework and current practice

Under Articles 100 and 105 UNCLOS '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.' '*On the high seas*, or in any other place outside the jurisdiction of any State, *every State may seize a pirate ship* […], or a ship […] *taken by piracy* and under the control of pirates, *and arrest the persons* and seize the property on board. *The courts of the State which carried out the seizure may decide upon the penalties to be imposed*, and may also determine the action to be taken with regard to the ships[…] or property, subject to the rights of third parties acting in good faith.'[920] Article 105 UNCLOS, thus, encompasses both *extraterritorial enforcement and adjudicatory jurisdiction*[921] conferring to the capturing state, after the seizure of the involved ship, the right to arrest and sentence the suspected pirates.[922]

Less clear is whether such powers should be from the beginning to the end by a single state or whether states cooperating in the repression of piracy may decide amongst themselves a different path of action, *e.g. State X arrests the suspect pirates and State Y tries them etc.*[923]

A textual reading of Article 105 would *prima facie* support the first interpretation as the Article refers to the power of the state 'which carried out the seizure [and the arrest of the persons] [to] decide upon the penalties to be imposed'.[924] As noticed by Guilfoyle,[925] though, the sole duty

---

[920] Emphasis added.

[921] Referred by Guilfoyle as prescriptive and adjudicative. GUILFOYLE, D., 'Article 105 Seizure of a pirate ship or aircraft', in Proelβ, *supra* note 260, para. 2 p. 750.

[922] On the recent practice of state prosecutions see *ex multis* MAURITIUS, INTERMEDIATE COURT OF MAURITIUS, *Police v Mohamed Ali Abdeoulkader and ors*, Cause No.850/2013, 2014 INT 311, 6 november 2014; NETHERLANDS, COURT OF APPEAL IN THE HAGUE, case no. 22-004920-12, CLI:NL:GHDHA:2014:1006, 21 march 2014; US COURT OF APPEALS, NINTH CIRCUIT, *United States v Lei Shi*, Appeal Judgment, 525 F.3d709 (9th Cir. 2008), ILDC 1396 (US 2008), 24th April 2008; GERMANY, HAMBURG REGIONAL COURT, *Hamburg Pirates Case, Office of Public Prosecutor of the Free and Hanseatic City of Hamburg v CM and ors*, Judgment, 603 KLs 17/10, ILDC 2390 (DE 2012), BeckRS 2013, 07408, 19th October 2012;

[923] GUILFOYLE, *ibid.* para. 9 p. 752.

[924] In this sense PAPASTAVRIDIS, *supra* note 598, pp. 183-4. According to him, the disjointed exercise of jurisdiction (and particularly the transfer of the pirates) is not contrary to international law, though it is contingent on the 'prior assertion of jurisdiction over piracy' by the pirates receiving states.

[925] GUILFOYLE, D., '6. The Legal Challenges In Fighting Piracy', in van Ginkel, B., van der Putten, F. (eds.), *The International Response to Somali Piracy*, Leiden (2010), p. 130: 'The practical result is that while all states have international legal authority to capture and prosecute pirates, they do not have a duty to do so. While there is a duty to cooperate to suppress piracy 'to the fullest possible extent' (Article 100 UNCLOS), there is only a discretion to prosecute them (Article 105).'

imposed by Article 100 is -very generically[926]- to 'cooperate to the fullest possible extent in the repression of piracy', and it is hard to contend that states capturing pirates in often remotes seas *cooperate* to the repression of piracy since there is no agreement *de minimis* on the meaning of such duty.[927] Equally, the consistent use of the verb 'may' instead of 'should' throughout Article 105 points to the *facultative*[928] rather than *imperative nature of the actions* undertaken under that article.[929] Still, the facultative nature of the jurisdiction provided under Article 105 does not mean (nor does it actually deny[930]) that these actions can be exerted disjointedly. Still, the denial of the disjointed exercise of jurisdiction, according to Roach, would be incompatible with the joined interpretation of the (generic) duty of *full* cooperation ex Article 100 and the *permissive rule* under Article 105, since 'it does not mean that [the latter] permits only the seizing State to try pirates. […]cooperation in the suppression of piracy by transferring captured pirates to another State for prosecution is entirely consistent with the international law of piracy.'[931]

In Papastavridis' opinion, though, clues from state practice would allegedly indicate that states perceive Article 105 as a '*package*', or at least that universal jurisdiction under Article 105 means the complete and joined exercise of state jurisdiction over piracy:[932] 'off the waters of Somalia […]States have been reticent to prosecute pirates and try them before their courts,

---

[926] CHADWICK, *supra* note 422, p. 181: 'Article 100 obliges States to suppress piracy by any means available to them, but is remarkably vague, being deliberately intended to allow "a certain latitude as to the measures it should take to this end in any individual instance". The provision was drafted amidst disagreement between delegations over whether a failure to take action against pirates should be considered a violation of international law, hence the forceful but vague formulation, intended as a "statement of intent" rather than imposing any definite duty'.

[927] *Ibid.*

[928] Or, as Gavouneli calls it, 'permissive customary universal jurisdiction'. GAVOUNELI, *supra* note 3, p. 25.

[929] CHADWICK, *supra* note 422, pp. 180-1: 'Article 105 does, […] leave a large amount of discretion to States; apprehension of pirates is *permitted* rather than obliged and States are under no explicit subsequent obligation to take any concrete action following capture, such as prosecuting or extraditing captured suspects.'

[930] GUILFOYLE, *Ibid.* pp. 130-1: 'UNCLOS contains no mechanism to transfer them to another state. While the general international law of piracy does not prohibit such transfers, it does little to facilitate them. In this context it is very important to note that there is no hierarchy of jurisdictions in international law. A capturing state is neither obliged to prosecute a suspect pirate nor to offer a right of first prosecution to the pirate's state of nationality, the state of nationality of any victims or the flag state of the attacked vessel (although as a practical matter it may). Nor is a state exercising universal jurisdiction after the event required to secure the consent of other states or satisfy itself that no other state could, or is willing to, prosecute the case first. Put simply, it is the state with the suspect pirate in custody that has the final say over where that suspect will be sent for trial, if (s)he is sent anywhere at all. On the other side of the equation, no state has a duty under the law of piracy to receive a captured pirate from a seizing warship and to prosecute them: all could do so, but none must do so.'

[931] ROACH, J. A., 'Chapter Seven. General Problematic Issues On Exercise Of Jurisdiction Over Modern Instances Of Piracy', in Symmons, C.R. (ed.), *Selected Contemporary Issues in the Law of the Sea*. Leiden (2011), p. 130.

[932] *Contra*: ROACH, *ibid.*, p. 129: 'An argument that only the State of the capturing force has international jurisdiction to try the pirates is inconsistent with the strong duty of cooperation in the international law of piracy articulated by Article 100.'

mostly because of the anticipated difficulty, expense or the fear of asylum claims.[933] […]*It is readily apparent that states scarcely invoke article 105 and the universality principle in order to try pirates*, which brings into question the relevance of this provision in the twenty-first century.'[934]

Perhaps more interestingly, this reluctance to invoke Article 105 may not derive as much from questions of interpretation of the *severability* of the kinds of jurisdiction attributed to non-flag states with regard to piracy as much as the *practical difficulties*[935] *encountered by the principle of universal jurisdiction* despite the doctrinal enthusiasm that sometimes considers it a sort of a panacea for international crimes. As reckoned by Abi-Saab, in fact, '[i]t should not be thought […] that states are eager to exercise universal jurisdiction. *Such jurisdiction is cumbersome, costly, and its results are uncertain*.'[936]

Amongst the various obstacles against the exercise of universal jurisdiction over piracy,[937] there is also the concrete availability of this jurisdictional basis in the prosecuting country. For instance, the Kenyan High Court in *Hashi et ors*. (2010) denied having jurisdiction over piracy *jure gentium* perpetrated on the high seas on the ground that no provision thereto could be found in Kenyan law (at the time of the judgment a *dualistic* system).[938]

In synthesis, two sets of difficulties collide with respect to the disjointed exercise of universal jurisdiction, theoretical and practical. Yet, what if we, rather than dwelling on those exposed passages, considered another perspective, adopting an '*effectivist'* approach -one focused on the *result of the overall universal jurisdiction operation*- focusing less on the stages necessary to

---

[933] Instead, several agreements have been concluded between the states involved in the patrolling of the high seas of the Indian Ocean and several states of the area, *e.g.* the EU-Tanzania Transfer Agreement (COUNCIL DECISION 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania) and the EU-Seychelles transfer agreement (Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, 2 December 2009).

[934] PAPASTAVRIDIS, *supra* note 438, p. 169. Emphasis added.

[935] CHADWICK, *ibid*. p. 183: 'Even with satisfactory laws, States may not possess sufficient willpower, resources or expertise to safely and legally capture pirates or to conduct a trial (which will inevitably be more complex than "ordinary" criminal cases). States can become reluctant to act due to the prohibitive costs associated with the apprehension, trial and incarceration of suspects, problems with obtaining evidence, transporting in witnesses, translation, and the possibility of suspects claiming asylum.'

[936] *Ibid*. p. 600. Emphasis added.

[937] Though the same could also be said with regard to any other crime disciplined under international law.

[938] KENYA, HIGH COURT, *Mohamud Mohamed Hashi & 8 ors, Re, Hashi alias Dhodi and ors v Chief Magistrate's Court, Mombasa*, Judicial review judgment, Misc App No 434 of 2009, ILDC 1603 (KE 2010), 9th November 2010, para. 69. See also on this topic KEYOUAN, Z., JING, J., The Question of Pirate Trials in States Without a Crime of Piracy, *Chinese Journal of International Law* 19(2020), pp. 591–623. *Contra*: SPAIN, AUDIENCIA NACIONAL, SALA DE LO PENAL, Sección 4ª, Sentencia de 3 May. 2011, rec. 93/2009, para. 61: 'la origen de esa competencia se encuentra en los tratados internacionales vigentes sobre la materia'.

reach such a result?[939] In this sense, I believe it is necessary to increase cooperation amongst states by creating new models -economic, legal, military, and technological- to revitalise the centuries-old framework of the anti-piracy efforts and make them able to withstand the challenges of this *brave new XXI century's world*.

6. Intertwined crimes and the proposed unified regime over crimes of international concern

In this final Paragraph, I intend to draw attention, rather empirically, to the genealogies of crime and the jurisdictional impact of the nexus between so-called international crimes and other crimes, questioning in particular whether this interconnectedness may broaden the scope of states' jurisdiction over conducts 'accomplices' to international crimes.[940] To this aim a few examples will be discussed.

a) Piracy: aiding and abetting from the land?

Starting from piracy and the question of the jurisdiction over land-based aiding and abetting,[941] in the *Shibin* case (2013), the US Court of Appeals for the Fourth District examined whether an individual whose conduct took place in a foreign state and its territorial waters, could be prosecuted as an aider and abettor of the piracies of two vessels which took place on the high seas. The question asked to the Court, in particular, was whether the conduct of aiding and abetting piracy must *itself* take place on the high seas.[942] In this sense the Court observed that whereas Art. 101(a) UNCLOS requires for the *principal perpetration* of piracy a *ship2ship* dynamic ('directed on the high seas against another ship'),[943] Article 101(c) establishes another form of

---

[939] Provided that, in doing so, no substantive or procedural violations of the rights of the suspects/accused are made. See MUJUZI, J.D., The Prosecution in Seychelles of piracy committed on the high seas and the right to a fair trial, *Criminal Law Forum* 31(2020), pp. 1–48.

[940] Used in an a-technical sense, as encompassing all the conducts causally contributing to the realization of an international crime without 'containing' its *actus reus,* or, *rectius,* 'on bases other than physical perpetration'. In light of this ambiguity, I will more often refer to *ancillarity* (also a much more *euphonic* word). Under the theory of *derivative criminal liability* (covering *inter alia* inchoate offences, organized crime, probable consequence liability, post-crime aid and complicity), complicity is used to describe a class of forms of criminal liability covering joint-perpetration, perpetration-through-another, incitement, solicitation, accessorship, etc. HALLEVY, G., *The Matrix of Derivative Criminal Liability*, Berlin (2012), p. X.

[941] The indicted was accused of having worked as the *de facto* mediator of the pirate group.

[942] US, COURT OF APPEALS, FOURTH CIRCUIT, *United States v Shibin (Mohammad Saaili)*, Appeal judgment, Case No 12-4652, ILDC 2160 (US 2013), 722 F 3d 233 (4th Cir 2013), 12th July 2013, paras. 29-30.

[943] According to the MAURITIUS, INTERMEDIATE COURT OF MAURITIUS, *Police v Mohamed Ali Abdeoulkader and ors*, Cause No.850/2013, 2014 INT 311, 6 November 2014 (paras. 53-8), the *actus reus* does not require the completion of the attack or the successful hijacking and robbing of the ship. All that is necessary for the perpetration of a piratical attack is the existence of an act of violence directed against an X ship: 'all that the prosecution need prove is that amongst other elements constituting the act of piracy as per this definition, there was an illegal act of violence

perpetration of piracy, whose *actus reus* consists of '*any act* that "intentionally facilitat[es]"[944] any act described in Article 101(a)',[945] with no mention of either a *ship2ship* relationship or the presence of the facilitator on the high seas.

As explained by the US Court, 'there is no conceptual reason why acts facilitating high-seas acts must themselves be carried out on the high seas. The text of Article 101 describes one class of acts involving violence, detention, and depredation of ships on the high seas and another class of acts that facilitate those acts. In this way, Article 101 reaches all the piratical conduct, wherever carried out, so long as the acts specified in Article 101(a) are carried out on the high seas. […] thus […][the] conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas.'[946] To support this argument, the US judges invoked *inter alia* the UNSC Resolutions 1976 and 2020(2011) underlining 'the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks'.[947]

b) Migrant smuggling and murder on the (high) seas

As recognised in the jurisprudence, to be heard by Italian judges, *all crimes must have a qualified link with the state* as provided under Article 6(2) of the Italian Penal Code.[948]

---

directed against the MSC Jasmine. *There is no need for the attack to be completed and the shipping vessel hijacked and robbed by the alleged pirates for the act of piracy to be completed.'* Emphasis added.

[944] 'the facilitating conduct of Article 101(c) is "functionally equivalent" to aiding and abetting criminal conduct'. *Ibid.* Para. 34.

[945] *Id.* Emphasis added.

[946] *Ibid.* paras. 36-7. In the same sense US COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, *US v Ali Mohamed Ali (aka Ahmed Ali Adan, aka Ismail Ali)*, no. 12–3056, 718 F.3d 929, 11 June 2013.

[947] UNSC Res. 2020(2011), adopted by the Security Council at its 6663rd meeting, on 22 November 2011, Preambular para. 5. In the same sense UNSC Res. 1976 (2011), adopted by the Security Council at its 6512th meeting, on 11 April 2011, para. 15. Against this interpretation, it should be mentioned that both Resolutions expressly limit their applicability to the peculiar circumstances of the situation in Somalia: '… reaffirming that the provisions of this resolution apply only with respect to the situation in Somalia and do not affect the rights and obligations or responsibilities of Member States under international law' (UNSC Res. 1976(2011), preambular para. 9). The plethora of UNSC Resolutions derogating from the exclusive jurisdiction exercised by Somalia over its territorial waters is inter alia highlighted by The Hague Court of Appeals which nevertheless carefully avoids deriving any broader conclusion from them. See NETHERLANDS, THE HAGUE COURT OF APPEALS, case no. 22-004920-12, ECLI:NL:GHDHA:2014:1006, 21 march 2014, para. 5.

[948] 'A crime is considered having been committed in the territory of the State when its *actus reus* (action or omission) entirely took place in it (or at least in part) or the event that occurred there was the consequence of the action or omission.' The so-called principle of TT (more commonly referred to as *objective* territoriality). *Supra* note 517.

A critical point in the jurisprudential elucidation of the qualified nexus allowing Italian authorities to hear cases concerning crimes committed on the high seas, has been the irregular migration's unitarian, *geo-teleological* Italian destination.

Without getting too much into details, as recognised -*ex multis*- in judgment 12619/2019,[949] traffickers have developed a method to take advantage of the SAR duties of individuals and states: the overfilled -barely floating (and oftentimes flagless)[950] wrecks carrying the lives and deaths of many are abandoned on the high seas where the traffickers count on the rescuers' help for reaching Europe and also for trying to break the nexus with their destination's jurisdiction, arguing that the transfer onboard warships or NGO's vessels (and the subsequent disembarking in Italy) are simply *very welcomed* accidents.[951] The Supreme Court has thus concluded that '[i]t follows that the jurisdiction of the Italian State must be recognised where in the case of migrants trafficking from the African coasts to ours, they are abandoned at sea in extraterritorial waters on wholly unsuitable vessels, in order to provoke the intervention of SAR and allow those carried to be accompanied through territorial waters by the rescuing vessels operating under the exemption of the state of necessity. In such cases, in fact, the serious endangerment of migrants, constituting a state of necessity, is directly ascribable to the traffickers who provoked it and is linked, without interruption, to the first element of the conduct committed in extraterritorial waters, thus coming under the cover of Article 6 of the Criminal Code.'

Less than two years later, however, the Court seemingly shifted its approach in the *Jomaa Laamami Tarek case*[952] concerning the crimes of irregular migration and mass murder of forty-nine subsaharians amassed in the minuscule cargo bay of a flagless vessel and thereby asphyxiated by the exhaustion fumes of the engine and the lack of oxygen, after having been

[949] CASS. I PEN., 21 March 2019 n. 12619. Even more explicitly CASS. I PEN. I, 21 june 2022, n. 23912, paras. 2-3. see also *ex multis* CASS. I PEN., 13 december 2018 n. 56138 (*Molkenbur, Waldhoff*), para. 3.2; CASS. I PEN., 5 may 2014 n. 18354.

[950] In this sense CASS. I PEN., 27 March 2014 n. 14510.

[951] Similarly, SPAIN, AUDIENCIA PROVINCIAL, SANTA CRUZ DE TENERIFE, SECCIÓN 6, 13 december 2022, Nº de Recurso 33/2022, Nº de Resolución 372/2022, fundamentos juridicos, primero motivo: 'es posible colegir, sin mayores esfuerzos, la competencia de los Juzgados y Tribunales españoles para el conocimiento de tales delitos con independencia de que la aprehensión de la embarcación en la que viajaban los acusados junto con otros inmigrantes se pudiera haber producido fuera de las aguas jurisdiccionales españolas y con independencia de la nacionalidad de los posibles implicados en los hechos o si el delito se consumó o en territorio español.'

[952] CASS. I PEN., 13 august 2021 n. 31652. See MANDRIOLI, D., La Giurisdizione Penale Extraterritoriale E La Convenzione Di Palermo: Nuove (O Antiche?) Riflessioni Ispirate Dalla Corte Di Cassazione, *SIDIBlog* 31 january 2022 http://www.sidiblog.org/2022/01/31/la-giurisdizione-penale-extraterritoriale-e-la-convenzione-di-palermo-nuove-o-antiche-riflessioni-ispirate-dalla-corte-di-cassazione/.

prevented with beatings and injuries from rising to the deck in order not to destabilise the already precariously floating vessel.[953]

Following its consolidated jurisprudence on the matter of the 'mediated autorship' in the context of illegal migrants, the Court not unreasonably concluded that, from a factual point of view, the eventuality of a SAR operation does not militate against the recognition of the existence of the crime of migrant smuggling, as smugglers routinely (almost by default) bring the migrants relatively close to the shores trusting that someone will come to their rescue towing them into some port.[954]

The combined readings of Article 7(1)(5) of the Italian Criminal Code and Article 15 UNCAC appear unconvincing, as poignantly observed by Mandrioli.[955] According to the judgment, 'the conditions for the application of Italian law are established under the general clause *ex* art. 7 Penal Code and the clear-cut identification of the nexus required by international conventions ratified by Italy to extend Italian jurisdiction. The Palermo convention provides one of these occurrences insofar as it requires -thus clarifying the nexus giving rise to Italian jurisdiction- the existence of a 'serious offence' perpetrated by a criminal organised network, having substantial effects in Italy. *These circumstantiate parameters set under international law do not require any domestic implementation, being on the contrary, sufficiently precise and self-executing pursuant to Article 7 of the Criminal Code'*.[956]

The Supreme Court, adopting a '*neo-Lotusian*'[957] reading of Article 15(4) UNCAC -of questionable compatibility with the requirement of *lex stricta*- considers its merely facultative, generic formulation ('*may* also adopt such *measures as may be necessary to establish* its jurisdiction') as directly applicable in the domestic system. We must be thankful the judges were lawyers. Had they been electricians, they could have short-circuited their customers. Irony aside, it is hard to see how article 15(4) UNCAC could be understood to be self-executing as it requires the adoption

[953] In the same sense CASS. I PEN. 10 January 2023 n. 431; CASS. I PEN., 3 March 2020 n. 13076: in case of interconnected transboundary crimes, the adjudicatory competence *ratione loci* shall be identified with respect to the *locus commissi delicti* of the most serious crime the actus reus of which has been, at least in part, perpetrated in the Italian territory or, if that place cannot be identified, with respect to the immediately less serious crime.

[954] In this sense, it is necessary to highlight the subject-matter differences between *Tartoussi* and *Tarek*: while *Tartoussi* was exclusively concerned with a foreign-flagged vessel engaged in less-than-noble extraterritorial activities, *Tarek* deals with an unflagged vessel on the high seas connected to Italy by a TT.

[955] *Ibid*.

[956] Paras. 2.6.2-3. Emphasis added.

[957] *i.e.* referring to the laxer, and recently rejected interpretation of the *Lotus* principle as a rule allowing the extension of jurisdiction to extraterritorial conducts unless expressly forbidden by international law. *supra* note 712.

of (facultative but nonetheless necessary) some domestic, assertive rules, with the risk, otherwise, to fall into a neverending (diabolic) circle of empty references.[958]

As seen in this brief incursion on the Italian jurisprudence over transnational organised maritime crimes, the *Palermo system* offers states a comparatively wide degree of freedom in *asserting* (in an assertive, positive manner) and exercising their jurisdiction not just over the crimes listed under the Convention and its protocols, but also on the other offences that may be inextricably connected (or may find their cause in) thereto.

The success of these measures, however, does not depend uniquely on judicial authorities (who should ensure creative yet legally sound interpretation and application of the existing rules to maximise their beneficial impact) but first and foremost on the legislators, who should not limit themselves to a passive acknowledgement of the rules, but actively concur to their translation into positive, proactive rules. In this sense, it would be advisable for Italy to be more careful and attentive when ratifying international provisions. If it is laudable -and it is- the commitment not to distort the original *littera legis*, it should also be avoided transforming it into a *littera morta*.

c) Trafficking weapons, fuelling violence

If the repression of migrant trafficking as such is hardly problematic in light of its TT, it is far more difficult (and open to critics) to deal with other offences or crimes ancillary or incidental to extraterritorial trafficking.

In *Tartoussi*,[959] concerning the unlawful possession and movement of tanks, vehicles armoured with rocket launchers, machine guns, explosives and other armaments, embarked from Turkey on a Lebanese-flagged vessel and subsequently transferred (escorted by Turkish frigates)

---

[958] ITALY, Law 16 marzo 2006, n. 146 (Ratification and execution of the United Nations Convention and Protocols against Transnational Organized Crime) strangely follows the 'special' method of ratification and execution even though it is widely agreed that 'where the treaty contains rules that are only programmatic or whose content cannot be determined solely by interpretation, or rules that do not fully prescribe all the details and aspects of particular cases regulated and thus require supplementary legislation' legislator is expected to resort to the 'ordinary' method ('a law that interprets and reformulates the provisions of the treaty amending the national legislation if this is necessary to implement them'). CATALDI, G., 'Italy', in Shelton, D. (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion,* Oxford (2011), p. 338. See in the same sense EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR PARLIAMENTARY RESEARCH SERVICES, CAFARO, S., *La ratifica dei trattati internazionali, una prospettiva di diritto comparator – Italia* (2018), https://data.europa.eu/doi/10.2861/646762.

[959] CASS. I PEN., 17 june 2020, n. 19762. For a comprehensive and admirably detailed analysis of the case and the relating issues, see my *learned friend* (and former colleague in the Ph.D) MANDRIOLI, D., Oltre i limiti territoriali: l'esercizio della giurisdizione penale italiana sul traffico di armi nel Mar Mediterraneo, *Il Diritto Marittimo* II (2021), pp. 354-68; ZUGLIANI, N., In the matter of criminal proceedings against Youssef Tartoussi, Tartoussi, Final appeal judgment, No 19672/2020, ILDC 3171 (IT 2020), 17th June 2020, Italy; Supreme Court of Cassation, *Oxford Reports On International Law In Domestic Courts* (2020), pp. 1-6.

to unknown persons in Libya in open and blatant violation of the arms embargo imposed on Libya. The *Bana* (the smuggling vessel), having discharged its deadly cargo in Libya, then proceeded for a stopover in Genova, where it was arrested by Italian authorities based on the evidence supplied by a former officer of the ship.[960]

In *Tartoussi*, the Supreme Court denied the applicability of Italian jurisdiction to the offences at stake pursuant to Article 7 of the Italian Criminal Code[961] and Article 15(4) UNCAC, since the *nullum crimen sine lege* principle, in the absence of either international or domestic express derogations to the territoriality principle, does not allow the extension of Italian adjudicative jurisdiction over crimes perpetrated by foreigners against foreigners in their entirety abroad, even when linked to crimes committed in Italy.[962] In particular, with regard to Article 15(4) the Court found that 'with respect to [its contents] there is no such self-executing condition. The provision, derogating from the general principle of territoriality of the State Party's jurisdiction and sovereignty […] and allowing prosecution for acts committed in their totality abroad, *and not even prospectively related to acts to be committed within their domestic territory*, does not constitute an obligation as much as a faculty: "...each State Party may adopt...". *This option, moreover, appears to be hinting towards the introduction of an instrument having the characteristics of generality and abstractness of legal norms: "… necessary measures to establish its jurisdiction in respect to the offences referred to in this Convention…". This hermeneutic structure, leading to the conclusion that to date the Italian State has not exercised that power (regardless of the ratification of the Convention), appears to be corroborated by the comparison with the other provisions contained in the same Article 15 of the UN Convention.*'[963]

d) Death in Libya

---

[960] The Court found that Article 6(2) of the Italian Criminal Code was inapplicable in this case since it was not possible to prove the passage of the *Bana*, in its journey from Turkey to Libya, through Italian territorial waters establishing a nexus between the criminal conduct and Italy. If that had been the case, all the complications with Article 7(1)(5) below could have been avoided. *Ibid.*, paras. 2.3, 3.1-3.

[961] Article 7(1)(5) Italian Penal Code: 'Italian citizens and foreign nationals who perpetrate in foreign territory any of the crimes below shall be subject to punishment according to Italian law […] any other offence over which either specific domestic *rules* ['speciali disposizioni di legge'] or international agreements provide the applicability of Italian law'. *Unless otherwise declared, all the translations are exclusively mine.*

[962] *Ibid.*, para. 4.2.

[963] *Ibid.*, para. 4.3. emphasis added. see also *ibid.*: '[i]n this sense, the references - although present in the text of Article 15(4) UN Convention - to the condition of the presence of the alleged in the territory of the State and his non-extradition, are simply meant as the minimum parameters shared in the Treaty, according to which the State Party 'has the power to' shape the domestic provision of adaptation, but *they do not confer upon the treaty provision the characteristics of a self-executing norm.*' Emphasis added.

The Italian Supreme Court in *judgment* 48250(2019) relating to the possible extension of Italian jurisdiction over violence against migrants perpetrated in Libya by foreign citizens denied having 'affirmed the principle [built on an unidentified normative basis] that the appellant would like to attribute to its paternity, namely that the [mere] existence of a nexus would become an autonomous criterion for establishing Italian jurisdiction over acts *perpetrated beyond the State's territory by and against a foreigner*. [...] In the case of crimes *entirely perpetrated abroad* - as in the present proceedings - even if these are connected to others subject to Italian jurisdiction, in the absence of a[n express] normative basis derogating from the territoriality principle, such as the aforementioned institutes of the right of hot pursuit and constructive presence, *such an expansion of punitive power cannot, therefore, be considered justifiable*.'[964]

In conclusion, as seen from this *blitz* into the possibility of prosecuting transnational crimes as ancillary forms of international crimes, whilst this solution does not seem a universally applicable paradigm, looks very promising in relation to all the economic, productive, financial or otherwise logistic activities connected to international crimes.[965]

Generally speaking -though its precise terms must be verified *in concreto*- the activities relating to the trade, trafficking or smuggling of commodities -or the financing- used to commit the crime or resulting from its commission, by its principal perpetrator, of an international crime[966] are the most likely forms of complicity to international crimes and can therefore be attracted to their jurisdictional regime.[967] Nevertheless, they are not the sole ones. As previously

---

[964] CASS. V PEN., 12 september 2019 n. 48250. Personal translation. Emphasis added.

[965] In spite of the restrictive approach adopted by the ATS-based US jurisprudence since *Kiobel*. an obstacle to the cognition of extraterritorial (tort) claims over derivative liability for international crimes lies in the *mens rea* required to justify the extension of US courts' jurisdiction, *i.e.* it must be *proven that the corporate accomplice/aid or abettor shared the same mens rea of the principal perpetrator*. Easier said than done. See, *ex multis* US COURT OF APPEALS, 2ND CIRCUIT, *Mastafa and ors v Chevron Corporation and Banque Nationale de Paris Paribas, Appeal judgment,* 770 F 3d 170 (2d Cir 2014), ILDC 2604 (US 2014), 23rd October 2014, paras. 63-4: 'Plaintiffs' allegations that defendants *intentionally* flouted the sanctions regime for profit, or that they *knew* their actions were in violation of United Nations Security Council resolutions, or "international law," or U.S. policy are irrelevant to the *mens rea* inquiry; rather, our analysis necessarily focuses on allegations that defendants *intended* to aid and abet violations of *customary international law* carried out by the Saddam Hussein regime—a contention that is unsupported by the facts alleged in the complaint [...] *Plaintiffs never elaborate upon this assertion in any way that establishes the plausibility of a large international corporation intending—and taking deliberate steps with the purpose of assisting—the Saddam Hussein regime's torture and abuse* of Iraqi persons.' Emphasis added.

[966] If accompanied by the necessary *mens rea* which, in most cases (except for genocide, terrorism, persecution) may likely be integrated by a *dolus indirectus* or a *dolus eventualis*, as seen in *Kouwenhoven* (*supra* note 534). On a more general account see JØRGENSEN, N. (ed.), *The International Criminal Responsibility of War's Funders and Profiteers*. Cambridge (2020).

[967] See in this sense REID, H., The Zyklon B Legacy and the Case for Investigating Arms Dealers Responsible for International Crimes in Myanmar, *New Zealand Journal of Public and International Law* 18(1)(2020), pp. 29-48;

seen,[968] it may also be possible that when courts exercise their jurisdiction in relation to a primary offence (*e.g.* smuggling), they also know and adjudicate offences originated or inextricably linked to the principal one.[969]

RAPP, S. 'The Relationship between Economic and Atrocity Crimes: Challenges and Opportunities', in Jørgensen, N. (ed.), *The International Criminal Responsibility of War's Funders and Profiteers,* Cambridge (2020), pp. 506-23.

[968] *Supra* note 582.

[969] In this sense, SPAIN, AUDIENCIA PROVINCIAL, SANTA CRUZ DE TENERIFE, *supra* note 841: 'el principio de justicia universal concluye que España tiene plena jurisdicción por conocer de los delitos cometidos contra los ciudadanos extranjeros y del delito de lesiones por imprudencia grave que debe tener la consideración de conexo con el principal'. While the case specifically refers to lesions or damages caused by great negligence in connection with a principal crime subject to universal jurisdiction, it should logically extend to any dependent or ancillary offence connected (or rather, jurisdictionally attracted) to a more serious one.

SECTION III: THE SEA[970]

CHAPTER IV: A zonal investigation on maritime jurisdiction: from general principles to the application of the regime of the law of the sea to crimes of international concern.

1. Introduction

As a preliminary, general matter, as it will be seen throughout the Chapter, UNCLOS references to jurisdiction tend to focus on either prescriptive or enforcement jurisdiction (set up the applicable legal framework or the means to ensure its abeyance), with no or very scarce references to adjudicatory jurisdiction. Differently put, it would seem *prima facie* that the primary concern of the Convention consists in avoiding as much as possible any unnecessary interference with navigation and the legitimate enjoyment of maritime resources.

As acutely pointed out in the literature[971] the notion itself of sovereignty over natural resources appears to be shaped upon the discipline of ownership under private law.[972]

Whereas arrests and seizures appear to be very likely to affect these rights and freedoms, it is less clear whether such consideration could also be made with regard to (criminal) adjudication.

Specific arguments will thus be occasionally developed in the course of the Chapter as to whether the recognition of a certain enforcement prerogative may be indicative of the potential existence of an -allegedly less cumbersome- adjudicatory function in the hands of non-flag states.

---

[970] **In memory of the beloved POPE BENEDICT XVI who taught us the beauty of truth and the truth of beauty. *Magister optimus, mitis fidelisque Pastor*, passed away during the drafting of this Section on the 31st of December 2022.**

[971] I am most grateful in this sense to Professors Cedric Ryngaert and Richard Barnes for the precious suggestions on the framing of jurisdiction in the law of the sea regime and the usefulness of distinguishing between its various forms received during our conversations in the occasion of the *International Conference Jurisdiction and Protection of Human Rights at Sea* hosted by the University of Milano-Bicocca on the 7th March 2024.

[972] 'Territorial sovereignty in particular has been developed largely by reference to concepts of private ownership, to the extent that it mirrors the conceptual modus operandi of property. It is no mere coincidence that the doctrinal modes of acquisition of territory under international law parallel the modes of acquisition of property under domestic law. […] By casting territorial sovereignty as a property type relationship, it is possible to draw upon conceptual analyses of property to provide an account of the factors shaping the regulation or natural resources under international law. This approach allows for the development of three further lines of analysis. It allows us to consider claims to territorial sovereignty in light of justifications of property, it allows us to consider the limits to territorial sovereignty in light of the normative limits of property law and it allows us to consider what may be termed the public incidents of territorial sovereignty.' BARNES, R., *Property Rights and Natural Resources,* London (2009), pp. 13-4.

1.1 Pathologies and issues with the regime of maritime jurisdiction (notes)

As a *caveat* before proceeding with a detailed analysis of UNCLOS provision and their applicability to crimes of international concern regards the pathologies of maritime jurisdiction and in particular the issues relating to flag state jurisdiction.

In very brief terms, as it will be seen, the *ascription of nationality to ships is one of the pillars of public order at sea*. In particular, on the high seas, aside from the exceptions established by UNCLOS and other treaties, vessels are subject to the exclusive jurisdiction of their state of registration (more commonly referred to as *flag state*, as the flag has traditionally served as a means to identify the ship and its nationality)[973] under Article 92(1) UNCLOS. Articles 91 and 94 UNCLOS, respectively require the existence of 'a genuine link between the State and the ship' and that every '[flag] State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[974]

This duty is nevertheless temperated by Article 91, as it provides that '[e]very 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.'

This freedom of the states to determine the conditions upon which their nationality is granted has led[975] several states to establish open registries[976] -*i.e.* subject to lower registration fees and not requiring compliance with international labour or security standards-[977] which grant only *nominal* jurisdiction on the vessel which, in fact, find itself beyond the control of any state, weakening the entire construction of the law of the sea.[978]

---

[973] MBIAH, E.K., 'Coastal, flag and port state jurisdictions: powers and other considerations under UNCLOS', in Mukherjee, P.K., Mejia, M.Q.J., Xu, J. (eds.), *Maritime Law in motion*, Cham (2020), p. 510.

[974] See PAPANICOLOPULU, I., '9 Due Diligence in the Law of the Sea', in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order*, Oxford (2020), p. 150.

[975] Although the origins of the phenomenon are much older, tracing back to the 1920s. *Ibid.* p. 511.

[976] See READY, N.P., 'Nationality, Registration, Ownership of ships', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016), pp. 32-5.

[977] Hence the name flags of convenience, since there is no genuine link whatsoever between the vessel and its flag but only an administrative formality. CHURCHILL, LOWE, SANDER, *ibid.*, p. 466; BARNES, R.A., 'Flag States', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015), p. 308. MANSELL, J.N.K., *Flag State Responsibility. Historical Development and Contemporary Issues*, Dordrecht (2009), pp. 76, 95-6.

[978] 'On the high seas the LOSC reaffirmed the exclusivity of flag state jurisdiction as the pre-eminent jurisdictional rule, a privilege counterbalanced by the duties of flag states to exercise effective control over ships flying their flag. However, this trade-off has always been unsatisfactory, as the genuine link requirement for the nationality of ships is a minimal one, and flags of convenience have prospered and remain a challenge to effective oceans governance both for the law of the sea and maritime law.' STEPHENS, T., ROTHWELL, D.R., The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On, *The International Journal of Marine and Coastal Law* 27 (2012), p. 706.

The fertility of such a system for developing abuses is self-evident, particularly concerning IUU fishing,[979] slavery at sea and marine pollution.[980]

In this Chapter, though, we will only focus on the physiology of maritime jurisdiction, as the pathologies of maritime jurisdiction will be thoroughly examined in Chapter V.

1.2 The maritime zones under the law of the sea: definition and geographical extension. Some notes on the problem of competing maritime claims

To properly discuss the jurisdictional regime of the various maritime zones, it is preliminarily necessary to provide some brief introductory comments on their definition and geographical extension, highlighting, in particular, the frequently competing claims advanced by states on the various maritime zones.

The seas are divided into five main zones (territorial sea, contiguous zone, exclusive economic zone, continental shelf, high seas), to which should be added the internal waters and the area. All maritime spaces are determined in relation to the baseline. Article 5 UNCLOS defines

[979] 'The International Transport Workers' Federation (ITF) has identified 33 countries that are classified as FoC countries. In July 2018, the TryggMat Foundation's combined IUU vessel list contained data on 305 fishing vessels used for IUU fishing and fisheries crime. While the analysis of the dataset showed that close to half of these vessels were stateless or had an unknown flag state, the data also showed that over a third of vessels with known flags were operating under a FoC (as per the ITF list), demonstrating the link between IUU fishing and FoCs […] FoCs can not only lead to confusion and circumvention of fishing regulations but also exacerbate or facilitate human rights abuses. A recent murder case involving a Vanuatu registered, Taiwanese owned tuna longliner – Tunago No.61 – shows how FoC and beneficial ownership jurisdictions can impact subsequent investigations. The captain of the vessel, Xie Dingrong, was killed by six crew members while at sea between Fiji and Easter Island. They have since been sentenced to 18 years imprisonment by the Vanuatu Supreme Court. The court investigations found that the Indonesian crewmembers on board had experienced wide-ranging physical and verbal abuses at the hands of Mr. Xie. Although numerous human rights abuses and incidences of mistreatment were recorded during the hearings, to date there has been no formal investigation of the Taiwanese-owned vessel by the Taiwanese authorities either into the recruitment process, or the treatment of the crew on board'. THE ENVIRONMENTAL JUSTICE FOUNDATION, *BLOOD AND WATER: Human rights abuse in the global seafood industry* (2019), p. 26. See CALLEY, D., 'transitional states and the flag of convenience fishing industry', in Michalowski, S. (ed.), *Corporate accountability in the context of transitional justice*, Abingdon (2013), pp. 228-46.

[980] CHURCHILL, LOWE, SANDER, *ibid.* p. 574.

the normal baseline[981] as the 'low-water line along the coast as marked on large-scale charts officially recognised by the coastal State'.[982]

While the baselines are placed in Part II Section 2 of UNCLOS (limits of the territorial sea), they actually serve as the reference of all maritime spaces which are defined as a portion of the sea[983] situated within a certain seaward distance from the baseline.

Under Article 2 UNCLOS, the territorial sea is defined as a belt of the sea adjacent to the coastline, subject to the sovereignty of the coastal state. In principle, its width is set at (maximum) 12 nautical miles (Article 3 UNCLOS)[984] from the baseline, yet there are many exceptions to this rule either due to geographical or historical factors. For instance, where the coastlines of two opposing states are so close to each other that fully extended territorial seas would affect the freedom of navigation or limit third states' rights, states have mutually agreed to limit their territorial seas to lesser widths. That is the case of Estonia and Finland which, in

[981] As it is also possible that the maritime zones are defined with respect to a different line. Article 7(1) and (2) UNCLOS provides for these cases establishing that 'In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline [...] Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line.' As established under para. 3 thereto, 'The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.' A typical example of the first can be found in the Norwegian coastline, famously riddled with deep (and oftentimes beautiful) fiords, gulfs and a constellation of islands and rocks, former peaks of the mountains surrounding the fjords, as 'Royal Decree of June 14, 2002 sets forth Norway's straight baselines around mainland Norway [...] This straight baseline system consists of 103 points and 102 segments, extending from the Norway-Russia boundary (north) to the Norway-Sweden boundary (south), for a total length of 1,365 M'. UNITED STATES DEPARTMENT OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, *Limits in the Seas No. 148 Norway Maritime Claims and Boundaries,* August 28, 2020, p. 8: https://www.state.gov/wp-content/uploads/2020/08/LIS148-Norway.pdf. On the regime of straight baselines and the conditions for their establishment, see, *ex multis*, ROTHWELL, STEPHENS, *supra* note 9, pp. 44-6; CHURCHILL, LOWE, SANDERS, *supra* note 4, pp. 65-89. Various examples with commentaries are also provided in FRANCALANCI, G., SCOVAZZI, T. (eds.), *Lines in the sea*, Dordrecht (1994).

[982] On the definition of normal baseline see: ROTHWELL, STEPHENS, *ibid.* pp. 42-4 ff.; CHURCHILL, LOWE, SANDERS, *ibid.*, pp. 54-65 ff.

[983] With regard to the continental shelf the measure does not refer to the water (and air) column but rather to the seabed. See part VI UNCLOS.

[984] The limit is believed to have acquired a customary status. See TANAKA, *supra* note 9, p. 103: 'At present, some 137 States Parties to the LOSC have established a 12-nautical-mile territorial sea, and approximately ten States have claimed, wholly or partly, a territorial sea of less than 12 nautical miles.' US DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, *United States v Salad and ors, Decision on motion to dismiss,* 908 F Supp 2d 730 (ED Va 2012), ILDC 2027 (US 2012), 30th November 2012, para. 13: 'although the Defendants provide ample evidence that Somalia has claimed a 200-mile territorial sea, they fail to demonstrate that Somalia possesses exclusive territorial sovereignty forty miles from its shore, where the alleged offenses occurred. In effect, the Defendants ask this court to hold that a forty-year-old Somali law—which was passed before that country ratified UNCLOS, and which contradicts a near-unanimous international understanding about the size of territorial seas—precludes this court from exercising jurisdiction over offenses committed outside the twelve-mile territorial limit.'

the area of the *Viro Strait* in the Gulf of Finland, have agreed to limit the width of their respective territorial seas no closer to 3 miles from the median line.[985] Similarly, in the Aegean Sea, Greece and Turkey have, until now, restrained the extensions of their respective territorial waters to 6 nautical miles since a unilateral extension of their *mare terrae proximum*[986] would bring almost the entire Aegean Sea under Greek sovereignty[987] severely preventing Turkey from exercising fundamental state functions.[988]

In several cases, however, states have claimed sovereignty over wider maritime areas on the ground of alleged historical titles. As Symmons highlights, though, these claims are *contra legem* as the areas beyond the territorial sea fall under the contiguous zone, the EEZ, or the continental shelf in the post-UNCLOS regime.[989]

Under Article 15 UNCLOS, though, the delimitation of the territorial sea between two opposite (*e.g.* Finland and Estonia)[990] or adjacent states (*e.g.* the closing line of the Gulf of Taranto serving as the baseline, unilaterally declared by Italy and accepted by Greece)[991] may not follow the principle of equidistance when 'it is necessary by reason of *historic title* or other special circumstances to delimit the territorial seas of the two States in a way which is at variance

---

[985] Exchange of notes constituting an agreement on the procedure to be followed in the modification of the limits of the territorial sea in the Gulf of Finland, 6 april and 4 may 1994. See on the delimitation of the Gulf of Finland, LOTT, A., The (In)applicability of the Right of Innocent Passage in the Gulf of Finland – Russia's Return to a Mare Clausum?, available at https://munin.uit.no/bitstream/handle/10037/23853/article.pdf?sequence=4 (originally published in Estonian as LOTT, A., 'Rahumeelse läbisõidu õigus Venemaa Föderatsiooni Soome lahe vetest', *Juridica* 25(7)(2017), pp. 501–11).

[986] As the territorial sea was referred to by Bynkershoek. See PHILLIPSON, C., Cornelius van Bynkershoek, *Journal of the Society of Comparative Legislation* 9(1)(1908), p. 36.

[987] '71.5 per cent of the Aegean Sea would be under Greek sovereignty'. ORTOLLAND, D., The Greco-Turkish dispute over the Aegean Sea: a possible solution ?, *Diploweb.com: la revue géopolitique,* 10 april 2009 https://www.diploweb.com/The-Greco-Turkish-dispute-over-the.html. On the Greek-Turkish border dispute see GAVOUNELI, M., Whose Sea? A Greek International Law Perspective on the Greek-Turkish Disputes, *Institute Montaigne*, 16 October 2020 https://www.institutmontaigne.org/en/analysis/whose-sea-greek-international-law-perspective-greek-turkish-disputes.

[988] 'If the Greek territorial waters were extended to 12 n miles in the Aegean Sea, Turkish warships coming from the Bosporus or from Izmir would be subject to the limitations of the 'right of innocent passage' or even to regulations adopted by Athens to link the central Mediterranean Sea'. ORTOLLAND, *Ibid.*

[989] SYMMONS, C.R., *Historic Waters and Historic Rights in the Law of the Sea, A modern reappraisal, 2nd edition,* Leiden (2019), pp. 38-9.

[990] *supra* note 40.

[991] 'on August 24, 1977, Italy and Greece concluded an agreement for the delimitation of the continental shelf. Regarding apportionment, the agreement applies the median line principle. Since every point of the line must be equidistant from the nearest points on the baseline from which the breadth of the territorial sea is measured, the median line between Italy and Greece was drawn by taking into account the new baseline along the Ionian coast. […] The enclosure of the Gulf of Taranto as an historic bay has met a considerable degree of acquiescence by third states.' RONZITTI, N., Is The Gulf of Taranto an Historic Bay?, *Syracuse Journal of International Law and Commerce*,11(2)(4)(1984), p. 282; SYMMONS, *ibid.* p. 119; FRANCALANCI, SCOVAZZI, *supra* note 37, pp. 222-3.

therewith'.[992] Significantly, UNCLOS offers no definition of any such historic titles (nor it defines historic bays under Article 10(6)),[993] which must therefore be found in the case law.[994]

These issues hereby discussed with regard to the territorial waters apply, *mutatis mutandis*, also to the other maritime zones under coastal state jurisdiction or sovereign rights, as the delimitation of these maritime zones is equally influenced by geographical, historical and political considerations which are not possible to explore in this Dissertation.[995]

Moving seaward, the contiguous zone is defined by UNCLOS in Article 33 as 'a zone contiguous to its territorial sea', which 'may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured'.[996]

The contiguous zone, as it shall be seen, serves as a buffer zone aimed at protecting vital state interests, conferring the coastal states the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations and punish infringement of the above laws and regulations committed within its territory or territorial sea. In essence, the contiguous zone creates an area beyond the territorial sea, wide up to 12 miles where the coastal state enjoys the powers necessary to prevent and punish specific violations committed on its territory or in the waters under its sovereignty.[997]

The exclusive economic zone and the continental shelf instead comprise the *patrimonial sea* enabling the exploration and exploitation of the living and non-living resources of the deep sea.[998]

---

[992] Emphasis added.

[993] See WALKER, G.K. (gen. ed.), *Definitions for the law of the sea. Terms not defined by the 1982 Convention*, Leiden (2012), pp. 225-7.

[994] VIDAS, D., 'Delimitation of the territorial sea, the continental shelf, and the EEZ. A comparative perspective', in Oude Elferink, A.G., Henriksen, T., Veierud Busch, S. (eds.), *Maritime boundary delimitation: the case law. is it consistent and predictable?*, Cambridge (2018), pp. 46-7.

[995] See *ex multis* EVANS, M.D., 'Maritime Boundary Delimitation: whatever Next?', in Barrett, J., Barnes, R. (eds.), Law of the Sea. UNCLOS as a living treaty, London (2016), pp. 41-81; ORTOLLAND, D., PIRAT, J.-P., *Atlas Géopolitique des espaces maritimes. Frontières, énergie, piraterie, pêche et environnement*, Paris (2010), pp. 13-29; ANDERSON, D., *Modern Law of the Sea. Selected essays*, Leiden (2008), pp. 379-502.

[996] hence it may overlap with the territorial sea for the first 12 miles.

[997] As noticed by Churchill, Lowe and Sander, 'since the purpose of the zone is essentially the protection of the shore, it has been doubted whether a contiguous zone is strictly necessary if a 12-mile territorial sea is established', while recognising nevertheless that many states have claimed such a zone. CHURCHILL, LOWE, SANDERS, *supra* note 4, p. 211.

[998] On the origins of the CS and the EEZ from the Truman Proclamations to UNCLOS III (1982) see *ex multis* SCHARF, M. 'The Truman Proclamation on the Continental Shelf', in *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge (2013), pp. 109-10; ROZWADOWSKI, H.M., *Fathoming The Ocean. The Discovery and Exploration of the Deep Sea*, Harvard (2008), p. 5; United States of America, Proclamation 2667—*Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, September 28, 1945; ANAND, R. R., Non-European Sources of Law of the Sea, *Ocean Yearbook*

Under Article 76 UNCLOS, the continental shelf (hereinafter CS) 'comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance'.[999] Under article 55 UNCLOS, instead, 'The exclusive economic zone is an area beyond and adjacent to the territorial sea', 'not extend[ing] beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.' (Article 57 UNCLOS).

Over the CS and the EEZ, as it shall be seen, the coastal state does not have sovereignty but can merely exercise its (exclusive) sovereign rights in relation to the resources of the maritime zones. The exclusive nature of the rights attributed to the coastal states concerning the exploitation of the natural resources of the EEZ and the Continental Shelf has dramatically emerged in the last decades with regard to the tensions in the South China Sea.

Here the abundance of hydrocarbons, as well as the vibrant and complex ecosystem, have triggered a dangerous competition over these resources characterised by violent clashes and risks of even more violent military escalations between the interested states (China, Vietnam, Philippines, Malaysia, Brunei, Singapore, Indonesia and Taiwan).[1000]

Moving further seaward, the high sea -or it should be more correctly said, *the provisions of UNCLOS applicable to the high sea-* is defined in *negative terms* by Article 86 UNCLOS as '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'. In other terms, that of the high seas is a *residual category* which applies to areas not included in other maritime zones. No high sea can be found, for instance, in the Black Sea,[1001] and in the Baltic, only tight

17(2003), p. 13; Proclamation 2668-Policy of the United States with respect to coastal fisheries in certain areas of the high seas, 28 September 1945.

[999] For the outer limit of the continental shelf beyond the 200 miles see CHURCHILL, LOWE, SANDER, *supra* note 6. See also ROUGHTON, D., TREHARNE, C.,' The Continental Shelf', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014), pp. 156-73.

[1000] *Ex multis* XUE, G., 'The South China Sea: competing claims and conflict solutions', in Schonfield, C., Lee, S., Kwon, M-S. (eds.), *The limits of maritime jurisdiction*, Leiden (2014), p. 227.

[1001] ORTOLLAND, PIRAT, *supra* note 51, pp. 88-9.

corridors of the high sea can be found to enable the transit of the vessels belonging to the coastal states directed to the high sea.[1002]

Finally, the area is defined under Article 1(1)(1) UNCLOS as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', which constitutes 'the common heritage of mankind' (Article 136 UNCLOS) and the management of which is delegated to the *International Seabed Authority*.[1003]

2. Sovereignty: internal waters, territorial waters and archipelagic waters; port state jurisdiction over violations perpetrated in other maritime zones

As established by Article 2 UNCLOS, the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. As Article 11 UNCLOS states that (for the purpose of delimiting the territorial sea) the outermost permanent harbour works, which form an integral part of the harbour system *are regarded as forming part of the coast*, ports within permanent harbour works fall under the internal waters, and the same applies to river mouths under Article 9.

As seen in the previous paragraph, at least very synthetically, the amount of water comprised within the baselines depends on the physical configuration of the coastline; hence there are states (*e.g.* Norway) which, due to their geography, have very extensive internal waters, subject, as mentioned, to their sovereignty.

In principle, sovereignty is 'an indivisible monistic power that stands above other power',[1004] *i.e.* the simultaneous presence of all powers within a given authority. Implicit in this

---

[1002] In particular, the aforementioned agreement between Finland and Estonia creates a 3 miles wide corridor of high sea to enable Russian vessels to reach the high sea without transiting in the territorial sea of the neighbouring states. *ibid.* p. 66.

[1003] See TUERK, H. 'The International Seabed Area', in Attard, Fitzmaurice, Martìnez Gutiérrez, *supra* note 56, pp. 287-95.

[1004] MOTHA, S., 'Sovereignty', in Cane, P., Conaghan, J. (eds.), *The new Oxford Companion to law*, Oxford (2008), p. 1102; a definition of sovereignty was offered by Anzilotti, although he was principally interested in the problem of external state sovereignty: 'Independence […] is really no more than the normal condition of States according to international law ; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.' PCIJ, *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B. No 41, Individual Opinion by M. Anzilotti, para. 57. More generally, on the development and contemporary meaning of the notion of sovereignty in international law see BESSON, S., 'Sovereignty', in *Max Planck Encyclopedias of International Law* [MPIL], April 2011. As illustrated in the Nordquist commentary of the law of the sea, the ILC in her commentary to its 1956 draft articles on the law of

definition is, therefore, that a state exercising sovereignty over a given segment of land or water possesses all the powers within the aforementioned geographical element, whether it is the right to set the law applicable to that entity or the right to enforce it, with the limits set by international law.[1005]

With specific regard to the internal waters, it is uncontested that coastal -*rectius,* territorial-[1006] states enjoy full jurisdiction over their internal waters[1007] and all the persons and goods therein with the exception of warships or governmental ships used for non-commercial purposes[1008] and on people and goods covered by diplomatic immunity.[1009]

Noteworthily, UNCLOS does not provide any detail on the discipline applicable to the internal waters, except for the reference to the right of innocent passage *ex* Article 8(2),[1010] yet even in this case the Convention manages to preserve its ambiguity. It is not clear, in fact, what is the regime applicable to that peculiar form of innocent passage.[1011]

---

the sea chose to refer to sovereignty (i.e. the rights exercised by states over the parts of their territories) to clearly distinguish their regime from the high sea, subject to the principle of free use by all nations. 'Article 2', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993), p. 72. In the same sense BARNES, R., 'Article 2', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary,* Munchen (2017), paras. 14-23, pp. 32-4; YANG, H., *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea,* Berlin (2006), p. 48.

[1005] These powers, in the internal waters, include the exclusive right of fishing, exploration and exploitation of natural resources of the water column and its seabed and subsoil, right to lay cables and pipelines, to build artificial islands and installations and conduct scientific research. It is also fairly accepted that states have the right to regulate access to their ports but they can not refuse access to ships in distress seeking refuge in ports. As a general rule, states should regulate access to their ports without discriminating between ships belonging to different states. See DEGAN, V.D., 'Internal waters', in *Netherlands Yearbook of International Law* 17(1986), pp. 8-9; CHURCHILL, R., 'Coastal waters', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, The law of the sea, Oxford (2016), pp. 12-3; TANAKA, *supra* note 9, pp. 99-102; SHARMA, O.P., 'Inland or Internal Waters', in *The International Law of the Sea: India and the UN Convention of 1982*, Oxford (2012), p. 38; YANG, *ibid.* p. 64.

[1006] Notably, McLaughlin describes metaphorically internal waters as 'wet lands' highlighting their double nature of sea branches subject to the same law of the land. MCLAUGHLIN, R., *United nations naval peace operations in the territorial sea,* Leiden (2009), pp. 32-3.

[1007] *Ex multis,* CHURCHILL, LOWE, SANDER, *supra* note 4, p. 111; ROTHWELL, STEPHENS, *supra* note 9, p. 56; TANAKA, *supra* note 9, pp. 96-7; CHURCHILL, *ibid.*, pp. 18-21.

[1008] Article 32 UNCLOS. DEGAN, *ibid.* p. 9. See in this sense US SUPREME COURT, *Wildenhus's Case, Appeal From the Circuit Court Of The United States For The District Of New Jersey* (1887), pp. 11, 'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, 'unless by treaty or otherwise the two countries have come to some different understanding or agreement […] As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.'

[1009] CHURCHILL, LOWE, SANDER, *ibid.*, p. 122;

[1010] HAYASHI, M., Jurisdiction over Foreign Commercial Ships in Ports: Gap in the Law of the Sea Codification, *Ocean Yearbook* (2004), p. 488.

[1011] not to mention the issue of temporal applicability of this regime, since, as noticed by Churchill, it is unclear whether the right of innocent passage comes to existence in every case of straight lines or in case of straight baselines

The most reasonable view appears that with regard to innocent passage within a state's internal waters, it follows the rules expressely provided for the territorial waters under Articles 17-9 UNCLOS also to innocent passage in internal waters.[1012]

Back to the general question of coastal state jurisdiction over the internal waters, coastal states have been traditionally reluctant to exercise their jurisdiction on foreign vessels within their internal waters, *historically* resorting to interference with foreign vessels only as an *extrema ratio, i.e.:* a) only on those offences which appear to be capable of disturbing the peace or the good order of the port;[1013] b) the captain or consul of the flag state requests the intervention;[1014] c) a non-crew member is involved; d) the offence committed on board is of a serious character,[1015] and finally e) when the consequences of the offence extend beyond the vessel (*e.g.* in case of pollution).[1016]

In this sense it ought to notice the increasing proliferation and reliance on port state measures as means to improve the levels and effectiveness of the maritime rule of law.

There is an evident similarity between these conditions and those imposed by Article 27(1) UNCLOS on the exercise of criminal jurisdiction on foreign vessels passing through the territorial sea. Article 27(1) UNCLOS, as it shall more thoroughly be seen later in this Paragraph, lists four conditions: a) the consequences of the crime extend to the coastal state; b) the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; c) the assistance has been requested by the master or the authorities of the flag state; d) the measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Where literature requires, in rather general terms, the gravity of the crime, Article 27(1) limits the availability of

---

delineated after becoming a party to UNCLOS or to the 1958 territorial sea convention. CHURCHILL, *supra* note 72, pp. 15-6.

[1012] TRÜMPLER, K., 'Article 8', in Proelss, A. (ed.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 31, p. 96. *Infra* para. 2.2.

[1013] in this sense US SUPREME COURT, *Wildenhus's, supra* note 74, p. 12: 'by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.'

[1014] Though in this case rather than an exercise of sovereignty of the coastal state it would instead seem a case of cooperation between the flag state and the coastal state. *infra* para. 2.1.

[1015] A seriousness discernible from the entity of the sentence imposed in relation to the crime (the duration of the imprisonment).

[1016] TANAKA, *ibid.* p. 97.

the enforcement measures to two (albeit widely phrased) sole kinds of offences. For these reasons, it seems reasonable to analyse both lists of offences while discussing the territorial sea to avoid purposeless repetitions.[1017] Furthermore, also from an exquisitely logical point of view, the distinctions between the regimes of the territorial sea and the internal waters -equally subject to coastal state sovereignty- appear to be unreasonable.[1018]

The ultimate trigger was the *Torrey Canyon* oil spill,[1019] soon to be followed by a proliferation of normative efforts.[1020] These provided two complementary sets of rules relating to prescriptive and enforcement jurisdiction and measures of port state control.[1021]

Without getting too much into details, with regard to the former, state powers encompass the right to proscribe navigational safety standards internationally set out by the IMO and ILO, as well as environmental standards and the labour standards provided under the MLC.[1022]

Interestingly, no definition of either port state or port state jurisdiction can be found in UNCLOS despite the many examples of it provided under the Convention.[1023] Furthermore, it is

---

[1017] *Infra* para. 2.1.

[1018] CHURCHILL, R., Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-territoriality?, *The International Journal of Marine and Coastal Law* 31 (2016), p. 445: 'The jurisdiction of a port State over foreign ships in its ports is […] in principle exactly the same as its territorial jurisdiction over other foreign means of transport (such as aircraft and road vehicles) and foreign nationals that are present within its territory.' With regard to the use of port state jurisdiction as a counterweight of FoCs abuses, MARTEN, B., *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Cham (2014), pp. 43-4.

[1019] See *ex multis* VAUGHAN, A., Torrey Canyon disaster – the UK's worst-ever oil spill 50 years on, *The Guardian* 28 march 2017 https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary.

[1020] *Ibid.*: The International Maritime Organization said that many of the measures to prevent a spill employed by today's shipping industry, such as double hulls and duplicate navigation controls, can be traced back to the disaster of 1967'.

[1021] ZWINGE, T., Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So, *Journal of International Business and Law* 10(2)(2011), p. 312: 'Some of the drawbacks regarding the concept of exclusive flag State control have, to some extent, have been overcome by the rights of port States given by some IMO conventions. These rights permit port States to control vessels lying in their ports.' In this sense, Ryngaert and Ringbom underline that 'international agreements have increasingly affirmed the existence of such residual jurisdiction; notably international agreements on fishing, both binding and non-binding, have emphasized port states' right to exercise jurisdiction over visiting vessels in rather explicit terms.' RYNGAERT, C., RINGBOM, H., Introduction: Port state Jurisdiction: Challenges and Potential, *The International Journal of Marine and Coastal Law* 31 (2016), p. 382.

[1022] CHURCHILL, LOWE, SANDER, *supra* note 4, p. 476. The most important IMO conventions are the International Convention for the Safety of Life at Sea (SOLAS), Convention on the International Regulations for Prevailing Collisions at Sea, the Convention on Load Lines, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). As it will be seen, with regard to the marine environment, the principal instruments are the MARPOL and the London Dumping Convention and Protocol. See ZWINGE, T., *ibid.* pp. 303 ff.

[1023] MOLENAAR, E.J., '13. Port and coastal states', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015), p. 280.

not even clear how to distinguish between port-state and coastal-state jurisdiction: the port state is always a coastal state, though a coastal state is not always a port state.[1024]

As a way of necessary *caveat*, a comprehensive analysis of port state jurisdiction -or any other jurisdictional ground- in the context of this dissertation is by no means possible nor even desirable.

That said, what is both possible and useful to do in this Chapter is to provide an overview of the potential application of the paradigm of maritime *adjudicatory* jurisdiction onto crimes of international concern perpetrated at sea.[1025] In many cases, the identification of the kind of jurisdiction enjoyed (i.e. prescriptive, adjudicatory or enforcement) is, at the very least, dubious.

Article 218 UNCLOS is emblematic in this sense.

On the one hand, both the subject of Article 218 and the contiguous articles use the expression 'enforcement', yet at the same time, Article 218 refers quite broadly to '*investigations and …proceedings*' without giving any indications of the nature of the actions available to the states.as observed in the literature, it would not seem unreasonable to interpret -contrary to its title- Article 218 as *encompassing both enforcement and adjudication*.[1026]

More broadly, reasoning on Akehurst's pre-UNCLOS considerations on the extraterritorial applicability of (what he refers to as) port state jurisdiction,[1027] Khaliq remarks the extra-ordinary nature of human rights violations, affirming -perhaps tautologically- that if those violations constituted *crimes subject to universal jurisdiction*, they would allow the exercise of jurisdiction even upon those acts which have ceased before the entry into the port. To put it differently, the principle of universality would prevail upon the *jus maritimum*.[1028]

[1024] GAVOUNELI, *supra* note 3, p. 44. Port state jurisdiction is a multifaceted form of jurisdiction, comprising both territorial and extraterritorial elements (PAPANICOLOPULU, *supra* note 112, p. 142). In this paragraph we will only address port state jurisdiction and a *species* of territorial jurisdiction, leaving instead the extraterritorial aspect to para. 4.3.

[1025] See also, *ex multis,* the similar provision of Articles 6(2) and 6(4) of the International Convention for the Prevention of Pollution from Ships (MARPOL) and Article V(4) of the Maritime Labour Convention (MLC). CHURCHILL, *supra* note 72, p. 24.

[1026] An almost identical provision being article 220(1) with regard to ships-source pollution. KÖNIG, D., 'Article 218', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017), para. 11, p. 1494; See also MOLENAAR, E.J., 'Port State Jurisdiction', *Max Planck Encyclopedias of International Law [MPIL],* January 2021; GAVOUNELI, *ibid.* p. 45; NORDQUIST ET AL., *supra* note 89, para. 218.9(a) p. 271; TANAKA, *supra* note 9, p. 356.

[1027] AKEHURST, M., Jurisdiction in International Law, *British Year Book of International Law* 46(1972-1973), p. 164: 'It is also significant that many countries believe that international law prohibits a State from trying crimes committed by foreigners on foreign ships within its ports, unless the crime disturbs the peace of the port'.

[1028] KHALIQ, U., 'Jurisdiction, Ships and Human Rights Treaties', in Ringbom, H. (ed.), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea*, Leiden (2015), p. 331. Emphasis added.

This formula echoes the one adopted by the French Court of Cassation in the *Affair Jally* (1859), where the Court justified what *later* became port state jurisdiction on the ground that '*lorsque le fait constitue un crime de droit commun que sa gravite ne permet a aucune nation de laisser impuni sans porter atteinte a ses droits de souverainete juridictionnelle et territoriale, parce que ce crime est la violation la plus manifeste comme la plus flagrante des lois qui chaque nation est charge de faire respecter dans toutes les parties de son territoire'*.[1029]

As seen from this example, port state jurisdiction presents therefore some *chimeric or proteiform* characteristics allowing it to be territorial or extraterritorial depending on the (subsidiary) function it is deemed to assume in a given context, the contours given to it by the (*extra*-UNCLOS) provision establishing it and the measure required.[1030]

Moving onto the territorial sea, the protruding sovereign marine belt finds its roots and reason in history. Already Gentili[1031] and Grotius acknowledged that, in principle, a small portion of the sea, the one closest to the shores or contained by gulfs or closed waters like those controlled by

---

[1029] Quoted in GIDEL, G., *Le Droit international public de la mer, Le temps de paix, Tome II, les eaux intérieurs*, Chateauroux (1932), p. 217; HAYASHI, *supra* note 76, pp. 496 ff. *Contra:* KLEIN, N., *Maritime Security and the law of the sea*, Oxford (2011), p. 64. According to her the exercise of jurisdiction on crimes committed within the port constitutes an example of coastal state jurisdiction, whereas the extraterritorial application of port state jurisdiction falls under port state jurisdiction (*stricto sensu*).

[1030]. RYNGAERT, RINGBOM, *supra* note 89, pp. 382-3: 'While it is intuitive to state that port state jurisdiction is territorial, analytically speaking one needs to carefully distinguish between port state prescriptive jurisdiction and port state enforcement jurisdiction. This distinction sometimes appears to be insufficiently made in the discussion on PSJ. Logically, the exercise of PSJ is an instance of territorial enforcement jurisdiction, as by definition the port state enforces its measures within the territorially delimited port […]Put differently, a state can only enforce norms which it had the authority to prescribe in the first place. Accordingly, the focus of the inquiry should shift to the boundaries of a port state's prescriptive jurisdiction. In the common understanding of territoriality for prescriptive jurisdiction purposes, a state has jurisdiction over acts that occur, at least in part, in its territory […] However, to the extent that PSJ pertains to activities occurring entirely out- side areas within national jurisdiction (the high seas or other states' coastal waters), territoriality cannot be the basis of jurisdiction and its exercise will need to rely on other potential jurisdictional bases to be lawful. International agreements could offer a legal basis for such 'extraterritorial' jurisdiction.'; MOLENAAR, E., Port state jurisdiction: toward comprehensive, mandatory and global coverage, *Ocean Development and International Law*, 38(1-2)(2007), in particular pp. 227-37; RAYFUSE, R.G., *Non-flag state enforcement in high seas fisheries*, Leiden (2004), pp. 76-8; KASOULIDES, G.C., *Port state control and jurisdiction: evolution of the port state regime*, Dordrecht (1993), pp. 32-4; MOLENAAR, E. J., 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in Freestone, D., Barnes, R., Ong, D. (eds), *The Law of the Sea: Progress and Prospects,* Oxford (2006), pp. 197-202.

[1031] On the Gentilian genealogy of the notion of territorial sea see *ex multis* VADI, V., 'Chapter 6 Gentili and the Law of the Sea', in *War and Peace*, Leiden (2020), pp. 273–328; BENTON, L., 'Legalities of the Sea in Gentili's Hispanica Advocatio', in Kingsbury, B., Straumann, B. (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford (2010), pp. 269-82.

the Venetians and the Genoese,[1032] could be subjected to the power of the coastal state.[1033] To determine how far could such power venture on the sea, Bynkershoek famously suggested in 1703[1034] the formula of the cannon-shot rule (*'poteftatem terræ finiri, ubi finitur armorum vis')*, swiftly accepted in practice[1035] and at the root of the current Articles 2 and 3 UNCLOS.

The relevance of the regime applicable to the territorial waters, though, it is not limited to the internal waters and the territorial sea, but it serves as the model for the discipline of Article 49 UNCLOS[1036] and it is explicitly referred to by Article 52 (Right of innocent passage)[1037] concerning the Archipelagic waters.[1038]

[1032] FULTON, T.W., The Sovereignty of the Sea. *An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: with special reference to the Rights of Fishing and the Naval Salute*, Edinburgh London (1911), pp. 3-4 ff. OPPENHEIM, L., *International Law: a treatise, eight edition, edited by H. Lauterpacht, Q.C., LL.D, F.B.A., vol. 1 – Peace*, London New York, Toronto (1955), p. 583; DESCENDRE, R., Quand la mer est territoire : Paolo Sarpi et le 'Dominio del mare Adriatico', *Studi Veneziani* (2008) pp. 55-73; ANDERSON, D., *Modern Law of the Sea: Selected Essays*, Leiden Boston (2008), p. 4; SCOVAZZI, T., The Evolution of International Law of the Sea: New Issues, New Challenges, *Collected Courses of The Hague Academy of International Law - Recueil des cours* 286 (2000), p. 66 ff. As observed by Hesse, however, other States reclaimed vaste marine areas under their jurisdiction. HESSE, P.J., 'Historie et sources des Droits maritimes', in Hesse, P.J. et al. (eds.), *Droit Maritimes. Tome I. Mer, Navire et Marins*, Lyon (1995), pp. 32-3.

[1033] GROTIUS, H., *De iure belli ac pacis libri tres, in quibus ius naturae et gentium, item iuris publici praecipua explicantur cum annotatis auctoris edidit P.C. Molhuysen prefatus est C. Van Vollenhoven, Lugdunum Batavorum (1919), Liber II,* ,Ch. III, para. X.2 pp. 464-5; BLANCHETTE-SEGUIN, V., Preserving territorial status quo: Grotian law of nature, baselines and rising sea level, *New York University Journal of International Law and Politics*, 50 (2017), p. 233.

[1034] BYNKERSHOEK, C.V., *Cornelii Van Bynkershoek, Jurisconsulti, ad L. ΑΞΙΩΣΙΣ IX. De Lege Rhodia De Jactu Liber Singularis. Et De Dominio Maris Dissertatio,* Hagae Batavorum (1703), III.15. See PHILLIPSON, C., Cornelius van Bynkershoek, *Journal of the Society of Comparative Legislation* 9(1)(1908), p. 29; GORDON, E., Grotius And The Freedom Of The Seas In The Seventeenth Century, *Willamette Journal of International Law and Dispute Resolution* 16(2)(2008), p. 262.

[1035] KLEIN, *supra* note 109, p. 12.

[1036] 'Article 49', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993), para. 49.9(b), p 441.

[1037] TANAKA, *supra* note 9, p. 137; 'Article 18', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993), para. 18.6(a), p. 161: 'although the text refers to "passage" in terms of "navigation through the territorial sea", the meaning of "passage" contained in article 18 is not limited to this group of articles, but it is applicable where relevant to the convention as a whole, and it implies movement through a given portion of the sea.'

[1038] As observed by Churchill, Lowe and Sander, 'Archipelagic waters have a special status. They are neither internal waters nor territorial sea, although they bear a number of resemblances to the latter.' CHURCHILL, LOWE, SANDER, *supra* note 4, p. 192.

Archipelagic waters[1039], defined by Article 47 UNCLOS as the waters enclosed by the baselines joining the outermost points of the outermost islands and drying reefs of the archipelago fall under the sovereignty of the archipelagic states to which they belong.[1040]

States possessing territory on the continent, such as Greece, do not fall into this category, nor do the United Kingdom or New Zealand as Article 47 requires a ratio of the area of the water to the area of the land, including atolls, between 1 to 1 and 9 to 1.[1041]

As mentioned, archipelagic states enjoy sovereignty over their archipelagic waters, yet this sovereignty is subject to certain limits. In particular, in the *Duzgit Integrity* award, the PCA affirmed that '*enforcement measures* taken by a coastal State[1042] in response to activity within its archipelagic waters are subject, under Article 293(1) UNCLOS,[1043] to the requirement of *reasonableness, which encompasses the general principles of necessity and proportionality*'.[1044]

In the *Arctic Sunrise* Arbitration, the Tribunal had affirmed that in evaluating the lawfulness of the measures taken by a coastal state -in that case, in its EEZ- it was necessary to determine whether '(i) the measures had a basis in international law; and (ii) *the measures were carried out in accordance with international law, including with the principle of reasonableness,'* explicitly recognising the status of *general principles* of the principles of necessity and proportionality.'[1045]

[1039] The term emerged in the aftermath of World War II when mid-ocean insular states such as the Bahamas, Fiji, Indonesia and the Philippines gained independence and raised the issue of the legal regime applicable to the waters lying around the islands within their archipelagos. The Third United Nations Conference on the Law of the Sea filled the lacuna by establishing a specific regime applicable only to those states composed of archipelagos with certain geographical features. See OEGROSENO, A.H., 'Archipelagic states: from concept to law', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law, volume II, The law of the sea*, Oxford (2016), pp. 125-36; DAVENPORT, T., 'The Archipelagic regime', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015), pp. 134-54.

[1040] Under Article 46 UNCLOS, it is a state constituted wholly by one or more archipelagos and may include other islands; archipelagos are defined as groups of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

[1041] Currently twenty-two state have claimed archipelagic status, from the Maldives to the Seychelles, from the Marshall Islands to the Bahamas. TANAKA, *ibid.*, p. 132.

[1042] More correctly, an archipelagic state.

[1043] Article 293 Applicable law 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

[1044] PCA, *The Republic Of Malta V. The Democratic Republic Of São Tomé And Príncipe* (Duzgit Integrity Arbitration), PCA Case Nº 2014-07, 5 September 2016, para. 254, p. 69. Emphasis added.

[1045] PCA, *The Kingdom Of The Netherlands V. The Russian Federation* (Arctic Sunrise Arbitration), PCA Case Nº 2014-02, 14 August 2015, para. 222 p. 52 and para. 326, p. 82 (In the view of the Tribunal, the protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality'). Similarly, in the M/V 'Virginia G' (Panama/Guinea-Bissau) case, the ITLOS stated that '*the principle of reasonableness applies generally to enforcement measures* under article 73 of the Convention.' ITLOS, *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, case

Beyond the specific contexts of these *obiter*, what matters is that the Tribunal has recognised the concurrent applicability of maritime rules and principles of general public international law, (potentially) including those applicable to *crimes of international concern,*[1046] or, to put it differently, the Tribunal has set up the basis *for a stronger interaction between the law of the sea and the broader public international law*.[1047]

2.1 Innocent and not-so-innocent passage in internal waters and the territorial sea: when is the passage 'innocent'?

As seen, states enjoy general jurisdiction over the people and goods within their internal and territorial waters.[1048] Still, sovereignty does not mean coastal states have unlimited discretionary powers to act. On the contrary, their jurisdiction is limited by international law.[1049]

This limitation finds its roots in the dialectic between freedom and sovereignty of the sea and the compromise of a sovereign strip of water within which, nevertheless, all states enjoy the innocent passage *ex* Article 17 UNCLOS. The right of innocent passage is a necessary corollary of

No. 19 Judgment Of 14 April 2014, para. 270 p. 81. Whilst, in this case, the reference to reasonableness is a literal application of Article 73(2) ('Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security'), it is nevertheless evident that the application of such principle cannot be limited to the situations considered in the case-law. See on the principle of reasonableness SCHACHTER, O., *International law in theory and practice*, Dordrecht (1991), pp. 258-61.

[1046] In the first case (*Duzigt Integrity*), the masters were suspected of having committed or attempted to commit the crime of smuggling under Article 274 of the Código Penal ("Criminal Code"), while in *Arctic Sunrise* the activists were charged with piracy committed by an organised group under Article 227(3) of the Criminal Code of the Russian Federation. See in this sense PAPANICOLOPULU, I., *International Law and the Protection of People at Sea*, Oxford (2018), pp. 163-6,

[1047] 'Reasonableness also enables international law to effectively take account of diverse interests, by providing a mechanism for normative standards to be adjusted and applied taking into account the reality of concrete circumstances, and allowing for flexibility and compromise in the application of universal rules while modulating the discretionary powers of States. In this respect, while States commonly use the term 'reasonable' in legal instruments in order to introduce a degree of flexibility, tribunals have also been known to 'reformulate' a treaty provision by introducing the notion of reasonableness despite its absence from the original text. In the law of the sea, the requirement of 'reasonableness' is relied upon— whether explicitly or implicitly— to play an important role in determining the limit of all aspects of coastal State jurisdiction'. GOODMAN, C., *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone*, Oxford (2021), p. 345. In the same sense, PAINE, J., 'Chapter 7 The Judicial Dimension of Regime Interaction beyond Systemic Integration', in Trevisanut, S., Giannopoulos, N., Holst, R. (eds.), *Regime Interaction in Ocean Governance*, Leiden (2020), p. 212; MIRON, A., The archipelagic status reconsidered in light of the South China Sea and Duzgit Integrity Awards, *Indonesian Journal of International Law*, 15(3)(2018), pp. 306-40.

[1048] PAPANICOLOPULU, *supra* note 130, pp. 138-9; PAPASTAVRIDIS, E., 'Crimes at sea: a law of the sea perspective', in Papastavridis, E.D., Trapp, K.N. (eds.), *La criminalité en mer/Crimes at sea,* Leiden (2014), p. 8.

[1049] *Supra* note 72.

the freedom of the sea since no such right could exist if vessels were not allowed to navigate in coastal waters.[1050]

Whilst coastal states possess all the jurisdictional powers derived from their sovereignty, they cannot exercise them on foreign vessels[1051] unless these disturb the peace of the country, that is, when their passage through the territorial waters is not innocent (or they are not in 'passage').[1052] Consequently, the innocence or non-innocence of the passage of the foreign vessel constitutes the *watershed* -no pun intended- between freedom and sovereignty and the *discrimen* between two different regimes.[1053]

Article 17 does not specify what measures can be taken by the coastal state in response to the violations of the right of innocent passage. Article 25 UNCLOS simply provides that coastal states can take the necessary measures to prevent non-innocent passage undertaken by non-military vessels as long as the measures are not of a *discriminatory nature*. No definition is provided, however, on what these should or may consist of.[1054] As highlighted by Molenaar, 'with respect to non-innocent passage, coastal states once more regain full jurisdiction',[1055] an appendage or consequence of which is that they may not only prevent the entrance of or expel delinquent vessels, but they may also choose to prosecute them for their offences.[1056]

[1050] GAHLEN, S.F., Less than meets the eye: the right of innocent passage and coastal state sovereignty in territorial waters, *Annuaire de Droit maritime et océanique* 33(2015), p. 73.

[1051] Special rules apply to warships and other governmental vessels used for non-commercial purposes, which, under Article 30 UNCLOS can only be required to leave the territorial sea immediately by the coastal State in the event of non-compliance with its laws and regulations as they enjoy sovereign immunity (Article 32 UNCLOS). SHEARER, I. A. Problems of Jurisdiction and Law Enforcement against Delinquent Vessels, *The International and Comparative Law Quarterly*, *35*(2)(1986), p. 325.

[1052] WALKER, P.B., What is innocent passage?, *International Law Studies* 61(1980), p. 367; BARNES, R., 'Article 17', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), paras. 3-6, pp. 177-9; AQUILINA, K., '2. Territorial sea and the contiguous zone', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016), pp. 38-9; THE UNITED STATES-PANAMA GENERAL CLAIMS COMMISSION, *Compañia de Navegación Nacional (Panama) v. U.S*, 29 June 1933, VOLUME VI, Dissenting opinion of Panamanian Commissioner, p. 386: 'this right, as is seen from the many citations of authorities made by both parties, has been considered as a necessary appendage to the freedom of navigation on the high seas. To subject a merchant ship sailing coastwise within the 3-mile limit to civil arrest by coastal authorities, violently interrupts such passage and notably abridges the freedom of the seas referred to'. Whilst the opinion refers to civil arrest, a fortiori the reasoning can reasonably be applied to criminal jurisdiction.

[1053] On the functional limitations of coastal state jurisdiction in internal waters and the territorial sea, *infra* para. 2.2.

[1054] BARNES, *ibid.*, para. 11, p. 181. In the same sense, TANAKA, *supra* note 9, p. 115; ROTHWELL, STEPHENS, supra note 9, pp. 233-4; AQUILINA, *ibid.* pp. 49-50; KLEIN, N., Responding to Law of the Sea Violations. *Australian International Law Journal*, 27(2020), p. 6.

[1055] MOLENAAR, E.J., *Coastal state jurisdiction over vessel-source pollution*, The Hague (1998), p. 149.

[1056] BARNES, R., 'Article 25', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017), paras. 5-6 p. 224; SHEARER, *ibid.* p. 326; YANG, *supra* note 72, p. 217; GAHLEN, *ibid.* p. 83. In this sense FRANCE, COUR DE CASSATION, Chambre criminelle, 11 juin 2008, n° 07-83.024, ECLI:FR:CCASS:2008:CR02836.

Articles 18 and 19 UNCLOS together define innocent passage.[1057]

Under UNCLOS there are two kinds of (innocent) passage: passage *stricto sensu, i.e.* traversing or proceeding to or from internal waters (or a call at such roadstead or port facility), under Article 18(1) and stopping and anchoring, but only in so far as they are incidental to ordinary navigation or are rendered necessary by force majeure or distress or to render assistance to persons, ships danger or distress (Article 18(2)).

On the contrary, they cannot hover or circle around within the territorial sea since the second paragraph of Article 18 expressly requires that passage be *continuous and expeditious*:[1058] the faster the passage takes place, the better. The adverb only used in article 18(2) limits the exceptions to the fast and continuous passage to the sole *force majeure* or distress (or the act of assisting those who may find themselves in those unfortunate circumstances). No other activities can be performed. The less expeditious, the less straightforward the passage, the more dangerous it becomes irrespectively of its innocence or lack thereof.[1059] To paraphrase the slogan of a famous commercial with George Clooney, *no expeditious, no passage*.[1060]

Far more elusive, also intuitively, is the meaning of the innocence of the passage[1061] and the question of whether a passage can remain innocent if or when tainted by crimes of international concern.

In its constitutive elements, innocent passage excludes all the behaviours which, due to their manner, are capable of prejudicing the vital interests of the coastal state.

The 1930 Hague Conference[1062] identified these interests in the *security, public policy and fiscal interests* of the state. Almost thirty years later, UNCLOS I[1063] and subsequently UNCLOS III (1982) instead referred to the *peace, good order or security* of the coastal state, explicitly providing that the conduct of fishing vessels non-compliant with the laws and regulations of the coastal state fell outside the definition of innocent passage.

[1057] 'Article 18', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993), para. 18.1 p. 159

[1058] CHURCHILL, LOWE, SANDER, *supra* note 4, p. 143.

[1059] AQUILINA, *ibid*. pp. 40-1.

[1060] The original catchphrase was 'no martini no party'. See in this sense CHURCHILL, LOWE, SANDER, *supra* note 4, p. 161, who explain that the accent on swift passage under Article 19(2) of the CTSCZ meant that coastal states 'impliedly retained the right […] to enforcement jurisdiction over ships not engaged in passage but lying in the territorial sea'.

[1061] See NGATCHA, F., *The right of innocent passage and the evolution of the international law of the sea. The current regime of 'free' navigation in coastal waters of third states*, London (1990), pp. 43-56.

[1062] See: ROIGER-SIMEK, K., 1958 The Geneva Conventions on the Law of the Sea of 1958, *Austrian Review of International and European Law* 23(2018), p. 108.

[1063] Geneva Convention on the Territorial Sea and the Contiguous Zone (1958), Art. 14(4)-(5).

In this regard, it must be highlighted the ICJ's *Corfu Channel's* insistence on the *manner* - further developed in UNCLOS I in the sense of requiring *an effective impact*, according to Fitzmaurice[1064]- of the conduct of the passing vessel *vis à vis* the vital interests of the coastal state.[1065]

Under the second part of Article 19(1) UNCLOS the passage, to be innocent, must also comply with this Convention and with other rules of international law. As observed in the literature, the reference to the overall structure of UNCLOS and the other rules of international law is unclear: 'a literal reading suggests that innocence is not the only criterion for passage, and that other rules of international law might also control the right of passage. On the other hand, a more contextual interpretation suggests that other rules of law can be used to define the meaning of innocence with the scope of the first sentence. In either case, it indicates that neither Art 19 nor the Convention is exhaustive of factors determining the meaning of innocent passage. At the very least, it leaves the door open for further regulation of the right.'[1066]

As magniloquently illustrated by Jackson in his inaugural speech of the Nuremberg Trials, international crimes are 'so calculated, so malignant, and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated'.

More recently, the Preamble to the Rome Statute has recognised in para. 3, paraphrasing the formula adopted in the first part of Article 19(1) UNCLOS, that 'such grave crimes threaten the *peace, security and well-being* of the world'.

Every international crime, wherever and whenever committed, devastates humanity and shatters any hope of *peace, good order or security* both within and among states. *A fortiori*, an international crime committed within the *mare terrae proximum*, a narrow area subject to its sovereignty and adjacent to its land, necessarily reverberates upon the state, violating the peace, good order or security of the coastal state. Genocide, war crimes, crimes against humanity and the crime of aggression are the most violent manifest and blatant denials of the existence of peace, order and security.[1067] So much that it appears somehow pleonastic the reference in Article

---

[1064] See in this sense FITZMAURICE, G., Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics. *The International and Comparative Law Quarterly*, *8*(1)(1959), pp. 96-7.

[1065] ICJ, *Corfu Channel, United Kingdom v Albania*, Judgment, Merits, 9th April 1949, p. 30.

[1066] BARNES, R., 'Article 19', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017), para 10, p. 191.

[1067] In this sense PAPANICOLOPULU, *supra* note 129, p. 139: 'At the same time, Article 19(2) leaves out activities that, while not constituting a threat to the coastal State, may negatively impact the persons on board, such as potential violations of their human rights. It is true that an argument could be made that violations of human rights, in

19(2)(a) to any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.

It is one of the core principles of international law that, as a consequence of their sovereignty, states enjoy criminal jurisdiction with regard to the acts committed within their territory,[1068] to which territorial waters are assimilated under Article 2(1) UNCLOS, yet not only states have the right to prosecute, but it is questioned whether they are also under a *duty* to prosecute.

Not only is it safe to conclude that the perpetration of any of the so-called core crimes entirely deprives the passage of a vessel in the territorial waters of a state of any trace of innocence and the coastal state, therefore, enjoys full jurisdiction on these crimes. Strong arguments also support the idea that the prosecution and punishment of those crimes is not merely a faculty but a sacred duty of every state[1069].

To help with the identification of the conducts incompatible with the innocent passage, Article 19(2) UNCLOS introduces a list -according to the majority of literature, not exhaustive- of examples of activities forbidden in territorial waters.[1070] These include: 1) threat or use of force; 2) exercise or practice with weapons; 3) collecting information (espionage); 4) acts of propaganda; 5) launching, landing or taking on board of any aircraft; 6) the launching, landing or taking on board of any military device; 7) the loading or unloading of *any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations* of the coastal State; 8) any *act of wilful and serious pollution* contrary to this Convention; 9) any *fishing activities*; 10) research or survey activities; 11) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (12) any other activity not having a direct bearing on passage.

---

particular, if they are gross and protracted, would be prejudicial to the peace and good order of the coastal State and would therefore render passage non-innocent, as provided in Article 19(1) UNCLOS. The argument however is yet to be made in legal proceedings and does not seem to have been tested in practice so far.'

[1068] *Ex multis* ORAKHELASHVILI, A., *Akehursts introduction to modern international law, ninth edition*, Abingdon (2022), p. 234; CASSESE,A., *International law, second edition*, Oxford (2005), pp. 49-50; SHAW, M.N., International law, ninth edition, Cambridge (2021), pp. 561-6; CRAWFORD, J., *Brownlie's Principles of Public International Law*, 9th Edition, Oxford (2019), p. 462.

[1069] VAN DER WILT, H., '21. States' obligations to investigate and prosecute perpetrators of international crimes: the perspective of the European Court of Human Rights', in Stahn, C., El Zeidy, M.M. (eds.), *The International Criminal Court and complementarity: from theory to practice*, Cambridge (2011), vol. II, p. 687. In the chapter, the Author discusses the similarities and differences of the investigations required by the ECHR and those requested under the complementarity principle of the ICC statute.

[1070] BARNES, *supra* note 150, paras. 12-3 pp. 191-2.

Between the generic formulation of these activities provided in the Convention and the open clause of Article 19, coastal states enjoy a certain degree of discretion in deciding what activities are incompatible with the innocent passage and can henceforth be subjected to their jurisdiction.[1071]

From pollution to smuggling or trafficking of human beings,[1072] to IUU fishing and the related human rights violations, Article 19(2) should seemingly apply to a multitude of crimes traditionally referred to as transnational crimes. More controversial, however, is whether coastal states may interfere in the transport of WMDs.

With regard to the threat to peace, recognised under UNSC res 1540/2004,[1073] Guilfoyle argues that 'if an activity threatens international peace and security by definition it also affects national security. But this approach seems unsatisfactory, *relying on an indirect threat to meet a direct nexus requirement*. While 'prejudice' might comprehend inchoate threats to the coastal state, if a shipment of WMD materiel intended for use against a distant state is only temporarily present in territorial waters it is hard to see how this accident inherently prejudices coastal-state interests. This is especially so if the shipment consists only of delivery system components. […] *The 'prejudice' it may represent to (some state's) security is heavily contingent on its intended end use* […] The same logic applies to arguments that a coastal state could straightforwardly justify seizure by characterising such shipments through its territorial waters as a threat to both its security and that of other states. One cannot bootstrap oneself into jurisdiction'.[1074]

[1071] JOYNER, D.H., The Proliferation Security Initiative Security Initiative: Nonproliferation, Counterproliferation, and International Law, *The Yale Journal Of International Law* 30(2005), p. 529: 'The addition of a delineated list of activities was intended to add objectivity to determinations regarding this right and to make such judgments less open to interpretation by the coastal state. As drafted, it appears to condition loss of innocence on some action or activity over and above mere passage. However, in the absence of language explicitly rebutting the presumption, the list must be interpreted as non-exhaustive. Moreover, the retention of the 1958 language in the first paragraph indicates that passage alone may justify interdiction, after all. In particular, Article 19(2)(a) is arguably wide enough to include threats of force against states other than the coastal state.'

[1072] The proposed formula C for article 27 (current Article 19) UNCLOS considered prejudicial to the peace, good order or security of the coastal State '[t]he embarking or disembarking of any person or cargo contrary to the customs, fiscal, *immigration* or sanitary laws or regulations of the coastal State'. Third United Nations Conference on the Law of the Sea 1973-1982 Concluded at Montego Bay, Jamaica on 10 December 1982 Document:- A/CONF.62/L. 8/Rev.1 Statement of activities of the Conference during its first and second sessions Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume III (Documents of the Conference, First and Second Sessions), p. 112.

[1073] UNSC res. 1540/2004, preambular para. 1: 'Affirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,* constitutes a threat to international peace and security'.

[1074] GUILFOYLE, D., *Shipping Interdiction and the Law of the Sea*, Cambridge (2009), p. 241. Emphasis added. See also *ibid*. p. 242: 'The assumption is that it is the external acts of a vessel engaged in innocent passage, not its internal economy, which may prejudice a coastal state's security. It is hard to see that a latent threat in the vessel's hold, destined elsewhere, has any 'external' manifestation capable of affecting the character of passage'. In the same sense, BARNES *supra* note 150, para. 9, p. 151. *Contra* JOYNER, *supra* note 161; KAYE, S., The Proliferation Security

A more *nuanced* position is expressed by Klein, who suggests that in the specific case of WMDs' proliferation and non-state actors, the preferable interpretation of Article 19 should be in favour of 'the entitlement of the coastal state to take steps against a vessel violating the right of innocent passage'.[1075] These steps -which can include the exercise of criminal jurisdiction- nevertheless, could only be taken 'if the crime is of the kind to disturb the peace of the country.'[1076]

It has been suggested that for states to claim the existence of a threat to the peace of a country, several things should be demonstrated: 1) the transport of WMDs constitutes a threat of the use of force against it (an issue complicated by the potential dual use of WMDs components);[1077] 2) the transport of WMD threatens its 'sovereignty, territorial integrity or political independence', yet it is not the passage, *but the use* of weapons that threatens the (coastal) state; 3) the threat must be made *in the territorial sea*: if it happens elsewhere the passage is innocent.[1078]

The fact that a certain behaviour does not disturb the peace, security and public order of a state, does not entail that such a state cannot exercise its jurisdiction over these actions. In particular, with regard to trafficking in WMDs -which, as seen, do not appear to meet the requirements set by Article 19[1079]- it is argued by some authors that 'Art. 27 [...] may include enforcement measures against ships suspected of carrying weapons of mass destruction (WMD), and ships engaged in people trafficking or the smuggling of illegal migrants.'[1080]

Initiative in the Maritime Domain, *Israel Yearbook on Human Rights*, 35(2005), p. 214. The author argues that if there is evidence that the transported WMDs are destined to be delivered to terrorists, their movement 'may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed.'

[1075] KLEIN, *supra* note 28, p. 201.

[1076] *Ibid.*

[1077] LOGAN, S. E., The proliferation security initiative: navigating the legal challenges, *Journal of Transnational Law & Policy* 14(2)(2005), p. 259.

[1078] LOGAN, *ibid.*

[1079] WOLFRUM, R., '7 The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective', in Del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*. Leiden (2015), p. 100: 'Taken literally article 19 of the Convention excludes that the coastal States limits the exercise of passage with the view to protect the interest of the community of States. It may act in its own interests only.'

[1080] BARNES, R., 'Article 27', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017), para. 9 p. 234. Para. 3 of the UNSC res. 1540/2004 expressly 'Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall'.

1.2 Coastal state criminal jurisdiction over crimes committed on vessels engaged in innocent passage

If Article 19 UNCLOS distinguishes what is not innocent passage -and is henceforth subject to the territorial jurisdiction of the coastal state- from innocent passage, Article 27(1) UNCLOS provides the rule applicable to the latter,[1081] as this regulates '*the criminal jurisdiction of the coastal State* […] on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage.'

Under Article 27(1) coastal states *should not* exercise their criminal jurisdiction over the crimes committed on board passing ships *unless* '(a) […] the *consequences of the crime extend to the coastal State*; (b) […] the crime is *of a kind to disturb the peace* of the country *or the good order* of the territorial sea; (c) […] the *assistance* of the local authorities has been *requested* by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) […] such measures are *necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances*.'

To understand this provision and its applicability to crimes of international concern, it is necessary to discuss its historical origins.

In 1930 the Hague Codification Conference promoted by the League of Nations sought to codify, *ex multis*, the regime of the territorial waters. While the discussions and drafts did not (immediately) culminate in the adoption of a convention, they were the basis of the subsequent Geneva Convention (1958), which repeats almost *verbatim* the wording of the 1930 draft, as acknowledged by the ILC.[1082]

One of the issues that emerged during the discussions concerned the *basis* under which coastal states could prosecute offences and crimes committed on board vessels in their territorial waters. In particular, there were tensions between a *subjective* approach to the issue (the crime or

---

[1081] *Ibid.* para. 1 p. 231: 'The aim of Art. 27 is to balance flag State interests in shipping and navigation on the one hand, with the interests of the coastal State in securing the enforcement of criminal law in its territory. However, Art. 27 does not generally resolve conflicts of jurisdiction that may arise, leaving these to be determined on a case-by-case basis.'

[1082] ILC, *Report of the International Law Commission Covering the Work of its Sixth Session*, 3 28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), Para. 56, p. 152: 'The Commission was greatly assisted by the work done at the Conference for the Codification of International Law held at The Hague in March and April 1930, which had amongst other subjects considered the regime of the territorial sea. Owing to differences of opinion concerning the extent of the territorial sea, it had proved impossible to conclude a convention relating to this question; nevertheless, the reports and preparatory studies of that Conference were a valuable basis on which the Commission has largely relied.'

offence is, *in the opinion of the competent local authority*, of *a nature* to disturb the peace of the country or the maintenance of order)[1083] or an *objective* test to derogate flag-state jurisdiction (the intrinsic nature of the violations or their effect).[1084]

The delegates recognised the exigence to avoid potential abuses of the authorities of the coastal state against the innocent passage.[1085] The issue at stake, in the words of the Chairman, was one of *conflicts between the interests of justice and the interests of navigation*[1086] which mandated, in the words of the Czechoslovakian delegate, that 'a vessel passing through territorial waters [cannot] be stopped *unless the interests of the coastal State make this essential*.'[1087] There were several supporters of an objective test based on a *gravity threshold*. In the words of Mr Miller (U.S.A), 'stopping a ship was a matter for the police, […] the power of the police must be limited very largely to *certain kinds of very grave crimes*.'[1088]

An elaboration of what crimes were to be considered *very grave* for the sake of allowing coastal state jurisdiction (*rectius*, arrests on ships) on vessels within their territorial waters was made by the Italian delegate, Mr Giannini. According to him, there were a) *offences directed against mankind at large*. Crimes such as piracy, traffic in women and children and counterfeiting currency must be prosecuted wherever they occur, and the offender must be arrested; b) *crimes which a given State may insist upon punishing wherever they have been committed*.[1089] The only distinction concerns the *definition* of categories — the fundamental principle remains the same. A State may declare that, *for reasons of self-defence*, it will prosecute an offender wherever he may be; c) *other offences in regard to which a certain distinction is made by States*. Each state can decide to prosecute any offence committed within its territory. To prosecute offences perpetrated outside

[1083] As originally suggested by the British delegate. EIGHTH MEETING Tuesday, March 25th;. 1930, at 10 a.m., Chairman: M. GOPPERT. Para. 16. BASIS OF DISCUSSION No. 22. P. 78.
[1084] See in this regard the Spanish delegate, M. Goicocchea. *Ibid.* p. 83: 'acts committed on board of a nature to disturb the maintenance of order'.
[1085] In this sense, REEVES, J.S., 'The Codification of the Law of Territorial Waters', *The American Journal of International Law* 24(3)(1930), p. 496: '[issues XIX to XXVI], recognized as primarily juridical in character, had a certain unity, for they embraced those matters which involved potential clashes of authority between the littoral state as sovereign over its territorial waters and the state whose ships might be within those areas. These bases had to do with sojourn in, or passage (innocent or otherwise) through the territorial sea of foreign ships, the criminal and civil jurisdiction of the littoral state over foreign ships therein, and hot pursuit.'
[1086] *Supra* note 171, p. 84.
[1087] *Ibid.* p. 85
[1088] *Ibid.* p. 89. Emphasis added.
[1089] Echoing the French Court of Cassation in the *Affaire Jolly*, *supra* note 107.

the territory of the state it is necessary that, at least, the *effects of the offence* extend to its territory.[1090]

The problem was how to transpose this rugged profile of crimes and jurisdictions into a linear and general rule without tumbling into a variety of cases and exceptions.[1091] A compromise solution suggested by the Japanese delegate would have combined the reference to the local authorities of the coastal states with the requirement of the existence of a *grave offence* against criminal law.[1092] Again the issue, as commented by the Egyptian delegate, was the extreme *vagueness* of the expression: grave crime means nothing in legal terms. Only by referring to *specific protected interests*, such as the internal and external security of a state, it is possible to delimit the exception to the interests of navigation.[1093] Against the Japanese proposal, the Swedish delegate suggested a different test, based on the *effect* of the crime or offence: '[t]he reason for providing that the right of the coastal State to arrest individuals for crimes committed on board a vessel should be restricted as far as possible is that *the effects of crimes or offences committed on board a vessel do not extend beyond the small area of the vessel itself, and, therefore, cannot affect the interests of the country*. If, however, the consequences of an offence extend beyond the vessel, the State must retain its right to effect an arrest. This right [...] covers all offences, whether they are of a serious nature or not.'[1094]

Eventually, the Hague Conference endorsed the theory proposed by the Egyptian and Swedish delegates: under Article 8 of the Draft Convention,[1095] '[a] coastal State *may not* take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases : (1) If the *consequences of the crime extend beyond the vessel*; or (2) If the crime is of a kind to *disturb the peace of the country or the good order* of the territorial sea;[1096] or (3) If the assistance of the local authorities has been requested by the captain

---

[1090] *Supra,* note 171, p. 91. Emphasis added.

[1091] *Ibid.* 'It would thus be extremely difficult to lay down a general rule capable of solving all these problems. There remains the general problem of an offence committed in the territory and which the State desires to punish for general reasons if the offender is on board a vessel passing through its territorial waters. It is only possible to solve all these problems by means of a general rule if that rule is sufficiently wide to avoid the necessity for going into details. If we do go into details, we shall be faced with a whole series of navigation problems.'

[1092] *Ibid.* p. 92.

[1093] In the same sense COLOMBOS, C.J., Territorial waters, in *Transactions of the Grotius Society* 9(1923), p. 91.

[1094] *Ibid.*, p. 94

[1095] Geneva Convention on the Territorial Sea and the Contiguous Zone(1958) -*hereinafter* CTSCZ- Article 9.

[1096] Echoing Article 7 of Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29 (1935), p. 440: 'Protection-Security Of The State. A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence

of the vessel or by the consul of the country whose flag the vessel flies. The above provisions do not affect the right of the coastal State to take steps authorised by its laws for the purpose of an arrest or investigation on board a foreign vessel in its inland waters, or lying in its territorial sea, or passing through the territorial sea after leaving the inland waters of the State. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.'[1097]

Twenty-eight years later, Article 19 CTSCZ reproduced almost *verbatim* the formulation of Article 8 of the Draft Hague Convention (1930). The only two differences were the replacing of 'may not' with 'should not', thus implying that the exercise of jurisdiction was permissible and at the discretion of the coastal State,[1098] and a restriction of the competence of the coastal state only to the crimes where the consequences of a crime extend 'beyond the ship' was introduced to include only those consequences which 'extend to the coastal State.' As explained in the literature of the time, '[i]n this conception, criminal acts in the territorial sea which have effects beyond the ship, but only on noncoastal states, are not within coastal authority.'[1099]

In the *travaux préparatoires* of the CTSCZ, the French draft elaborated by the *Special Rapporteur* François in 1953[1100], letter (a) refers to '*les consequences de l'infraction* [qui] *s'etendent hors du navire*', the consequences of the violation extend[ing] outside the vessel[1101]. The commentary to the French draft, *malheuresement,* does not provide any useful explanation on the nature and impact of the violation at stake, generically affirming that '*[s]i l'Etat riverain veut proceder a l'arret du navire en vue de deferer le coupable a ses tribunaux, un autre conflit d'interets peut surgir: d'une part, l'interet de la navigation, qui doit étre entravee le moins possible, d'autre part, celui de l'Etat riverain, qui veut appliquer* sa loi penale[1102] *sur toute l'etendue de son territoire.*'[1103]

---

of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.'

[1097] *Draft Report, Circulated To The Members Of The Committee On April 3rd, 1930*, (Work Of The First Sub-Committee.), p. 202.

[1098] BARNES, *supra* note 167, para. 6, p. 233.

[1099] MCDOUGAL, M. S., BURKE, W. T., Claims to authority over the territorial sea, *Philippine International Law Journal* 1(1)(1962), p. 135.

[1100] A/CN.4/61 (French only) and Add.1 & Corr.1, *Second Report on the Regime of the Territorial Sea*, by Mr. J.P.A. François, Special Rapporteur, Topic: Law of the sea - régime of the territorial sea. Extract from the Yearbook of the International Law Commission- 1953 , vol. II, paras. 82-4 pp. 72-3.

[1101] BAXTER, R. R., The Territorial Sea. *American Society of International Law Proceedings* 50(Fifth Session)(1956), p. 123: 'In very general terms, the right of a coastal state to arrest on board a foreign vessel is limited to those cases in which the effects of the crime extend beyond the vessel or in which the assistance of that state is requested'.

[1102] Emphasis added.

[1103] *Ibid.*, para. 82.

It is interesting to notice that the commentary only refers to '*its penal law*', the domestic penal law of the territorial state with the purpose of preventing excessive jurisdictional claims from the coastal state consisting of the undue application of its penal law to entities outside its jurisdiction.[1104] The *conflict* sought to be avoided was, therefore, between competing *domestic* legislations.

As highlighted in the Introduction of this Dissertation, however, the mere reference to the domestic legal systems is pretty much meaningless as it merely concerns the *source* of the law rather than its *content*. Domestic rules may patently *incorporate* international rules and principles (and they routinely do in fact) or, in the *monistic* systems, directly invoke them.[1105] In conclusion, it should not be excluded the possibility that states may invoke Article 27 UNCLOS to enforce rules relating to crimes of international concern.

In this regard, under Article 21 UNCLOS, coastal states may adopt laws and regulations concerning: (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Back to the criminal jurisdiction on board a foreign ship, UNCLOS III (1982) essentially maintains the structure and phrasing of the Geneva Convention (and the Hague Draft) with three notable *exceptions*: 1) a wider scope of application: subsection B of the CTSCZ only referred to

---

[1104] 'The vital interest of the coastal State on the one hand and the interest of all nations in free navigation on the other are, so to speak, two centres of gravity, to both of which we find ourselves simultaneously drawn. Our duty is to reconcile these two interests by means of reasonable regulations; in other words, we must find the point of equilibrium.' Dr. Schücking in LEAGUE OF NATIONS, *Acts Of The Conference For The Codification Of International Law Held At The Hague From March 13th To April 12th, 1930, Meetings Of The Committees*, Vol. Ill, Minutes Of The Second Committee, Territorial Waters, para. 6. p. 12.

[1105] *Ex multis* IWASAWA, Y., *Domestic Application of International Law: Focusing on Direct Applicability*, Leiden (2022); SHELTON, D., 'International Law in Domestic Systems', in Brown, K., Snyder, D. (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, Dordrecht (2012), pp. 509-40; DE LONDRAS, F., 'Dualism, Domestic Courts, and the Rule of International Law', in Sellers, M., Tomaszewski, T. (eds.), *The Rule of Law in Comparative Perspective. Ius Gentium: Comparative Perspectives on Law and Justice, vol 3.*, Dordrecht (2010), pp. 217-43; MANDRIOLI, D., Relationship Between Municipal and International Law: Between the Principle of Legality and the Renvoi to International Treaties: Italian Jurisdiction Over Transnational Crimes Committed Beyond National Territory. *The Italian Yearbook of International Law Online 31*(1)(2022), pp. 481-6.

Rules applicable to merchant ships while UNCLOS extends the regime of innocent passage also to *government ships operated for commercial purposes;* 2) the *inclusion*, alongside the narcotic drugs, *of psychotropic substances*; 3) a new reference in paragraph 5 to the applicability of the regime of innocent passage to the protection of the marine environment (part XII) and the EEZ (part 5).

Looking at the *travaux préparatoires* of the UNCLOS Convention on the innocent passage, it is evident that states did not feel the need to innovate or rejuvenate the analogous provisions of the Geneva Convention with the sole -and rather remarkable- exception of the extension of coastal state enforcement jurisdiction in respect of *marine environmental protection*, ex Articles 218[1106] and 220 (3), (5-6). These provisions in particular provide coastal states with ample jurisdictional competences to: 1*) require from the vessel information* (regarding its identity and port of registry, its last and its next port of call and other relevant information) to establish whether a *violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of the coastal State conforming and giving effect to such rules and standards*, has occurred; 2) conduct *physical inspection of the vessel* for matters relating to the violation (*resulting in a substantial discharge causing or threatening significant pollution of the marine environment*) if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection; 3) institute proceedings where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, *committed a violation resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State*, *or to any resources* of its territorial sea or exclusive economic zone.

Whether by *weaponising* the environment through the poisoning of essential sources for human life[1107] or as a consequence of greed and recklessness,[1108] pollution and dumping of toxic or dangerous substances may cross the lines of many crimes of international concern, whether existing or developing. The aforementioned UNCLOS provisions would most certainly encompass

---

[1106] *Supra* note 95-104.

[1107] See the origins of the crime of ecocide. In the same sense Article 20(g) of the Draft Code of Crimes against the Peace and Security of Mankind (1996): 'in the case of armed conflict, using methods or means of warfare not justified by military necessity *with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs*.' Emphasis added. SANDS, P. ET AL., *Principles of International Environmental Law,* fourth edition, Cambridge (2018), pp. 760-1.

[1108] See Articles 2 and 3 of the Council of Europe Convention on the Protection of the Environment through Criminal Law Strasbourg, 4.XI.1998. SANDS, *ibid.,* pp. 761-2.

such offences, the repression of which would therefore fall under the jurisdiction of the coastal state.[1109]

Environmental violations aside, and with the exception of drug trafficking,[1110] Article 27 UNCLOS (1982) reproduces with comparatively minor modifications the text of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958)[1111], which, in turn, is little more than a copy of Article 8 of the Draft Hague Convention (1930).

To put it differently and more bluntly, the core of Article 27 UNCLOS is almost a hundred years old, it is *outdated* and it does not acknowledge the social and legal developments of -being conservative- in the last half-century. It ignores Nuremberg and all the subsequent development of international and transnational criminal law.

This, like many other UNCLOS provisions – Article 99 and the meaning of slavery *in primis*- puts into question the availability of coastal state jurisdiction for crimes (of international concern) which do not appear *prima facie* to having been included in the text. As already mentioned,[1112] in many instances, customary law and other treaty provisions or UNSC resolutions explicitly have allowed and/or required states to exercise jurisdiction in situations not explicitly considered by UNCLOS. As argued in this Dissertation, this fragmentation and overall fogginess calls for a systematization of the discipline in order to improve its effectiveness and certainty.

Back to Article 27 UNCLOS, its first paragraph provides that '[t]he criminal jurisdiction of the coastal State *should not* be exercised [...] to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, *save only* in the following cases'. There is an evident tension between the *hortatory* dimension evoked by choice of the verb 'should not' and the *strictness* vehiculated by 'save only'. In his separate opinion to the *Saiga* judgment, Judge Laing affirmed that under Article 27(1), 'the coastal State can exercise criminal jurisdiction in or over a foreign ship exercising innocent passage *only in precisely stated situations'*.[1113]

[1109] With regard to the discussion of jurisdiction in the EEZ, *infra* para. 3.1.
[1110] MCDOUGAL, BURKE, *supra* note 188, pp. 135-6.
[1111] CHURCHILL, LOWE, SANDER, *supra* note 4, p. 162.
[1112] *Supra* note 154-9.
[1113] ITLOS, *The M/V "SAIGA" (No. 2)* Case (Saint Vincent and the Grenadines v. Guinea), Judgment 1 July 1999, *Separate Opinion Of Judge Laing,* para. 15 p. 162. In the same sense NANDAN, ROSENNE, GRANDY, *supra* note 71, para. 27.8(a), p. 242: 'Paragraph 1 lists the circumstances under which a coastal State may exercise criminal jurisdiction on board a foreign ship passing through its territorial sea. It specifically provides that such jurisdiction may be exercised "only" in those cases-the list is exhaustive. The measures that may be taken in exercising such jurisdiction extend to arresting an individual or conducting an investigation in connection with a crime committed on board the ship during its passage.'

In literature, however, there are also authors who propose a less strict interpretations of Article 27 in the sense of allowing a certain degree of discretion with regard to the exercise of criminal jurisdiction.[1114]

The only *mandatory* prohibition of enforcement under Article 27 UNCLOS can be found in paragraph 5 with regard to crimes committed before the ship entered the territorial sea, and the ship is only passing through the territorial sea without entering internal waters.[1115]

The exceptions under Article 27(1)(a)-(b) are very broadly framed: 'the consequences of the crime extend to the coastal State', 'the crime is of a kind to disturb the peace of the country or the good order of the territorial sea'.

According to Barnes '[the consequences of crime] may include the commission of serious crimes, crimes where the victim or perpetrator is a national of the coastal State, or crimes the physical effects of which extend to the coastal State'.[1116] Yet understanding what is a victim it is not too obvious,[1117] since, as underlined by Paoli and Greenfield, current criminological literature has not yet developed a systematic understanding of what are the consequences of the crimes and who are their victims.[1118]

Article 85 of the ICC Rules of Procedure and Evidence, for instance, defines victims as encompassing both 'natural persons who have suffered harm as a result of the commission of any crime' and 'organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'. Under Articles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985, it means both directly

---

[1114] In this sense, TANAKA, *supra* note 9, p. 115; GUILFOYLE, *supra* note 164, p. 242: 'states have criminal jurisdiction over ships within their territorial sea which they generally should not exercise for purposes outside Article 27, but nonetheless may.' Partially *contra* BARNES, *supra* note 167, para. 12, p. 235: 'The preferable view is that the use of the word 'only' makes it clear that jurisdiction may only be exercised in these four types of circumstance. Of course these exceptions may then be interpreted narrowly or broadly according to how serious the coastal State considers the nature or consequences of the crime.'

[1115] Finally, under Article 27(1)(c), coastal states may exercise enforcement criminal on board transiting vessels 'if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State'. As noticed in literature, rather than an exercise of coastal state jurisdiction, this hypothesis constitutes a case of *delegation of enforcement jurisdiction*, as the coastal state cooperates with the exercise of jurisdiction by its primary holder.

[1116] BARNES, *ibid*. para. 15.

[1117] LAURITSEN, J.L., Advances and Challenges in Empirical Studies of Victimization, *Journal of Quantitative Criminology* 26(4)(2010), p. 501.

[1118] PAOLI, L., GREENFIELD, V. A., Starting from the End: A Plea for Focusing on the Consequences of Crime, *European Journal of Crime, Criminal Law and Criminal Justice*, *23*(2)(2015), pp. 87-100.

affected (physically, mentally, economically) persons[1119] as well as 'the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation'. Along the same lines, under Principle 8 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted with the UNGA Res. 60/147 on the 16th December 2005, 'victims are persons who *individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights*, through acts or omissions that constitute *gross violations of international human rights law*, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" *also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation*.'[1120]

In synthesis, the victims of a crime may not be only those who are physically, mentally, and economically affected by the crime together with their families and communities, but also the people who have suffered harm (of unspecified nature) as a consequence of their assistance to the victims.[1121]

International crimes are described in the Preamble of the Rome Statute as '*unimaginable atrocities that deeply shock the conscience of humanity*'.[1122] Not only the conscience of humanity is shaken, though, but 'the peace, security and well-being of the world' themselves are threatened by these crimes. Their evil is so deep, their scale so enormous that everyone is affected either physically, psychologically or morally by their occurrence. These crimes destabilise the very foundations of human society and, as mentioned, every state is bound to prosecute and punish them even in the -quite frankly absurd- hypothesis that they do not suffer from any tangible direct consequences from international crimes committed within their territorial waters. The nature itself of these crimes projects consequences reaching any state.

[1119] Article 1. "Victims" means persons who, individually or collectively, *have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights*'. Emphasis added.
[1120] Emphasis added.
[1121] See Introduction, para. 1.2.1, note 307.
[1122] And Giannini referred to 'offences against mankind at large', which in his view included piracy, traffic in women and children and counterfeiting currency. *Supra* note 178.

UNCLOS Article 27(1)(b) mention of 'the peace of the country or the good order of the territorial sea' does not simply refer to peace as the lack of armed conflicts[1123], but through this *hendiadys,* instead seems to allude to the old notion of 'public peace' of the land and of the waters.

'[C]rimes […] which disturb the public peace and the calm of the citizenry […] as brawls and revels in the public streets which are meant for the conduct of business and traffic.'[1124]

More in general, public peace may simply be understood as a baroque synonym of public order and societal harmony.[1125] In the poetic words of De Zayas, '[p]eace is a state of harmonious national and international relations based on the rule of law, justice, and solidarity, consistent with the motto of the International Labour Office: 'if we want peace, we must cultivate social justice' (*si vis pacem, cole justitiam*).'[1126]

The same Author reminds us of the necessity of maintaining and enforcing mechanisms - both domestic and international- to deal with the penal consequences of the violations of peace, which are not limited to the crime of aggression, but also, more generally, 'propaganda for war, and incitement to violence […] blockades, targeted assassination, the use of indiscriminate weapons including drones, demolition of homes, forced population transfers, and other forms of State terrorism [including] incitement to genocide and crimes against humanity.'[1127]

More practically, as the territorial sea only extends up to twelve nautical miles from the shore (*rectius*, the baseline), it seems unrealistic that the consequences of an international crime committed on board a passing vessel can be contained within the ship and do not extend in one way or another to the coastal state.

Balancing the *gravity and impact of international crimes* on the one hand and the due regard to the *interests of navigation*[1128] - with regard to whether or in what manner an arrest should be

---

[1123] DE ZAYAS, A., 'Peace', in W. Schabas (Ed.), *The Cambridge Companion to International Criminal Law,* Cambridge (2016), p. 98.

[1124] BECCARIA, C.,'Public peace', in Bellamy, R. (Ed.), Davies, R. (Trans.), *Beccaria: 'On Crimes and Punishments' and Other Writings,* Cambridge (1995), p. 29.

[1125] DUBBER, M.D., 'Preventive Justice. The Quest for Principle', in Ashworth, A., Zedner, L., Tomlin, P. (eds.), *Prevention and the Limits of the Criminal Law*, Oxford (2013), pp. 55-6.

[1126] *Supra* note 227, p. 97.

[1127] *Ibid.*

[1128] BARNES, *ibid.* para. 20, pp. 236-7: 'presumably, this requires the coastal State to be aware of and to consider the interests of ships engaged in innocent passage through the territorial sea. It is further reinforced by the general requirement of good faith in Art. 300. This would suggest that coastal States should not exercise their right to arrest ships in an arbitrary fashion, for reasons that do not relate to Art. 27, or in such a way that frustrates the Convention's aim to facilitate communication and navigation'.

made- *ex* Article 27(4) UNCLOS on the other,[1129] it appears that prevalence should be given to the repression of the crime. Such a solution, in the vagueness of the expressions used under Article 27(1)(a)-(b), has the merit of following an objective approach to the identification of the conducts affecting the public order *etc.*, of the coastal state.

If during the 1930s Hague Conference, the proposal to refer to the 'most serious crimes' failed to be accepted due to the lack of legal meaning of the expression 'grave crimes',[1130] the subsequent development of international criminal law and the identification of the category of *international crimes* may offer a more solid parameter for the exercise of enforcement jurisdiction.

International crimes, are not the sole crimes capable of disturbing the peace of the country or the good order of the territorial sea. Smuggling of migrants, maritime terrorism, armed robbery at sea, environmental crimes and IUU fishing are all crimes which greatly impact states.[1131]

As seen in the previous Chapter, illegal fishing may spoliate coastal communities of resources essential for their survival, condemning them to insecurity and crime.[1132]

As recognised in the Preamble[1133] of the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention Against Transnational Organized Crime, 'the significant increase in the activities of organised criminal groups in smuggling of migrants and other related criminal activities [...] bring great harm to the States concerned'.[1134]

Terrorism and armed robbery at sea, needless to say, are highly prejudicial to the security of the coastal state and environmental crimes, even if they were not mentioned under Article 27(5), may have devastating effects on coastal states.

[1129] In this sense WALKER, *supra* note 56, p. 179: 'In UNCLOS Article 27(4), "due regard" means that a State conducting an arrest aboard a foreign ship in territorial sea passage must be aware of and consider the interests of other States whose ships are navigating in that territorial sea and must balance its rights and interests against the rights and interests of States conducting territorial sea passage.'

[1130] *Supra* note 177-9, 183.

[1131] PAPASTAVRIDIS, *supra* note 132, p. 8; GALANI, S., EVANS, M.D., 'The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?' in Galani, S., Evans, M.D. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?*, Cheltenham (2020), p. 13.

[1132] In this sense KLEIN, *supra* note 108, p. 78.

[1133] paragraph 5.

[1134] Though it has been argued that the absence of references to migrant smuggling under Article 27 'militates against subsuming them under the general category of disturbing crimes. However, if undocumented departure is criminalized in the coastal state, the consequences requirement will be fulfilled.' More problematic, according to the Author, appears the qualification of the vessels used for migrant smuggling as 'merchant ships'. MARKARD, N., The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries, *European Journal of International Law* 27(3)(2016), p. 606.

In addition to these crimes, Article 27(1)(d) explicitly allows coastal states to take the enforcement measures necessary for the 'suppression of illicit traffic in narcotic drugs or psychotropic substances'. Not only do these conducts *threaten public health*, but it is widely acknowledged that they also provide a conspicuous *source of income for criminal enterprises*, for instance, terrorism.[1135]

More controversial, on the contrary, is whether coastal state enforcement jurisdiction extends to the transport of WMDs.[1136] One issue underlined by Kaye concerns the destination of the WMDs, as if they were intended for third states, no threat would be made against the coastal state, which would be, therefore, unable to invoke Article 27 UNCLOS as the basis of its jurisdiction.[1137] To circumvent this obstacle, states -acting under Article 21 UNCLOS- may be tempted to criminalise WMD's transport, arguing that this crime is of a kind to disturb the peace of the country or the consequences of the crime extend to the coastal State. Nevertheless, this interpretation would be incompatible with the text of the Convention,[1138] as it would *virtually* open the door to the indiscriminate prohibition of transport of any kind of dangerous goods,[1139] though it has been observed that this is the precise *ratio* behind the coastal state enforcement powers in case of drug trafficking, hence an analogy between drugs and weapons would not be

[1135] There is plenty of literature and official sources highlighting the nexus between narcotraffic and terrorism (the so-called narco-terrorism), from the cartels in Colombia and Mexico to the Afghan Talibans, as recently recognised, *inter alia*, by the recent UNSC Res. 2611/2021, S/RES/2611 (2021) Security Council Distr. General 17 December 2021: 'Reiterating its support for the fight against illicit production and trafficking of drugs from, and chemical precursors to, Afghanistan, acknowledging that illicit proceeds of the drug trafficking in Afghanistan are a source of financing for terrorist groups and non-state actors that threatens regional and international security, and recognizing the threats that terrorist groups and non-state actors involved in narcotics trade, and illicit exploitation of natural resources, continue to pose to the security and stability of Afghanistan'. See also, HERNÁNDEZ, J., Drug Trafficking, and the Globalization of Supply, *Perspectives on Terrorism* 7(4)(2013), pp. 41-61; KHAN, A., Afghanistan And The Drug Trade, *Strategic Studies*, *25*(3)(2005), pp 162-82; CLARKE, C. P., Drugs & Thugs: Funding Terrorism through Narcotics Trafficking, *Journal of Strategic Security*, *9*(3)(2016), pp. 1–15; TEINER, D., Cartel-Related Violence in Mexico as Narco-Terrorism or Criminal Insurgency: A Literature Review. *Perspectives on Terrorism*, *14*(4)(2020), pp. 83–98; TRAUGHBER, C. M., 'Terror-Crime Nexus? Terrorism and Arms, Drug, and Human Trafficking in Georgia.' *Connections* 6(1)(2007), pp. 47–64.

[1136] In favour of coastal state jurisdiction, BARNES, *supra* note 169, PAPASTAVRIDIS, *supra* note 132, p. 9.

[1137] KAYE, S., 'Chapter 14. Maritime Security in the post-9/11 World: A New Creeping Jurisdiction in the Law of the Sea?', in Schonfield, C., Lee, S., Kwon, M. (eds.), *The limits of maritime Jurisdiction,* Leiden (2014), p. 342.

[1138] In particular Articles 23 and 25(3) UNCLOS. In this sense KLEEMOLA-JUNTUNEN, P., 'The Right of Innocent Passage: The Challenge of the Proliferation Security Initiative and the Implications for the Territorial Waters of the Åland Islands', in Andreone, G. (eds.), *The Future of the Law of the Sea*, Cham (2017), p. 264.

[1139] WOLFRUM, *supra* note 168, p. 100.

totally unwarranted.[1140] It is not the mere passing of drugs that makes them dangerous, though, but rather their sale and subsequent use, and the same (allegedly) applies to weapons.[1141]

As observed by Scovazzi, 'Despite all its merits, […] UNCLOS, as any legal text, is linked to the moment when it was adopted and the *balance of interests which existed at* that *moment*. Being itself a product of time, the UNCLOS cannot stop the passing of time. While it provides a solid and tendentially stable basis, it would be illusory to think that the UNCLOS is the end of legal regulation. Yet *it is subject to a process of evolution and progressive development*'.[1142]

UNCLOS, as such, is already forty years old, with the substance of some of its provisions being much older. During this time, society has evolved. Crime *also* has evolved. To address these new challenges, the international community has developed a vast array of instruments to prevent and repress maritime crime, as seen in Chapters II and III.

Before continuing the analysis of zonal jurisdiction in the law of the sea, it should also be wondered, though, besides *evolution by integration*,[1143] whether and to what extent *evolutionary interpretation*[1144] may also serve as a mechanism to bring up-to-date obsolete or obsolescent provisions such as Article 27.

In the *Presence of South Africa in Namibia* Advisory Opinion (1970), the ICJ, reasoning on the (then-) contemporary meaning of Article 22 of the Covenant of the League of Nations (1919), declared: 'Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that *the concepts embodied* in Article 22 of the Covenant-"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned-*were not static, but were by definition evolutionary*, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, *the Court must take into consideration the changes*

[1140] LOGAN *supra* note 167, p. 263: 'To analogize from drugs to the transfer of weapons, the protective principle and Article 27 may help to justify the PSI in territorial waters. A coastal state might persuasively argue that the transport of WMD and related material could greatly harm its security or governmental functions, or that the consequences of the transport extend to the coastal state.'

[1141] For a synthetic overview of the debate over the 'dangerousness' or innocence of the transport of WMDs, see PERRY, T., The PSI as a Shared Good: How the Proliferation Security Initiative Both Challenges and Reinforces a Prevailingly *Mare Liberum* Regime, *Ocean Development & International Law* 49(4)(2018), pp. 347-8.

[1142] SCOVAZZI, *supra* note 111, p. 123. Emphasis added.

[1143] *Ibid.* p. 124.

[1144] 'Permissible modifications to a treaty that take into account the passing of time thus often require a new interpretation of its terms. To this end, a judge is often requested to redefine the meaning of a treaty without altering its nature.' DUPUY, P.-M., 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in Cannizzaro, E. (ed.), *The Law of Treaties Beyond the Vienna Convention,* Oxford (2011), p. 125.

which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, […]. Moreover, *an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments'.[1145]

The 'consequences of the crime' and 'peace of the country or the good order' of the coastal state and its territorial waters are arguably no *stricter*[1146] and in *no way more static* formulas than, for instance, 'the strenuous conditions of the modern world" and "the well-being and development" of the peoples'. If so, interpreting the formulas used in Article 27(1)(a)-(b) in an *evolutionary* manner,[1147] *i.e.* in the sense of subsuming the category of the *crimes of international concern* amongst those of a kind to disturb the peace of the country or the good order of the territorial sea falling under coastal state jurisdiction when committed on foreign vessels passing through their territorial sea, especially since the exercise of jurisdiction is permissible and at the discretion of the coastal state.[1148] Referring to crimes of international concern as a specific legal category encompassing the conducts currently falling (more or less felicitously) under international and transnational crimes would also precise the terms of *innocent passage in internal waters*, as its terms are not defined under the UNCLOS,[1149] thus overcoming the doctrinal perplexities as to the exact limits of coastal state jurisdiction.[1150]

[1145] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 53, p. 31. Emphasis added.

[1146] ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, para. 66, p. 243: 'where the parties have used *generic terms* in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'. Emphasis added.

[1147] In this sense BOYLE, A., 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change', in Freestone, D., Barnes, R., Ong, D. (eds.), *The Law of the Sea: Progress and Prospects*, Oxford (2006), p. 46: 'There is no doubt that the LOSC need not be interpreted as if it were a static instrument, cast in stone somewhere around 1982. Many of its terms are likely to be inherently evolutionary. […] Other examples of potentially evolutionary phraseology include references to 'special circumstances' in territorial sea boundary delimitation, the definition of 'pollution of the marine environment', the concept of 'conservation of living resources', and the identification of 'generally accepted international rules and standards'.

[1148] *Supra* note 190. Such a solution, as previously seen, would also have the merit of reflecting the original cases in which coastal state jurisdiction could allegedly be exercised over crimes committed on board vessels engaged in innocent passage.

[1149] Therefore filling the lacuna by referring to the notions applicable to the territorial sea.

[1150] Enforcement jurisdiction is exercised only on those offences which appear to be capable of disturbing the peace or the good order of the port; the captain or consul of the flag state requests the intervention; a non-crew member is involved; the offence committed on board is of a serious character, and finally when the consequences of the offence extend beyond the vessel (*e.g.* in case of pollution). *Supra* note 81-5.

2. Zones under coastal state jurisdiction

1.1 Right of police to prevent infringement within its territory or territorial sea: the Contiguous Zone

Beyond (seaward) and adhering to the territorial sea lies the contiguous zone. In this zone, whose entire discipline can be found in Article 33 UNCLOS, coastal states enjoy the right to the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. To properly understand its regime, it is helpful to have a glimpse at its historical development.

Already in the early 1900s, the literature recognised the existence of 'a customary rule of the Law of Nations […] allow[ing] Riparian States in the *interest of their revenue and sanitary laws to impose certain duties* on such foreign vessels bound to their ports as are approaching, *although not yet within, their territorial maritime belt*.'[1151]

At its core, it was intended to serve as a *buffer zone* between the territorial waters and the high seas in which enforce customs and sanitary violations.[1152] The very nature of the contiguous zone as a *diaphragm* between the territorial sea and the high seas (*i.e.* between sovereignty and freedom) proved to be a challenge during the negotiations of UNCLOS I, in particular with regard to a) the collocation of the regime of the CZ within the articles dedicated to the territorial sea or the high seas, and, b) the subjects (competences, powers, issues) included under coastal state jurisdiction within the CZ.

[1151] OPPENHEIM, L., *International Law: Treatise*, London (1905), pp. 245-6. The actual origins of the contiguous zone, *rectius,* of the enforcement powers of coastal states beyond the *mare terrae proximum* are actually much older, finding their deepest roots in the anti-smuggling 'Hovering Acts' enacted by the United Kingdom against vessels standing up to eight leagues from the coast (approximately twenty-four nautical miles). With the development of the notion of territorial sea and the recognition of the principle of *exclusive flag state jurisdiction* on the high seas, other solutions were adopted, from the doctrine of *constructive presence* to the doctrine of *hot pursuit* to -finally- the establishment by states of various jurisdictional zones beyond the territorial sea. CHURCHILL, LOWE, SANDER, *supra* note 4, pp. 206-8; KHAN, D.K., 'Article 33', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary,* München (2017), paras. 3-6, pp. 256-8; SYMONIDES, J., Origin and legal essence of the contiguous zone, *Ocean Development & International Law*, 20(2)(1989), pp. 203-11; SHARMA, O.P., 'The Contiguous Zone' in Sharma, O.P., *The International Law of the Sea: India and the UN Convention of 1982,* Oxford (2010), pp. 104-7. On the Hovering acts see GILMORE, B., 'Hovering Acts', in *Max Planck Encyclopedia of Public International* Law [MPEPIL], December 2008; FROMMER, A. M., The British hovering acts: contribution to the study of the contiguous zone, *Revue Belge de Droit International Belgian Review of International Law*, 16(2)(1981), pp. 434-58.

[1152] ODA, S., The concept of the contiguous zone, *International and Comparative Law Quarterly,* 11(1)(1962), pp. 131-3.

Against the inclusion of the CZ in the Convention on the Territorial Sea, it was argued that it would have created the danger of considering coastal state jurisdiction as being related to the sovereignty exercised over the territorial sea rather than the minimal rights of control within the CZ.[1153] Fitzmaurice, however, opposed this idea, affirming instead that the (-then) customary width of the territorial sea (three miles) was 'adequate as a belt in which the coastal State enjoyed full sovereign rights […][it] was not sufficient under modern conditions to protect certain specific interests of the coastal State (in particular its revenue and health regulations), that gave rise to claims for some additional " contiguous " zone, in which limited powers of control could be exercised. All this was evidently predicated upon, and indeed had its *raison d'etre* in the fact of a relatively narrow breadth of territorial sea.'[1154]

That, though, only holds partially true as, while it is true that states felt that the three-mile territorial sea was inadequate to ensure protection in certain matters,[1155] the three-miles rule was derogated by many who sought to establish a different width of their territorial sea.[1156]

Even more significant from our point of view, though, was the debate on *what matters* should be included in coastal state powers within the CZ. In this sense, two subjects were particularly discussed, fishing rights and the security of the state. There were widespread claims to fishery zones and equally common confusion on the nature and aim of the CZ and the other maritime zones.[1157]

The Commission, however, found that there was no agreement over 'any exclusive right of the coastal State to engage in fishing in the contiguous zone', nor there was any agreement over specific conservation measures of the living resources of the CZ beyond the ones already provided

---

[1153] FRANKLIN, C., *Law of the Sea: Some Recent Developments, with Particular Reference to the United Nations Conference of 1958*, Washington (1961), p. 87.

[1154] FITZMAURICE, G., Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics, *The International and Comparative Law Quarterly* 8(1)(1959), p. 109.

[1155] FELL, L.C., Maritime Contiguous Zones, *Michigan Law Review* 62(5)(1964), p. 849: 'As the width of the territorial sea narrowed, the importance of contiguous zones increased. Nations like Great Britain and the United States found three miles too narrow a band for effective enforcement of customs laws. In the eighteenth century, Great Britain extended its competence for customs enforcement to one hundred leagues, and soon after independence, the United States claimed four leagues for customs enforcement. These early contiguous zones were acquiesced in when they appeared reasonable.'

[1156] *ibid*. p. 848.

[1157] In particular the US called for the inclusion of these matters amongst those covered by coastal state jurisdiction in the CZ. See: The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *International Law Studies Series. US Naval War College* 53 (1959-1960), p. 86: 'It would have been wiser to have concluded that a coastal state has the right to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations, within reasonable distances from the coast in contiguous zones beyond the territorial sea'. *Ex multis* Franklin, *supra* note 247, pp. 87-8; CHURCHILL, LOWE, SANDER, *supra* note 4, p. 210.

under the regime of the high seas. Finally, the Commission held that it was not necessary to include immigration over the subjects conferred to the control of the coastal state in the CZ since it was sufficient to exercise said control within the territorial waters.[1158]

Finally, with regard to the security of the state, the ILC equally refused to include it as a circumstance enabling state intervention within the CZ, arguing the superfluity -and dangerousness-[1159] of such reference to an *inherent* state right: 'in the *majority of cases, the exercise of customs control will afford a sufficient safeguard.* As to *defence measures against an imminent and direct threat to its security, it is clear that a State has an inherent right to take certain protective measures both within the contiguous zone and outside it.* For this reason, it seems unnecessary, and even undesirable, to mention any special right connected with security among the rights which the coastal State may exercise in the contiguous zone.'[1160]

In the end, Article 24(1) CTSCZ limited coastal state powers only to prevent and punish violations of customs, fiscal, immigration or sanitary regulations. As noticed by Lowe, though, in spite of article 24 CTSCZ, states continued to claim enforcement powers relating to pollution, defence and economic zones.[1161]

In the 1970s, during the Third Conference of the Law of the Sea, with the extension of the territorial sea up to twelve miles and the emergence of the EEZ (covering the issues relating to the exploitation and conservation of marine living resources), some states questioned the necessity of the CZ. In contrast, others reiterated its usefulness, calling for its enlargement.[1162] Eventually, after intense negotiations, states agreed to maintain the regime of the contiguous zone in UNCLOS,[1163] with Article 33 thereto bearing only comparatively minor changes from the older formulation:[1164] within the CZ, coastal states enjoy the control necessary to (prevent and)

[1158] ILC, *Report of the International Law Commission on the Work of its Eighth Session*, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), Draft Article 66, commentary, p. 295.

[1159] *Ibid.:* 'The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term " security " would open the way for abuses and that the granting of such rights was not necessary.' SYMONIDES, *supra* note 245, p. 205.

[1160] INTERNATIONAL LAW COMMISSION, *Documents Of The Eighth Session, Including The Report Of The Commission To The General Assembly Regime Of The High Seas And Regime Of The Territorial Sea, Document A/Cn.4/97, Report By J. P. A. François, Special Rapporteur*, paras. 29-30 pp. 5-6. Emphasis Added.

[1161] LOWE, A.V., The Development of the Concept of the Contiguous Zone, *British Yearbook of International Law*, Volume 52(1)(1981), p. 168.

[1162] SYMONIDES, *ibid.* pp. 206-7; SHARMA, *supra* note 245, pp. 113-7.

[1163] KHAN, *supra* note 245, para. 17 pp. 260-1.

[1164] LOWE, *ibid.* p. 109; KOH, T.T.B., The Territorial Sea, Contiguous Zone, Straits And Archipelagoes Under The 1982 Convention On The Law Of The Sea, *Malaya Law Review* 29(2)(1987), p. 174; 'Article 33', in Nandan, S.N.,

punish infringement of its customs, fiscal, immigration or sanitary laws and regulations committed within its territory or territorial sea.

As noticed in the literature, the first difference between Article 24 CTSCZ and Article 33 UNCLOS concerns the omission in the latter of the nature of the contiguous zone (*i.e.*, whether it belongs to the territorial waters or to the high sea), as the specification 'a zone *of the high seas* contiguous…' was deleted from the text.[1165]

The first twelve miles of the contiguous zone overlap with the territorial sea[1166] (hence, the *de facto* breadth of the contiguous zone ordinarily amounts to no more than twelve miles) and if coastal states have claimed an EEZ, the CZ overlaps with it,[1167] thus, in the overlapping section the coastal state exercises the control *ex* Article 33 and the sovereign rights and jurisdiction provided under Article 56 with regard to the EEZ. If no EEZ exists, then the CZ overlaps with the high seas and the regime of the latter.[1168]

As consistently underlined in literature, the coastal state's right to punish infringements committed within its territory or territorial sea (and implicitly also its internal waters) requires -logically- that such a violation *has already taken place*; hence the provision cannot be applied to incoming ships, as they could not have made (yet) any infringement of customs, fiscal, immigration or sanitary laws and regulations.[1169] Nonetheless, contrary voices (or at least, uncertain voices) as to the exact delimitations of those powers can also be found.

For instance, in the *CPCF v Minister for Immigration and Border Protection* (2015) case, the High Court of Australia accepted that the preventative controls under Article 33 would reasonably include 'a coastal state stopping in its contiguous zone an inward-bound vessel

---

Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993), paras. 33.2 and 33.8, pp. 268 and 273.

[1165] SYMONIDES, *ibid*. p. 207.

[1166] Since in the territorial sea (as well as in the -omitted in the text of Article 33 UNCLOS- internal waters) the coastal state enjoys sovereignty, it does not need to exercise the controls ex Article 33(1). AQUILINA, *supra* note 136, p. 61; TANAKA, *supra* note 9, p. 147.

[1167] CHURCHILL, LOWE, SANDER, *supra* note 4, p. 219.

[1168] In this sense ICJ, *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea, (Nicaragua v. Colombia*), Judgment, 21 April 2022, para. 161, p. 59: 'Under the law of the sea, the powers that a State may exercise in the contiguous zone are different from the rights and duties that a coastal State has in the exclusive economic zone. The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same. The contiguous zone is based on an extension of control by the coastal State for the purposes of prevention and punishment of certain conduct that is illegal under its national laws and regulations, while the exclusive economic zone, on the other hand, is established to safeguard the coastal State's sovereign rights over natural resources and jurisdiction with regard to the protection of the marine environment.'

[1169] TANAKA, *supra* note 9, pp. 147-8; AQUILINA, *supra* note 136, p. 64; ROTHWELL, STEPHENS, *supra* note 9, p. 83; CHURCHILL, LOWE, SANDER, *supra* note 4, p. 215.

reasonably suspected of being involved in an intended contravention of one of those laws [and] [b]ecause there must be a power to stop the vessel, it may be accepted that there is a power to detain the vessel (at least for the purposes of investigating whether there is a threat of a relevant contravention).'[1170]

Somehow similar circumstances underpinned the *US v Best* case.[1171] A US Coastguard vessel intercepted a foreign (Brazilian) vessel in the US Contiguous Zone arresting the shipmaster for attempting to smuggle (Chinese) migrants from beyond the Territorial sea without having previously obtained any authorization from Brazil (the flag state) to do so. To establish jurisdiction over the alleged crime the US authorities relied on the controversial *Ker-Frisbie Doctrine.*[1172] According to it, a defendant "cannot rely upon a mere violation of international law as a defense to the court's jurisdiction'[1173] and in particular that since *'a treaty does not specifically prohibit the abduction of foreign nationals, then it will not cause a court to be divested of jurisdiction over the abducted individual*'(!).[1174] Consequently, the US Court held that 'unless the government's seizure of Best [the shipmaster] was in violation of a treaty between the United States and Brazil the District Court ha[d] jurisdiction over Best in spite of the potential violation of international law.[1175]

Back to the *CPCF* case, far less clear was nevertheless in the Australian judges' opinion *'whether, for the purposes of international law, Art 33 permits the coastal state to take persons on the vessel into its custody or to take command of the vessel or tow it out of the contiguous zone, [which]remains controversial.*'[1176] As it can be noticed, the judgment merely questions whether the coastal state can either take the individuals onboard a foreign vessel in the CZ under its

---

[1170] HIGH COURT OF AUSTRALIA, *CPCF v Minister for Immigration and Border Protection*, [2015] HCA 1, 28 January 2015, para. 79. Emphasis added.

[1171] US COURT OF APPEALS, 3RD CIRCUIT, *United States v Best, Appeal judgment,* ILDC 1869 (US 2002), 304 F3d 308 (3d Cir 2002), 18th September 2002.

[1172] The rule at the base of the extraordinary renditions program, pursuant to which 'a court's power to try a defendant is ordinarily not affected by the manner in which the defendant is brought to trial'. See *ex multis* Ker-Frisbie Doctrine Law and Legal Definition, *USLegal* https://definitions.uslegal.com/k/ker-frisbie-doctrine/; Jurisdiction Obtained by Forcible Abduction: Reach Exceeds Due Process Grasp, *The Journal of Criminal Law and Criminology* 67(2)(1976).

[1173] *Ibid.*, para.

[1174] Id. para. 28.

[1175] *Ibid.*, para. 21: 'Brazil is a party neither to the Territorial Sea Convention nor to the High Seas Convention. Furthermore, although UNCLOS was signed by the United States in 1994 and subsequently transmitted to the United States Senate, it has not been ratified by the Senate and, accordingly, does not have the force of law. Because none of these are treaties to which both Brazil and the United States are parties, the seizure of Best from the Cordeiro de Deus could not have been in violation of any of them. Thus, we find that the treaties cannot serve to limit the rule of Ker-Frisbie in this case.'

[1176] *Supra* note 1133.

custody or repel them from this zone to prevent a crime from being thereby committed. *What it does not say* -and this is a pretty common occurrence as seen in these pages- alas is *whether, beyond these enforcement powers, the coastal state can also exercise its adjudicatory criminal jurisdiction over those individuals*.

Set theory aside, it must be questioned which crimes of international concern fall (or at least, may be deductively comprised) under coastal state control in the CZ. In this sense, it is of paramount importance the recent ICJ *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* judgment (2022), which deserves to be quoted and discussed at length as it offers an exceptional authoritative guide on the interpretation of the terms used in Article 33(1) UNCLOS.[1177]

In the first place, the Court declared that '*Article 33 of UNCLOS reflects contemporary customary international law* on the contiguous zone, both in *respect of the powers* that a coastal State may exercise there and the limitation of the breadth of the contiguous zone',[1178] affirming that the powers listed under Article 24 CTSCZ and 33 UNCLOS must be understood as a *numerus clausus*.[1179] The disagreement between Nicaragua and Colombia as to the conformity with customary international law of the provisions of *Article 5 of Presidential Decree 1946*, providing the material scope of the powers sought to be exercised by Colombian authorities in its 'integral contiguous zone'.[1180] The Decree provided Colombian authorities with the power to prevent and control violations of laws and regulations concerning '"the *integral security* of the State, including *piracy*, *trafficking of drugs and psychotropic substances*, as well as conduct contrary to the *security in the sea and the national maritime interests*, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the *preservation of the maritime environment and the cultural heritage* will be prevented and controlled."'[1181]

[1177] See paras. 155-86, pp. 58-65.
[1178] *Ibid*. para. 155, p. 58. Emphasis added.
[1179] '[t]he drafting history of Article 24 […] and that of Article 33 of UNCLOS demonstrate that *States have generally accepted that the powers in the contiguous zone are confined to customs, fiscal, immigration and sanitary matters as stated in Article 33, paragraph 1.' Ibid*. para. 151, p. 57. Emphasis added. in the same sense KHAN, *supra* note 245, para. 26, p. 266; CHURCHILL, LOWE, SANDER, *ibid.*, p. 220; MOLENAAR, E.J., 'New Maritime Zones and the Law of the Sea', in Ringbom, H. (ed.), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea*, Leiden (2015), pp. 265-6.
[1180] *Ibid*. para. 170, p. 61.
[1181] *Ibid*. para. 176, p. 64.

Dissecting the activities brought under Colombian control by the Decree, in the first place, with a few quick pen strokes and a rather *tombstone-like* statement, the judges unsurprisingly affirmed that security was never included under coastal state control by treaty law nor by any post-UNCLOS customary development.[1182] Perhaps more interestingly, the Court also rejected the possibility of interpreting the reference to sanitary laws and regulations in the sense of encompassing environmental protection: 'With regard to [the] argument that the word *"sanitary"* can now be taken to include the protection of the marine environment, *the Court is not convinced that the meaning of that word […]has evolved to extend to the protection of the marine environment*, a matter that is *separately governed by customary international law on the environment*. The term "sanitary" was *originally included* in the provisions on the contiguous zone because of its connection with *customs regulations* […] There is no basis, either in law or in State practice, to give this term the expansive interpretation proposed by Colombia'.[1183]

As previously -very briefly- seen, the contiguous zone dates back to the efforts of coastal states to curb smuggling in the maritime strip contiguous to the territorial sea. Smuggling is defined in dictionaries as 'the crime of taking *goods or people* into or out of a country illegally',[1184] 'to bring into or take out of a country secretly, under illegal conditions or without paying the required import or export duties'.[1185]

Webster's Law Dictionary, defines *customs* as '1 [t]axes imposed on *imports and exports*; the United States Constitution prohibits Congress from imposing taxes on goods exported from a state. Also called duties. 2 The agency or procedure for collecting such taxes, or the place where they are collected',[1186] and *immigration* as '[t]he act of entering a country with the intention of remaining there permanently.'[1187]

The *focus* of the first three terms (linked by commas) is, clearly, on *the illegal entry* of goods and people or the violation of the budgetary interests of the state connected to such activity. Sanitary laws and regulations, on the contrary, point to a different protected interest of the state,[1188] namely the *protection and preservation of animal or plant life and health*.

[1182] *Ibid.* para. 177, pp. 64-5.
[1183] *Ibid.* para. 180, p. 65.
[1184] 'Smuggling', *Cambridge Dictionary* https://dictionary.cambridge.org/dictionary/english/smuggling.
[1185] Particularly in American English. 'Smuggle', *Collins Dictionary* https://www.collinsdictionary.com/dictionary/english/smuggle.
[1186] 'customs', in Wild, S. E. (ed.), *Webster's New World Law Dictionary*, Hoboken (2006), p. 115.
[1187] 'immigration', *ibid.* p. 153.
[1188] As highlighted by the use of o*r,* is a conjunction connecting two or more possibilities or alternatives of the same grammatical type.

In this sense, any attempt to enforce more general principles of environmental or human health protection beyond the limited scope of trading (and smuggling) activities under Article 33 UNCLOS was unequivocally deemed to fail.[1189]

Besides, the reasoning of the ICJ is complicated by the fact that there is an overlap between Colombian CZ and Nicaraguan EEZ, the consequence of which is an overlap of the distinct jurisdiction exercised by the two states. To make things (even) worse, since Colombia is not a party to the UNCLOS, its provisions can only be applied insofar as they reflect customary law.[1190]

As it will be seen in the next Paragraph, in their EEZs, under the customary norm reflected in Article 56(1) UNCLOS, coastal states have '(a) sovereign rights for the purpose of […] conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil […] (b) jurisdiction […] with regard to […] (iii) the protection and preservation of the marine environment'. Furthermore, under Article 73(1) '[t]he coastal State may, in the exercise of its sovereign rights […] take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention'. In other words, the jurisdiction claimed by Colombia with regard to environmental violations in its CZ was already covered by (and incompatible with) Nicaraguan sovereign rights and jurisdiction in its own EEZ.[1191]

[1189] Even though it has been authoritatively asserted *ex multis* that '[h]uman rights and environmental protection are interdependent. *A safe, clean, healthy and sustainable environment is necessary fo*r the full enjoyment of human rights, including the rights to life, to the highest attainable standard of *physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation*, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions.' UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES, *Framework Principles On Human Rights And The Environment: The Main Human Rights Obligations Relating To The Enjoyment Of A Safe, Clean, Healthy And Sustainable Environment* (2018), principles 1-2, commentary, para. 4, p. 6. Emphasis added. in the same sense, and more specifically to the preservation of the marine environment as a precondition for the preservation of human health, Article 7 of the Stockholm Declaration Of The United Nations Conference On The Human Environment (1972) calls on States 'to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health'. See SHELTON, D., Human rights, health and environmental protection: linkages in law and practice, *Human Rights & International Legal Discourse* 1(1)(2007), p. 14. Aquilina appears to suggest, or at least acknowledge the possibility of, an extensive interpretation of 'sanitary', which may therefore include pollution, occupational health and safety, animal or plant health. Aquilina, ibid. p. 63

[1190] ICJ, *Nicaragua v Colombia, supra* note 262, para. 48, p. 29: 'The Applicant and the Respondent agree that the applicable law between them is customary international law. Nicaragua is a party to UNCLOS and Colombia is not; consequently, UNCLOS is not applicable between them. The Court notes that both Parties acknowledge that a number of the provisions of UNCLOS that they refer to reflect customary international law. They disagree, however, about whether that is true of other provisions that are at issue in the present case.'

[1191] *Ibid.* Para. 144, p. 55. In particular, it would have been interesting if the judges had explored the consequences of the causal link existing between environmental protection and human health and whether this nexus could justify

The final issue to briefly discuss with regard to the CZ concerns one of the most significant innovations of UNCLOS, namely the reference to cultural heritage in Article 303.[1192]

1.2 The Exclusive Economic Zone

Under Article 56(1) UNCLOS, coastal states enjoy over the EEZ: 1) *sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone; 2) *jurisdiction* on the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. As the vast majority of fishing activities (and marine scientific research, shipping and energy production (wind turbines)) take place within 200 miles from the coastline,[1193] understanding *who can do what* is of vital importance.

Significantly, Article 56(2) subordinates such coastal state's rights and jurisdiction to the condition of the *due regard*, to the *rights and duties of other States* and to the duty to act in a manner compatible with the provisions of this Convention. To understand the regime of the EEZ and its relevance to crimes of international concern, once again, it is necessary to listen to the voice of the *historia magistra*.

As it shall be seen in the next Paragraph, both the EEZ and the CS found their historical origins in the 1945 unilateral Truman's Proclamations.[1194]

---

environmental considerations in the broader context of the latter. On the link between environmental protection and human health see, *ex multis*, WILLIS, F., Economic development, environmental protection, and the right to Health, *Georgetown International Environmental Law Review*, 9(1)(1996), pp. 195-220; GORDON, L.J., Does Public Health Still Include Environmental Health and Protection?, *Journal of Public Health Policy* 13(4)(1992), pp. 407-11; FITZMAURICE, M., A Human Right to a Clean Environment: A Reappraisal, in Ziccardi Capaldo, G., (ed.), *The Global Community Yearbook of International Law and Jurisprudence*, Oxford (2015), pp. 219-34. This idea has been recently endorsed by the United Nations General Assembly, Seventy-sixth session, Agenda item 74 (b), Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Resolution adopted by the General Assembly on 28 July 2022, 76/300. *The human right to a clean, healthy and sustainable environment*.

[1192] *Infra* Chapter V para. 4.

[1193] CHURCHILL, LOWE, SANDER, *supra* note 4, p. 254.

[1194] On the link between the EEZ and the CS in the modern law of the sea see ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I. C.J. Reports 1985, para. 33, p. 33: '[a]s the 1982 Convention demonstrates, the two institutions - continental shelf and exclusive economic zone - are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by

Against this background, UNCLOS III developed a far more comprehensive regime[1195] whose discipline can be found in Part V UNCLOS, *ex* Article 55.[1196] Article 55 is intriguingly sibylline: it says that the EEZ is an area beyond and contiguous to the territorial sea, but remarkably it does not say what it is an area of or, to be more precise, what is its *juridical nature*. On the one hand, UNCLOS explicitly affirms that the EEZ is 'an area beyond and adjacent to the territorial sea'. Literally and logically, if it is beyond and adjacent to the territorial sea, it cannot be a part of it. Another argument: the territorial sea is an area under coastal state sovereignty, as previously seen, whose principles can be found in part II UNCLOS. If the EEZ were part of the territorial sea, Article 55 should refer to this part instead of Part V. Similarly, if the EEZ were part of the high seas, there would be no need for Article 58(2) (on which we shall return) to provide that 'Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'.[1197] If the EEZ were a part of the high seas, its regime would automatically apply. Also, Article 86 UNCLOS, opening the part of the Convention dedicated to the high seas, explicitly refers to the EEZ, providing that '[t]he provisions of this Part 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. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.'

In other words, Article 86 specifies that certain rules of the high seas also apply in the EEZ, but at the same time, the first paragraph draws a distinction between, on the one hand, the high sea (negatively defined in the article as 'all parts… state') and the EEZ on the other.

---

that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the Coast, which are common to both concepts.'

[1195] Rather than seeking to provide a complete overview of the law of the EEZ -which would both be purposeless and ultimately undesirable in the context of this dissertation- we shall focus on those aspects more directly impacting our *thema dicendum*. On the general regime of the EEZ see *ex multis* ORREGO VICUÑA, *ibid.;* EXTAVOUR, W.C., *The exclusive economic zone. A study of the evolution and progressive development of the international law of the sea*, Gèneve (1979); QUINCE, *supra* note 318; O'CONNELL, D.P., *The international law of the sea, volume I*, Oxford (1982), pp. 553-81; LEANZA, U., CARACCIOLO, I., 'The Exclusive Economic Zone', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014), pp. 177-216; ROTHWELL, STEPHENS, *supra* note 9, pp. 85-101; TANAKA, *supra* note 9, pp. 149-60; CHURCHILL, LOWE, SANDER, *supra* note 6, pp. 253-99.

[1196] See ORREGO VICUÑA, F., *The exclusive economic zone. Regime and legal nature under international law*, Cambridge (1989), pp. 16-92; PROELSS, A., 'Article 55', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), paras. 15-8, pp. 416-8.

[1197] See ILA, The Exclusive Economic Zone, *International Law Association Reports of Conferences* 60 (1982), para. 19, p. 308.

In conclusion, as widely acknowledged in the literature, it is safe to say that the regime of the EEZ 'is an *hybrid one* and expresses a compromise which creates a *zone of transition*',[1198] or as often said, it is a *sui generis* zone.[1199]

Article 56 UNCLOS is one of the cornerstones of the discipline of the EEZ as it contains the core of coastal rights, jurisdiction and powers in the zone.[1200] The first thing that needs to be discussed is the meaning of *sovereign rights*, an expression borrowed from the 1958 Convention on the Continental Shelf.[1201] Such a formula 'desired to avoid language lending itself to interpretations alien to [...] the principle of the full freedom of the suprajacent sea [...]. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed [...]. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources [...]. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law.'[1202]

This definition applies *mutatis mutandis*[1203] to the EEZ. With regard to the latter, the ILA, while admonishing against interpretations in the sense of sovereign rights as a subspecies of sovereignty[1204], equally underlined the peculiar strength of the notion, which 'suggests a stronger position of the coastal state and a more secure basis in general international law than mere "jurisdiction"'.[1205] Reasoning on the powers exercised in the EEZ under Article 73(1),[1206] judge Oda, in his dissenting opinion in the ICJ *Tunisia/Libya Continental Shelf* case (1986), affirmed that 'the mode of exercise of jurisdiction is no different from that exercised by the coastal State

---

[1198] DUPUY, R., '5. the sea under national competence', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 1, Dordrecht (1991), p. 278. Emphasis added.

[1199] *Ex multis*, ANDREONE, G., 'The exclusive Economic Zone', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015), p. 162; CHURCHILL, LOWE, SANDER *supra* note 9, p. 262; ATTARD CAMILLERI, F.L., *The application of the High Seas Regime in the Exclusive Economic Zones*, Lanham (2018), pp. xvi-xvii.

[1200] 'Article 56', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary,* volume II, articles 1 to 85, Dordrecht (1993), para. 56.1, p. 525.

[1201] Hereinafter CTS. *Ibid*. para. 56.11(a), pp. 541-2.

[1202] ILC, *Articles concerning the Law of the Sea, with commentaries, 1956*, Article 68(2), Yearbook of the International Law Commission (1956), p. 527.

[1203] There is no full freedom of the superadjacent sea, but rather the principle of freedom of the high sea as long as it is compatible with the regime of the EEZ. In this sense, NANDAN, ROSENNE, GRANDY, *supra* note 334, p. 542.

[1204] 'the "sovereign rights" which may seem more or less accepted, as a fundamental element of the EEZ as such, relates to resources, including fisheries. This does not imply that the coastal state may interfere with other traditional freedoms of the high seas, for example, the rights of navigation, overflight, laying and maintenance of submarine cables and pipelines and fundamental oceanographic research. *Nor has there been established any precedence or priority of coastal state rights and jurisdiction in regard to the rights following from the traditional high seas freedoms of other states*.' ILA, *supra* note 332, p. 307. Emphasis added.

[1205] *ibid.*, p. 305.

[1206] *Infra*.

within its territorial sea and, *so far as the development of the natural resources of the sea is concerned*, its competence in the Exclusive Economic Zone is *equivalent to that it enjoys in the territorial sea*.'[1207]

In other words, as highlighted by Proelss, in the EEZ, sovereign rights constitute an '*extract* of the *broader concept of sovereignty'* which *functionally* applies to the EEZ for the *limited* scope of the purposes under Article 56(1)(a),[1208] encompassing both legislative and enforcement jurisdiction.[1209] To put it differently, these sovereign rights exist but only insofar as they are linked to the exploration, exploitation, management and conservation of the living and non-living resources within the EEZ. Having provided a general definition of 'sovereign rights' (which will be useful also when delineating the regime of the CS), it is now the turn to discuss the matters to which such rights apply.

Under Article 56(1), these sovereign rights are allocated to coastal states to' explore and exploit, conserve and manage' the natural resources. As highlighted in the literature, exploring and exploiting likely refer to the non-living natural resources of the sea of the waters, soil and subsoil, whereas conserving and managing is mainly conceived with regard to the living ones (disciplined in Articles 61-7).

It is interesting to notice the different treatment accorded, on the one hand, to conservation and management, on the one hand, and the protection and preservation of the marine environment on the other, which *ex* Article 56(2)(iii) is merely subject to the jurisdiction of the coastal state, as detailed in Part XII UNCLOS.[1210] These issues -and in particular, the question of whether and under which norm coastal states may exercise criminal jurisdiction over environmental crimes of international concern perpetrated in their EEZ- will be more thoroughly discussed after the conclusion of the illustration of coastal state competencies under Article 56.

Under Article 56(2)(i), coastal state jurisdiction in the EEZ also extends to 'the establishment and use of artificial islands, installations and structures' and (ii) marine scientific research.[1211]

[1207] ICJ, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment 24 February 1986, Dissenting Opinion of Judge Oda, Para. 124, p. 230. Emphasis added.
[1208] In this sense FLEISCHER, C.A., 'Fisheries and biological resources', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 2, Dordrecht (1991), p. 1068.
[1209] PROELSS, A., 'Article 56', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 10, p. 425.
[1210] In particular Articles 210(5), 211(5), 211(6), 216, 218, 220, 234. PROELSS, *ibid.* para. 21, p. 429.
[1211] Hereinafter, MSR.

With regard to the latter, it is fairly easy to exclude, in general terms, the relevance of MSR from the viewpoint of criminal jurisdiction.

It should be highlighted that the definition of MSR is quite controversial and foggy as many activities labelled as MSR are mainly concerned with the exploitation of marine resources rather than their scientific investigation, as in the case of the *Japanese whaling industry*.[1212] It is not possible to address the issue of the definition and limits of MSR in the context of this discussion as it would entail opening a *can of worms* (both literally and metaphorically). To avoid such an inconvenience, for the sake of the present discussion the question of the criminal dimension of MSR will be investigated only with regard to MSR *stricto sensu*.

More than science itself, it is what to do with our scientific discoveries that can have a criminal dimension (unless considering the *ungodly* working schedule of many researchers as a *gross human rights violation*). Jokes aside, though, it appears that the *manner* in which the research is carried out is not irrelevant, as it may significantly impact the environment.

For instance, it is recognised that trawling and dredging for samples can cause significant damage to corals and the marine environment.[1213] With specific regard to hydrothermal vents, *e.g.* '[i[n situ experiments may introduce the alien elements of light and noise into these deep sea habitats and induce changes in water temperature. Pollution may also occur from biological debris and other biological material imported into the environment.'[1214]

Unfortunately, Article 246 UNCLOS (section XIII on marine scientific research) does not specify whether and which powers coastal states enjoy with regard to MSR,[1215] yet if environmental damage is caused by (or as a consequence of) MSR, can still coastal states act

---

[1212] *Ex multis,* SCHIFFMAN, H. S., Scientific research whaling in international law: objectives and objections. *ILSA Journal of International & Comparative Law*, 8(2)(2002), pp. 473-86; NUSSBAUM WICHERT, R., NUSSBAUM, M.C., Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission, *Journal of Human Development and Capabilities*, 18(3)(2017), pp. 356-69.

[1213] FREESTONE, D. 'Chapter 1. The Impact Of Human Uses On The Marine Environment Beyond National Jurisdiction', in Warner, R. (ed.), *Protecting the Oceans Beyond National Jurisdiction*. Leiden (2009), p. 14.

[1214] *Ibid.*, p. 20. See also WOKER, H., ET AL., The law of the sea and current practices of marine scientific research in the Arctic, *Marine Policy* 115(2020), p. 7: 'A […] legal challenge potentially arising from the current practices of marine scientific research is the risks these technologies pose to the marine environment, and how these can be regulated. […] Previously, *research activities have been noted to have significant effects on the marine environment, especially activities such as the periodic underwater release of acoustic signals, the seeding of iron, the experimental mining of ferromanganese nodules, the catch of whales, and the catch of Southern bluefin tuna*'. Emphasis added.

[1215] As noticed by Wegelein, state practice with regard to enforcement of national legislation relating to MSR is *remarkably* scarce. WEGELEIN, F.H.T., *Marine Scientific Research: the operation and status of research vessels and other platforms in international law*, Leiden (2005), p. 114.

under the rules of environmental protection? The combined reading of Articles 56(1)(iii) and 220(5) and (6) seems to suggest so,[1216] at least to a certain degree.

As it shall be seen very shortly, under Part XII UNCLOS coastal states have enforcement powers relating to the prevention, reduction and control of ship-source and other types of pollution. In this context, Article 220(5) and (6) allow coastal states to undertake physical inspections and institute proceedings against vessels navigating in the territorial sea or the EEZ responsible for having violated anti-pollution coastal state laws and regulations resulting in the causation of '*substantial discharge* causing or threatening *significant pollution* of the marine environment'[1217] and 'a discharge causing *major damage* or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone'.[1218] As made clear by the adjectives employed in the Convention,[1219] coastal state enforcement jurisdiction only extends to extreme or at least highly severe cases of environmental damage,[1220] those which appear to endanger or cause more significant lesions to coastal states' interests.[1221]

All in all, it appears that the threshold necessary to activate coastal state enforcement jurisdiction with regard to environmental damage in its EEZ may be hardly achievable by accidental damage caused in the course of MSR, hence it is fairly reasonable to exclude the relevance of MSR *vis à vis* coastal state enforcement jurisdiction in the EEZ.

Moving onto more practical issues -not that inquiring about the criminal potential of fellow researchers is deprived of any usefulness, as it may at the very least be a curious and perhaps often ignored point- the next question deserving to be examined is that of crimes involving *platforms and structures in the EEZ*.

The regime of coastal state jurisdiction over man-made structures in the EEZ is particularly intriguing and variegated. On the one hand, in fact, states have 'exclusive right to

---

[1216] I must say I am most grateful to my fellow Ph.D colleague and dear friend from the University of Milano-Bicocca Dr Andrea Longo for his invaluable suggestions on this issue. As always, our conversations have proven to be a great source of inspiration and learning.

[1217] Article 220(5). Emphasis added.

[1218] Article 220(6). Emphasis added.

[1219] As noticed in Nordquist's commentary, 'paragraph 6 deals with the same violations mentioned in paragraph 5'. 'Article 220', in NORDQUIST, M.H., ET AL. (eds.), *United Nations Convention on the law of the sea 1982: a commentary*, volume IV, Dordrecht (2002), para. 220.11(i), p. 301.

[1220] See HAMAMOTO, S., 'Article 220', in Proelss, A. et al. (eds.*), United Nations Convention on the law of the sea. A commentary*, Munchen (2017), paras. 12-3, pp. 1509-10.

[1221] In this sense POZDNAKOVA, A., *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution*, Leiden (2012), pp. 68-9.

[…] operation and use of: artificial islands, installations and structures for the purposes [*ex*] Article 56 and other economic purposes [and finally] installations and structures which may interfere with the exercise of the rights of the coastal State in the zone'.

The regime of coastal state jurisdiction over man-made structures in the EEZ is particularly intriguing and variegated. On the one hand, in fact, states have 'exclusive right to […] operation and use of: artificial islands, installations and structures for the purposes [*ex*] Article 56 and other economic purposes [and finally] installations and structures which may interfere with the exercise of the rights of the coastal State in the zone'. To these already broadly framed limits,[1222] the second paragraph of Article 60 adds that 'coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations'.[1223]

Interestingly, UNCLOS does not provide any definition of the non-natural elements above,[1224] but the literature has tried to fill this lacune. Walker, for instance, suggests that the term artificial island or offshore installation refers to an artificial structure built by humans that is used to search for or take advantage of marine resources in territorial seas, the EEZ, continental shelf, archipelagic waters, or ocean space under UNCLOS.[1225]

Papadakis, on the contrary, focused his attention on the permanence and immovable nature of artificial islands and installations as opposed to ships and other floating devices and

---

[1222] PROELSS, A., 'Article 60', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 13 p. 471.

[1223] In this sense CHURCHILL, LOWE, SANDER, *supra* note 9, p. 189.

[1224] KWIATKOWSKA, B., *The 200 Mile Exclusive Economic Zone in the Law of the Sea*, Dordrecht (1989), pp. 106-11.

[1225] Though they may also serve 'for other purposes, such as marine scientific research, tide observations, resorts or residences, air terminals, transportation centers, traffic control, etc'. '10. Artificial island, offshore installation, installation (offshore)', in WALKER, *supra* note 56, p. 104. In (comparatively) recent years, we have also witnessed the Chinese militarization and artificial expansion (when not directly the building) of artificial or semi-artificial islands in the South-China Sea with the dual purpose of facilitating the Chinese claims of sovereignty (and right of exploitation) over the waters surrounding these structures as well as their use as 'unsinkable aircraft carriers' in the context of the increasing tensions between China and the US (and their allies). See *ex multis* O'HANLON, M., China's Unsinkable Aircraft Carriers, *Wall Street Journal*, Opinion, 6 august 2016 https://www.wsj.com/articles/chinas-unsinkable-aircraft-carriers-1438880237; GEORGE, M., 'Maritime security', in Keyuan, Z. (ed.), *Routledge Handbook of the South China Sea*, Abingdon (2021), pp. 69 ff.; ASSOCIATED PRESS, China has fully militarized three islands in South China Sea, US admiral says, *The Guardian*, 21 March 2022 https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says. On the distinction between natural and artificial islands see OUDE ELFERINK, A., Artificial Islands, Installations and Structures, *Max Planck Encyclopedias of International Law*, September 2013, para. 4: 'An island that is reinforced with coastal defences in principle remains an island in the sense of Art. 121 UN Convention on the Law of the Sea and an artificial island does not become an island in the sense of Art. 121 if there is an accretion of land that is natural in origin. Islands that are newly formed by natural processes after human intervention in the natural environment will in principle fall under Art. 121. The distinction between an island and an artificial island may require complex assessments of law and fact.'

naturally formed islands.[1226] He, therefore, defined an artificial island as 'man made alluvion formed by placing soil and/or rocks in the sea which partakes of the "nature of the territory" […] a non-naturally formed structure. Permanently attached to the sea-bed and surrounded by water, which is above water at high-tide'[1227] and installations as 'man-made structures constructed from such other materials as concrete and steel, for example drilling platforms' [which] do not possess the same degree of permanence as the artificial islands'.[1228]

According to Rothwell, in the absence of any definition as to what can be considered as an artificial island under the UNCLOS, it is necessary to refer to the definition of *natural* island as it is assumed that, artificial or not, man-made islands must possess all the *characteristics of an island*.[1229] Installations and structures, on the contrary, may be either floating or fixed to the sea floor with legs.

To put it differently and admittedly in way less technical words, an artificial island is -similarly to a natural one- a continuous landmass rooted on the seabed emerging from the marine surface like a mountain. Platforms and structures may have pillars anchoring them to and lifting them from the seafloor in the way of umbilical cords, or they may even be floating devices maintained in a specific location without having the navigating characteristics of a ship.[1230] If

---

[1226] The distinction between artificial islands and installations, on the one hand, and 'floating islands' or other floating devices has been underlined by Lallemant-Moe, as the latter remain under the common regime of ships, whereas all the permanently soil-anchored structures and similar contraptions fall under coastal state jurisdiction. LALLEMANT-MOE, H.R., Le régime juridique des îles flottantes, entre fantasme et réalité en Polynésie française, *Énergie-environnement-infrastructures* 7(2017), pp. 26-9.

[1227] Although it would appear that, at least with regard to permanence, the Chinese-built artificial islands in the contended waters of the South China Sea would not be as permanent as described by Papadakis, since according to Western sources, '[r]umours suggest the new islands' concrete is crumbling and their foundations turning to sponge in a hostile climate. And that is before considering what a direct hit from a super-typhoon might do.' 'China is resorting to new forms of bullying in the South China Sea', *The Economist*, 5 October 2019 https://www.economist.com/asia/2019/10/03/china-is-resorting-to-new-forms-of-bullying-in-the-south-china-sea.

[1228] PAPADAKIS, N., *The international legal regime of artificial islands*, Leyden (1977), p. 6.

[1229] ROTHWELL, D.R., *Islands and international law*, Oxford (2022), p.25. on the regime of islands see also MURPHY, S.D., *International law relating to islands*, The Hague (2017).

[1230] In this sense TREVES, T., The International Tribunal for the Law of the Sea and the Oil and Gas Industry , *Second International Oil and Gas Conference –Managing Risk –Dispute Avoidance and Resolution London 20-21 September 2007*, p. 6 https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/treves_oil_gas_200907_eng.pdf: 'Installations and structures (not defined, but to be read as artefacts having a lesser degree of permanence than artificial islands […])'. A potential definition may be found in the US Draft Article 28 (source 12) elaborated during the second session of the third UN Conference on the LOSC, whose para. 7 hold that '…the term "installations" refers to artificial off-shore islands, facilities or similar devices, other than those which are mobile in their normal mode of operation at sea'. (*reported in* 'Article 60', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993), para. 60.5 pp. 577-8). According to this definition, thus, installations and structures should be essentially immovable and linked permanently or ordinarily with the seabed. In this sense see the (although somehow tautological) definition of fixed platform contained in Article 1(3) of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed

distinguishing natural and artificial islands may not be easy, distinguishing between islands, installations, and platforms is comparatively intuitive.

Having provided a tentative definition of the artificial islands, installations and structures referred to in Article 60 UNCLOS, it is necessary to understand the most relevant crimes affecting them (or having some connections with them), with the usual *caveat* that this discussion is not and cannot be by any means comprehensive, as it would be impossible (or even unadvisable) for such an analysis to provide an in-depth examination of all the relevant cases.

In recent years, hydrocarbon-producing platforms have been victims of 'piratical' attacks in the Gulf of Mexico[1231] (within the Mexican EEZ)[1232] and in other regions of the world as the Nigerian Delta region,[1233] offshore oil facilities have been targeted by militias and other groups.[1234]

To be more precise, while these attacks have commonly been addressed in the media as *piratical attacks*, as remarked by the PCA in the *Arctic Sunrise* Annex VII Arbitration,[1235] '[a]n essential requirement of Article 101 [UNCLOS] is that the act of piracy be directed "against another ship"'(the ship2ship requirement). Hence, actions conducted by a *ship against a fixed platform or installation*, like those perpetrated in the Gulf of Mexico and the Nigerian Delta, should *not* be referred to as *piracy*.[1236] On the contrary, they may fall under the different crime of terrorism, with regard to which coastal states possess the necessary powers to take preventative

---

Platforms Located on the Continental Shelf (1988): '"fixed platform" means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploration of resources or for other economic purposes'.

[1231] 'Armed Pirates Rob Offshore Platform in Bay of Campeche', *The Maritime Executive*, 19 june 2022 https://maritime-executive.com/article/armed-pirates-rob-offshore-platform-in-bay-of-campeche.

[1232] FLANDERS MARINE INSTITUTE, *Maritime Boundaries Geodatabase: Maritime Boundaries and Exclusive Economic Zones* (200NM), version 11 (2019) http://www.marineregions.org/. https://doi.org/10.14284/386.

[1233] *e.g.* in 2016 the Niger Delta Avengers (NDA), a militia located in Nigerian Delta Region was allegedly responsible for blowing up the Chevron Valve Platform located some 40 nautical miles from the Escravos terminal, around the city of Warri (erroneously referred in the article as an area of high seas, falling instead in the Nigerian EEZ). See OKERE, R., SALAU S., OKAFOR, C., 'Militants blow up Chevron oil facility, vow more attacks', *The Guardian* (the Nigerian, not the British one) 6 May 2016 https://guardian.ng/news/militants-blow-up-chevron-oil-facility-vow-more-attacks/. This attack caused a significant oil spill in the surrounding waters with noticeable environmental consequences: KENT, S., OLSON, B., ' Chevron Shuts Platform Off Nigeria After Attack', *The Wall Street Journal* 6 May 2016 https://www.wsj.com/articles/nigeria-attack-shuts-chevron-oil-facility-1462533977. The issue of the environmental consequences of attacks against manmade structures in the EEZ will be subsumed in the general discussion on the jurisdiction concerning the protection of the marine environment.

[1234] As seen in the first chapter, the Gulf of Guinea is a notorious piracy hotspot. With regard to the particular situation of the Niger Delta see *ex multis* WATTS, M., Petro-Insurgency or Criminal Syndicate? Conflict & Violence in the Niger Delta, *Review of African Political Economy* 114(2007) pp. 637-60.

[1235] The case concerned a protest made by the *Arctic Sunrise*, a Dutch vessel chartered and operated by Greenpeace at the Russian offshore oil platform *Prirazlomnaya* situated within the Russian EEZ.

[1236] PCA, *Arctic Sunrise, supra* note 127, paras. 238 and 240-1 pp. 58-9.

measures when the 'circumstances […] give rise to a reasonable belief that the vessel may be involved in a terrorist attack on an installation or structure of the coastal State. [since s]uch an attack, if allowed to occur, would involve a direct interference with the exercise by the coastal State of its sovereign rights to exploit the non-living resources of its seabed.'[1237]

It is reasonable to infer that if coastal states have enforcement powers with regard to preventative measures relating to terrorism, they should also be able to exercise enforcement jurisdiction *ex post factum*. In this regard, it should be noticed that for decades states, scholars, and think-tanks have acknowledged the particular vulnerability of offshore platforms to terrorist actions and similar threats.[1238] To combat these phenomena, the corporations managing the offshore platforms have often resorted to hiring private military and security companies which, as stated in the 2022 *Report of the Working Group on the use of mercenaries as means of violating human rights and impeding the exercise of the right of peoples to self-determination*, have been linked to a panoply of HR abuses.[1239]

Gross human rights violations can also be found on the *jermals* scattered in the Indonesian waters, immortalised in the eponymous movie (2008).[1240]

A *jermal* is a wooden platform usually located many miles from the shores (in the EEZ of the coastal state) on which people work and live. As reported by the IOM, '[a]lmost all of the people found working on these platforms are boys under 14 years of age. These workers are deceptively recruited from villages and transported to the jermals, where they are subjected to excessive working hours and dangerous working conditions, as well as physical and sometimes even sexual abuse'.[1241]

[1237] *Ibid*. para. 314, p. 78.

[1238] See in this sense the dated but still very relevant 1988 Rand Corporation report: JENKINS, B.M., 'Potential Threats To Offshore Platforms', in *World air and seaport security and defence reference book 1989*, Cornhill (1988) https://apps.dtic.mil/sti/citations/ADA216866.

[1239] UN WORKING GROUP ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION, *Report of the Working Group on the use of mercenaries as means of violating human rights and impeding the exercise of the right of peoples to self-determination*, 4 August 2022, A/77/268, para. 14 p. 7. In recent years, according to some sources, the British Government has considered using abandoned oil rigs as asylum seekers offshore housing and processing centres, triggering perplexities with regard to the humaneness of such a treatment. O'CARROLL, L., Priti Patel to reveal proposals for offshore centres for asylum seekers, *The Guardian*, 5 july 2021 https://www.theguardian.com/uk-news/2021/jul/05/priti-patel-to-reveal-proposals-for-offshore-centres-for-asylum-seekers.

[1240] BHARWANI, R.L. (dir.), *Jermal*, Indonesia (2009): https://www.imdb.com/title/tt1190073/.

[1241] IOM, *Protecting migrants at sea*, Bangkok (2018), p. 14. See also: IOM, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, Jakarta (2016), pp. 35-41; CHOU, C.T., Child workers 'abandoned' at sea, *Al-Jazeera* 19 april 2007 https://www.aljazeera.com/economy/2007/4/19/child-workers-abandoned-at-sea.

Coming to the more substantial issue of what conducts may fall under coastal state jurisdiction (even though some of these aspects have already been touched,[1242] Article 60(2) provides that 'The coastal State shall have *exclusive jurisdiction* over such artificial islands, installations and structures, *including* jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.'[1243]

The open (or non-exhaustive)[1244] formulation[1245] of the matters subject to coastal state jurisdiction, together with the explicit statement of the exclusiveness of coastal state jurisdiction over manmade structures in the EEZ, is generally understood in the sense that coastal state jurisdiction: 1) is 'general and exclusive'; 2) it consists of legislative, enforcement and adjudicatory competences;[1246] 3) it encompasses all offences committed on or against artificial islands, installations and structures and the persons thereon.[1247] Even if this was not the case, it could reasonably be said that if crimes of international concern were committed on or against these elements,[1248] they would probably interfere with the coastal state's sovereign rights, as suggested in *Arctic Sunrise*.[1249] As it will be seen very shortly, though, applying the *Arctic Sunrise* (and the similar *Virginia G*) paradigms may not be too easy.

The question, in fact, is what can be said to have a 'direct interference with the exercise by the coastal State of its sovereign rights'? What can be said of having a *direct connection* with the activities under coastal state jurisdiction?[1250] Does this encompass human rights violations and/or other crimes? Before answering these questions (or at least attempting to do so), it is necessary to complete the discussion of coastal state sovereign rights and jurisdiction in the EEZ.

As previously said,[1251] in the EEZ coastal states have sovereign rights for the purpose of *conserving and managing* the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil and jurisdiction over the protection and preservation of the marine environment'.

[1242] See with regard to terrorism *supra* note 373.
[1243] Emphasis added.
[1244] PROELSS, *supra* note 357, para. 17, p. 473.
[1245] ELFERINK, A. O., The arctic sunrise incident: multi-faceted law of the sea case with human rights dimension, *International Journal of Marine and Coastal Law* 29(2)(2014), p. 255: 'The wording of Article 60(2) indicates that this jurisdiction is comprehensive.'
[1246] PAPANICOLOPULU, *supra* note 129, p. 145.
[1247] Article 60', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993), para. 60.15(d), p. 585.
[1248] In this sense QUINCE, *supra* note 318, pp. 192-3.
[1249] *Supra* note 373.
[1250] ITLOS, *Virginia G*, *supra* note 127, para. 215.
[1251] *Infra* para. 3.1 note 279.

Articles 61-7 clarify the content of coastal state jurisdiction relating to the preservation of their exploitable resources, with Articles 61-3 providing the general framework and the subsequent articles declining the general principles in specific regimes relating to highly migratory species, marine mammals, anadromous stocks, catadromous stocks.[1252]

Sedentary species, as it will be briefly seen in the next paragraph, fall under the regime of the continental shelf as, due to the fact that they live attached to the seabed, they are included in the regime of the latter.[1253]

With regard to the protection of the marine environment from or in connection with seabed activities or artificial islands, installations and structures, Article 208 not only allows, but imperatively requires coastal states to 'adopt laws and regulations to prevent, reduce and control pollution of the marine environment [...] pursuant to articles 60 and 80'.

Article 62(4), on the optimum utilization of the living resources in EEZ- provides a wide-ranging but non-exhaustive[1254] list of matters on which the coastal State may legislate in respect of foreign vessels.[1255]

The question is how wide, or elastic are the matters attributed to coastal state jurisdiction and in particular whether they may encompass human rights violations.[1256]

The 2014 ITLOS *Virginia G* judgment, distancing itself from the decision made by the Arbitral Tribunal in the *Filleting within the Gulf of St. Lawrence arbitration between Canada and*

[1252] See CHURCHILL, LOWE, SANDERS, *supra* note 9 pp. 550-7.

[1253] Paradigmatic in this sense is the *hilarious* saga of the *Chionoecetes opilio* (more usually referred to as *Snow Crab*) and the question of whether the pricey and delectable crustacean found in the cold waters of the North Atlantic can be considered a sedentary specie, since, as explained by Østhagen and Raspotnik, '[i]n non-legal gibberish: it does not swim but marches on the seabed' (a position shared, in legal terms, also by the Norwegian Supreme Court in 2019). On the *snow crab* saga see: ØSTHAGEN, A., RASPOTNIK, A., Crabtacular! Snow Crabs on their March from Svalbard to Brussels, *The Arctic Institute*, 24 April 2018. https://www.thearcticinstitute.org/crabtacular-snow-crabs-march-svalbard-brussels/; DOYLE, A., FOUCHE, G., Norway court rules in Oslo's favour in snow crab case with implication for oil, *Reuters* 12 september 2019 https://www.euronews.com/2019/02/14/norway-court-rules-in-oslos-favour-in-snow-crab-case-with-implication-for-oil; SCHATZ, V. J., The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes, *International Community Law Review*, 22(3-4)(2020), pp. 455-70. See in the same sense (with regard to the regime applicable to corals and similar creatures) PCA, *In The Matter Of The Chagos Marine Protected Area Arbitration (Mauritius/United Kingdom)*, Annex VII Arbitration, *Award*, 18 march 2015, para. 304, p. 118.

[1254] The lexical choice is particularly eloquent: may relate, inter alia. It appears to be a rather elastic provision. In the same sense ITLOS, *Virginia G, supra* note 127, para. 213, p. 68.

[1255] CHURCHILL, R., The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?, *The International Journal of Marine and Coastal Law*, 22(3)(2007), p. 385.

[1256] I am most grateful in this regard to His Excellency *Judge Jin-Hyun Paik* of the International Tribunal of the Law of the Sea, for the invaluable insights and stimulating discussions I have had the privilege of having had with him on the occasion of the 2023 Winter Course at the Hague Academy of International Law,

France (1986) case,[1257] adopted a different interpretation of Article 62(4) UNCLOS in the sense that 'it is apparent from the list in article 62, paragraph 4, of the Convention that *for all activities that may be regulated by a coastal State there must be a direct connection to fishing*.'[1258] Significantly, this position was reaffirmed in the 2015 ITLOS Fisheries Advisory Opinion.

The *Virginia G* case concerned the lawfulness anti-bunkering[1259] measures taken by the Guinea-Bissau on its EEZ when the bunkering is aimed at refuelling fishing vessels in the EEZ. In this context the Tribunal held that 'such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea.'[1260]

To put it differently, providing fuel to fishing vessels is considered an activity directly connected with fishing as (only) thanks to that fuel, the vessels can keep fishing, which, according to Scovazzi, is a perfectly logical and sensible conclusion.[1261]

In *Saiga,* the Tribunal had affirmed that '[a]rguments can be advanced to support the qualification of "bunkering of fishing vessels" as an activity the regulation of which can be assimilated to the regulation of the exercise by the coastal state of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. It can be argued that refuelling is *by nature an activity ancillary* to that of the refuelled ship.'[1262]

The question -which may admittedly sound somehow philosophical- is whether there are other activities enabling fishing to continue. The reference is, in this case, to what could be metaphorically described as the '*human engine'* of fishing, namely the fishers catching the fish and the crew managing the vessels without whom no fishing could reasonably take place.[1263]

[1257] *Case Concerning Filleting Within the Gulf of St. Lawrence Between Canada and France***.** Decision of 17 July 1986, *Reports of International Arbitral Awards*, Vol. XIX, para. 52, p. 257.

[1258] *Ibid*., para. 215 p. 68. Emphasis added. To support this argument the Tribunal relied on the definitions of "fishing" and "fishing-related" activities in several of the international agreements highlighting 'the close connection between fishing and the various support activities, including bunkering' as well as state practice. *Ibid.* paras. 216 and 218, pp. 68-9.

[1259] 'Bunkering means the provision of solid, liquid or gaseous fuel or of any other energy source used for the propulsion of the waterborne vessel as well as for general and specific energy provision on board of the waterborne vessel whilst at berth'. LAW INSIDER, Bunkering definition, https://www.lawinsider.com/dictionary/bunkering.

[1260] *Id*. para. 215.

[1261] SCOVAZZI, T., '15 ITLOS and Jurisdiction over Ships', in Ringbom, H. (ed.), *Jurisdiction over Ships,* Leiden, (2015), p. 398.

[1262] ITLOS, *M/V "SAIGA"* (Saint Vincent and the Grenadines v. Guinea), Prompt release, Judgment, ITLOS Reports 1997, para. 57, pp. 29-30.

[1263] Unless recourring to some unmanned vessels capable of fishing without any human intervention, which at the moment have not yet been developed. See in this regard: VANHÉE, L., BORIT, M., SANTOS, J., Autonomous Fishing Vessels Roving the Seas: What Multiagent Systems Have Got to Do with It, *AAMAS* (2018).

Article 1(d) of the *FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2009) -significantly quoted in the *M/V Virginia G* case[1264]- seems to point, at least implicitly, in this direction, as it includes within the (somehow extensive)[1265] definition of fishing-related activities 'any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, *as well as the provisioning of personnel*, fuel, gear and other supplies at sea'.[1266]

According to Goodman, this reference of the Tribunal to the FAO Agreement on Port State Measures seems to suggest that all these 'fishing-related activities' are considered to be 'directly connected' to fishing[1267] and as such attracted under coastal state jurisdiction, *including the issues relating to the personnel*. If so, it seems reasonable to argue that violations of workers' rights on board fishing vessels in the EEZ should be comprised under coastal state jurisdiction, as they are *directly connected or at least related to fishing*. In this sense, Papanicolopulu observes that '[w]hile 'labour law' is apparently a separate field from 'conservation of marine living resources,' and while the protection of workers' rights falls more easily within the first category, *it is nonetheless evident that the presence of workers on fishing vessels is instrumental and closely linked to fishing activities*.'[1268]

If, on the contrary, the direct connection were to be interpreted in a *more stringent and qualified way*[1269] than a mere relationship between the activity under examination and fishing, it could be possible to overcome the obstacle by inquiring (perhaps *ad abundantiam*) if a certain behaviour of conduct constituted the *conditio sine qua non* of the exploitative or explorative activities carried by the vessel in a specific case. To put it differently, a possible solution may be testing *whether the exercise of fishing was made possible by a certain activity* (*e.g.* the violation of workers' rights) *or at the very least whether that activity was the primary (or at least, one of the main) instruments for fishing*.

[1264] *Id.*, para. 216.

[1265] See: SCHATZ, V.J., Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State, *Gottingen Journal of International Law* 7(2)(2016), pp. 391-2.

[1266] Emphasis added.

[1267] GOODMAN, C., Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone, *The International Journal of Marine and Coastal Law* 33 (2018), p. 576.

[1268] *Supra* note 129, p. 142. Emphasis added.

[1269] As suggested by Judge Paik during our conversations at the Hague Academy of International Law.

To give an example: *'on board vessel X all the fishing was done in precarious, unsafe and barbarous conditions by fishers A, B and C who were forced to work in inhuman and degrading conditions etc. Would have been possible to catch some fish on board vessel X if A, B and C had not been subject to these abominable conditions? As an alternative, was the fish caught principally caught by the poor A,B and C or at least, did the fishing activity benefit from the work -in such dire circumstances- by A,B and C?'*

Adopting a rigorous case-by-case assessment, it would appear that any perplexity over the risk of an unreasonable extension of coastal state jurisdiction over not-so-clearly fishing directly connected activities should be addressed.

To keep the parallelism between bunkering and other potentially fishing-related activities, Judge Nelson, in his declaration attached to the *Virginia G* case argued that since bunkering in the EEZ is not dealt with in the Convention, it should fall under the mechanism of Article 59 UNCLOS - the *Castañeda formula*- dealing with these so-called residual rights.[1270] Under Article 59, if a 'conflict arises between the interests of the coastal State and any other State or States, the conflict should be *resolved on the basis of equity and in the light of all the relevant circumstances*, taking into account the *respective importance of the interests involved* to the parties as well as to the international community as a whole.'[1271]

Applying this *backup* provision[1272] to our case, it would be necessary to balance the protection of human rights -for instance- and the freedom of navigation or any other interest potentially conflicting with the extension of coastal state jurisdiction over violations of workers' rights. Again, any conclusion on the prevalence of coastal state jurisdiction or other conflicting jurisdictional bases should be based on the specific circumstances of the case.[1273]

Moving onto enforcement jurisdiction, under Article 73(1) coastal states may, in the *exercise of these sovereign rights* over the *living resources* of the EEZ, take such measures, *including* boarding, inspection, arrest and *judicial proceedings*, as may be *necessary to ensure compliance* with their laws and regulations as provided for in Articles 61-7 UNCLOS.

[1270] ITLOS, Virginia G, *Declaration of Judge Nelson*, para. 8 p. 132. As explained by GOODMAN, *supra* note 404, p. 566, '[i]n practice, however, this formula simply gives rise to an obligation to seek a solution, either through negotiation or dispute settlement'.

[1271] Emphasis added.

[1272] PROELSS, A., 'Article 59', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para, 3 p. 460.

[1273] *Ibid.* para. 8 p. 462.

The problem, as previously seen, is whether and to what extent can criminal proceedings ensure compliance with the violated norms. It is, differently put, the old good question of the effective impact of adjudication and punishment from the viewpoint of *general and special prevention*.

Coastal states enjoy broad authority when it comes to the enforcement of their sovereign rights within the EEZ (the verb 'including' reveals the open nature of the list in question),[1274] the subject matter of the enforcement power is limited -*functionally*- to the measures *necessary to preserve their sovereign rights to explore, exploit, conserve and manage the living resources* of the EEZ.[1275] In other words, enforcement powers over non-living resources are provided elsewhere (part VI UNCLOS), particularly in Article 220 (environmental enforcement).[1276] To put it in even more simple terms, Article 73 concerns only violations of fisheries laws and regulations[1277] and in their regards Article 73(3) provides that coastal State penalties 'may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.'[1278] No such limitation (at least, no prohibition of imprisonment), on the contrary, appears to be established with regard to pollution. [1279]

In spite of the limitations (either in the sense of the imposable penalties, in case of fisheries crimes, or of the gravity, in case of pollution), in conclusion, it is safe to assume that coastal state enforcement jurisdiction in the EEZ encompasses both IUU fishing[1280] and environmental degradation as well as, arguably, violations of workers' rights or human rights abuses perpetrated

---

[1274] 'Article 73', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993), para. 73.10(a), p. 794.

[1275] HARRISON, J., 'Article 73', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 6 p. 558.

[1276] *Supra* note 353-6 (potential environmental consequences derived from MSR).

[1277] CHURCHILL, LOWE, SANDERS, *supra* note 9, p. 545; QUINCE, *ibid.* p. 48;

[1278] As noticed in the literature, there appears to be a general aversion to imprisonment as a primary sanction against fisheries crimes amongst states since, it is argued, the confiscation of the assets appears to be a more effective deterrent measure. See *ex multis* ROSE, G., *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre*, Abingdon (2014), p. 126. In the same sense HARRISON, *supra* note 389, para. 16, p. 561.

[1279] POZDNAKOVA, *supra* note 357, p. 188.

[1280] In this sense ITLOS, Fisheries Advisory Opinion, Written Proceedings, *Written Statement Of The International Union For Conservation Of Nature And Natural Resources, World Commission On Environment Al Law, Specialist Group On Oceans, Coasts And Coral Reefs*, para. 24 p. 10: 'Article 62(4) further provides that "[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State." Failure to comply with those laws and regulations will constitute "illegal fishing" within the meaning of the IPOA-IUU.' As Article 73 provides enforcement jurisdiction over the violations of the rules and regulations adopted by coastal states pursuant to Articles 61-7, the conclusion is that they can exercise enforcement jurisdiction over IUU fishing.

against them due to the qualified link between these abuses and the operation and activity of the vessels.

The final issue to be discussed with regard to the EEZ concerns the limits of the applicability of the regime of the high seas and the availability of the enforcement powers established under the latter in the EEZ.

As previously seen,[1281] Article 58(2) UNCLOS extends the application of the regime of the high seas[1282] to the EEZ insofar as it is not incompatible with this part. As a result, the duties of flag states under Article 94, the rules on piracy and the other maritime crimes set forth in the regime of the high seas (together with the extra-UNCLOS rules developing this set of norms)[1283] equally apply to the EEZ.[1284] Like Article 58(2), therefore, it appears necessary and sufficient to refer to the considerations which will be developed in Paragraph 4.1.

3.3 The Continental Shelf

Since their birth with the 1945 Truman Declarations,[1285] the EEZ and the CS have presented significant overlaps and similarities[1286] widely acknowledged in the literature and case-law.[1287]

In particular, Oda, in his *Dissenting opinion to the Tunisia/Libya continental shelf case* (1982), underlined a common characteristic of both the CS and the EEZ: '[e]ither of the régimes – the Continental Shelf or the Exclusive Economic Zone - could be claimed to exist in parallel with the high seas régime, to which the exercise of jurisdiction under either - which at any rate is restrictive - might be regarded as an exception.'[1288]

So much the two regimes of the EEZ and the CS are parallel that it has been argued that they are *complementary* as they provide *together* coastal states rights and duties on the natural

---

[1281] *Supra* note 332.
[1282] *Infra* para. 4.1.
[1283] *Infra* chapter IV paras 3.1-2.
[1284] PROELSS, A., 'Article 58', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para, 21, p. 454; ATTARD CAMILLERI, *supra* note 334, p. 4
[1285] *Supra* note 305.
[1286] *Supra* note 6.
[1287] *Ex multis* KWIATKOWSKA, *supra* note 360, pp. 9-19; ROTHWELL, STEPHENS, *supra* note 4 pp. 125-6; TANAKA, *supra* note 4 pp. 173-82.
[1288] ICJ, *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), Judgment, I.C.J. Reports 1982, *Dissenting Opinion Of Judge Oda*, para. 126, p. 231.

resources of maritime areas under (functional) jurisdiction beyond the territorial sea.[1289] If a coastal state establishes an EEZ, the seabed of the continental slope becomes the seabed of the EEZ.[1290] If no EEZ is proclaimed, the superjacent water column belongs to the high seas *ex* Article 78(1) UNCLOS.[1291]

Significantly, the fact that the EEZ and the CS are two *species* of the same *genus* or that their discipline contains many similar or parallel provisions, as well as cross-references, has been highlighted by the ICJ in the *Libya/Malta Continental Shelf* (1985) case: 'Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.'[1292]

Under Article 77 UNCLOS (1)-(2) the coastal State exercises over the continental shelf *exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources*. Paragraph 4 clarifies what resources fall under coastal state jurisdiction in the CS, namely 'the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'.[1293]

While Article 77 UNCLOS does not define the extent of coastal state exclusive sovereign rights on the CS, it is fully accepted[1294] that such rights 'cover all rights necessary for and connected with the exploration and exploitation of the resources of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law'.[1295]

[1289] 'Part VI. Continental Shelf. Introduction', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993), p. 825.
[1290] GAVOUNELI, *supra* note 3, p. 4.
[1291] Even though, in practical terms, there would be comparatively limited differences between a water column comprised in an EEZ or in the high seas since, as seen (*supra* notes 420-1), Article 58(2) extends to the EEZ the application of the regime of the high seas.
[1292] ICJ, *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment, I. C.J. Reports 1985, para. 34, p. 33.
[1293] Similarly to the Roman principle *superficies solo cedit*. GAIUS, *Gai Institutionum Commentarii Quattuor,* II.73.
[1294] In this sense ROUGHTON, TREHARNE, *supra* note 63, pp. 153-4; CHURCHILL, LOWE, SANDERS, *supra* note 4 pp. 244-9.
[1295] ILC Articles concerning the law of the sea with commentaries," (1956) Yearbook of the ILC, vol. II, p. 297; reproduced in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993), p. 896; PCA, *Arctic Sunrise, supra* note 127, para. 283, p.

In this regard, it is useful to point out the observation made by Schwarzenberger on the impact of sovereign rights on the freedom of the waters superjacent the continental shelf, according to whom the sole way to ensure compliance with the rules thereof necessarily passes through the control of the surface of the sea.[1296] Admittedly, this idea not only reflects the most traditional -to put it in Oda's words, *orthodox*- approach to the freedom of the seas,[1297] but it also reveals its age and potential technological gaps as, since Schwartzenberger's reflections, a whole bunch of instruments have been invented ad put into action, from marine drones etc. Nevertheless, it remains a fact that to ensure the effectiveness of coastal state sovereign rights, it may be necessary to interfere to some degree with the freedom of navigation on the high seas (or, in the case of the EEZ, in waters subject to its regime) according to the principles of namely *reasonableness, proportionality and necessity*.[1298]

Finally, Article 80 extends *mutatis mutandis,* the application of Article 60 on manmade structures in the EEZ[1299] to the CS.[1300]

As the regime of the CS largely draws its principles from the rules applicable to the EEZ and the exploration and exploitation in the EEZ, and the CS presents common traits,[1301] it is reasonable to conclude that the jurisdictional rules connected to crimes of international concern relating to violations of coastal states sovereign rights committed in the EEZ may also be applied *mutatis mutandis* to the CS. In particular, it is reasonable to affirm that eventual environmental damages[1302] or human rights violations presenting a *qualified link* (or a *direct connection*, using the

70: 'The absence of any express enforcement provision in the Convention dealing with the right to enforce the coastal State's laws regarding non-living resources in the EEZ makes it necessary to recall that its Article 77, which deals with non-living resources in the continental shelf, largely reproduces the 1958 Convention on the Continental Shelf. That convention was itself based on draft articles prepared by the ILC.'

[1296] SCHWARZENBERGER, G., 'The fundamental principles of international law', in *Collected Courses of the Hague Academy of International Law* 87(1955), p. 364.

[1297] ODA, S., *International Control of Sea Resources, reprint with a new introduction*, Dordrecht (1989), p. 156.

[1298] *Supra* notes 127-8.

[1299] *Infra* para. 3.2,

[1300] With regard to the duty to prevent, reduce and control pollution arising or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures *ex* Article 208 UNCLOS, supra note 391.

[1301] For a comparative analysis of the regimes applicable to the EEZ and the CS see MCCONNELL, M.L., 'The law applicable on the continental shelf and in the exclusive economic zone', in Brown, K.B., Snyder, D.V. (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, Dordrecht (2012), pp. 453-67.

[1302] In this sense MAGGIO, A.R., 'Article 77' in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 20 p. 611.

lexicon of the *Virginia G* case[1303]) with violations of coastal state sovereign rights should fall under its jurisdiction.

2. Areas Beyond National Jurisdiction

The final section of this Chapter will explore the jurisdictional regime of the areas beyond national jurisdiction,[1304] namely the high seas and the Area, *i.e.* the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[1305]

For centuries states have contended the freedom of the (high) sea and purported to assert their dominion or jurisdiction on its elusive surface, not without a certain degree of success.

First, the recognition of the coastal state's rights on the *mare terrae proximum*, then a buffer zone for sanitary and custom reasons, hence the development of sovereign rights over the living and non-leaving resources of the cartesian diagram formed by the EEZ[1306] and the CS.

Before examining the discipline of these two partitions, two *caveats* are mandated. First, in this paragraph, we will not discuss the weaknesses of flag state jurisdiction (flags of convenience *etc.*), which will be addressed in Chapter V.

Second, the substantive definition of piracy and slavery has already been provided in Chapter II with regard to the meaning of slavery and the possibility of interpreting it as encompassing the conducts referred to as 'modern slavery'. For this reason, appropriate references to the relevant sections of the Dissertation will be provided in the footnotes when necessary.

[1303] *Supra* note 395.

[1304] Hereinafter, ABNJ.

[1305] Article 1(1)(1) UNCLOS. This regime has been integrated during the summer 2023 by the UN BBNJ treaty, not discussed in this Dissertation due to time constraints. See UNGA, 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 FURTHER RESUMED FIFTH SESSION NEW YORK, 19 AND 20 JUNE 2023, *Agreement 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* https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement.

[1306] ROTHWELL, STEPHENS, *supra* note 4, p. 82: 'the EEZ concept and regime established by the LOSC nonetheless represents a revolutionary development in the law of the sea, bringing around one-third of ocean space within coastal state jurisdiction. Not only does the EEZ effect an extension of coastal state resource rights seawards, it establishes a new capacity for coastal states to protect and preserve the marine environment from pollution and other environmental threats out to 200 nm'. Similarly, WOLFRUM, R., '7 The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective' in del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015), p. 90: 'This expansionist trend concerning the exclusive economic zones is motivated by the general desire to enhance the competences and jurisdictions granted to the coastal States, or even to add new competences not granted to them, and to restrict the freedoms granted to third States.'

4.1 The High Seas

With the introduction of the EEZ and the CS extending coastal state *functional* jurisdiction over vast expanses of waters worldwide, the maritime area not subject to any form of coastal state jurisdiction has dropped to 'only' 64 percent of the oceanic surface.[1307] No international waters can be found, *e.g.* in the Black Sea[1308] or the North Sea,[1309] and in many other enclosed or semi-enclosed seas, only fragments, or to be more precise, *interstices,* remain of the old *mare liberum*.[1310] Still, even though less than two-thirds of oceanic waters fall under the category of high seas, as seen in the previous paragraphs, the regime of the latter nevertheless applies also to the EEZ and the CS.[1311]

UNCLOS acknowledges this residuality of the high seas, defining them in Article 86 as 'all parts of the sea [...] 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.'[1312] This definition, however, is merely concerned with the *spatial* extension of the high seas, and it does not touch -if not indirectly- its characterising elements.[1313]

The *core* of the discipline of the high seas can be found in UNCLOS Articles 87 and 89, establishing the parallel principles of the *freedom of the high seas* and the *lack of any state's sovereignty* thereunto.

[1307] 'The High Seas, an Undisclosed World', *Connected Oceans*, 6 december 2021 https://oceansconnectes.org/en/the-high-seas-an-undisclosed-world/. The EEZ alone covers around 38 percent of the world's oceans, which were previously considered high seas. PEDROZO, R., Military Activities in the Exclusive Economic Zone: East Asia Focus, *International Law Studies* 90 (2014), p. 515.

[1308] ORTOLLAND, PIRAT, *supra* note 58, p. 88.

[1309] *Ibid.*, pp. 40-1.

[1310] With specific regard to the Baltic Sea and the treaty established three-miles wide corridor of high seas, *supra* note 67. See also with regard to the Red Sea ORTOLLAND, PIRAT, *ibid.* pp. 128-9.

[1311] PAPASTAVRIDIS, E., The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum* versus *Mare Clausum* Revisited, *Leiden Journal of International Law* 24 (2011), p. 53: 'Even if the extension of the high seas was limited by LOSC with the acknowledgement of a 12 nautical mile territorial sea (Article 3) and 200 nautical mile Exclusive Economic Zone (EEZ) (Article 57), the majority of the freedoms of Article 87 of LOSC, especially the freedom par excellence of navigation, are also applicable in the contiguous zone and in the EEZ subject to the rights of the coastal state therein. This is reflected, for example, in the recognition of the EEZ as a legally *sui generis* maritime zone. In addition, it is set forth in Article 78(2) of LOSC that 'the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States'.

[1312] In this sense ATTARD, D., MALLIA, P., 'the high seas', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014), pp. 239-40.

[1313] Since, as seen, coastal states possess either general either functional jurisdiction on the aforementioned zones, it is implicit that the high seas do not fall under any such kind of jurisdiction. on the high seas the sole jurisdiction is the one exercised upon vessels (and airplanes), never on the seas as such.

Under Article 86 UNCLOS, '1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.'

As it shall be seen in the next Paragraph, states can pursue their legitimate interests, but these must not interfere with the equally legitimate interests of (all) other states, i.e. the freedom exercised by states on the high seas is a *relative* one.[1314] It is *freedom of navigation*, not of devastating the environment (Article 194), trading slaves (Article 99) or engaging in piratical acts (Article 100) nor smuggling drugs (Article 108) or ignoring the basic principles protecting human life (Articles 94 and 98); *freedom of fishing*, not polluting or depleting the resources of the high seas (Section VII part 2).[1315]

[1314] O'CONNELL, D.P., *International law, second edition, Volume II*, Oxford (1984), pp. 796-9.

[1315] See TANAKA, *supra* note 3, p. 189: 'the freedom of the high seas is not absolute. As provided in Article 87(2), the freedom must be exercised 'with due regard for the interest of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area'. It is also to be noted that the freedom of the high seas may be qualified by specific treaties respecting such things as conservation of marine living resources and marine environmental protection'. See also ORREGO VICUÑA, F., 'The International Law of High Seas Fisheries: from Freedom of fishing to sustainable use', in Schram Stokke, O. (ed.), *Governing High Seas Fisheries. Then interplay of global and regional regimes*, Oxford (2001), pp. 44-6. Less clear, on the contrary, is the meaning of Article 88, providing that '[t]he high seas shall be reserved for peaceful purposes.' GUILFOYLE, D., 'Article 89 Invalidity of claims of sovereignty over the high seas' in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), pp. 682-6. ATTARD, MALLIA, *supra* note 452, p. 241: 'Article 88 UNCLOS, providing that the high seas are to be reserved for peaceful purposes, is supplemented by further provisions in the Convention such as Article 246 which provides that marine scientific research is to be conducted exclusively for peaceful purposes. More generally, Article 301 provides for the general obligation of peaceful purposes with respect to the exercise of any rights and duties under the UNCLOS. Using terminology reminiscent of the general prohibition of the use of force enunciated in Article 2(4) of the Charter of the United Nations, Article 301 states that, in the exercise of rights and duties under the UNCLOS, the State parties are to 'refrain from any threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the principle of international law embodied in the Charter of the United Nations'. While there is no comprehensive definition of 'peaceful purposes' in the UNCLOS, the Convention itself may have given an answer in Article 301, as mentioned. Its terms indicate that military activities consistent with the principles of international law embodied in the United Nations Charter, especially in Article 2(4) and Article 51, are not prohibited'.

The freedom of the high seas is also supported[1316] by the following Article 89, stating in *Grotian* terms that '[n]o State may validly purport to subject any part of the high seas to its sovereignty'.[1317]

In this context, under the ancient doctrine of the law of the sea,[1318] since the ships were considered floating fragments of the territory of the states which allowed them to fly their flags, the sovereignty exercised by the state upon its navigating territory appeared to be sufficient to prevent the high seas from becoming a *legal vacuum*[1319] or a 'no law's water'.[1320] Not only, but the freedom of the sea, coupled with the *sovereign equality* enjoyed by states on their vessels, *prohibited any act of interference*[1321] against them.[1322]

The *public order of the oceans*[1323] was ensured[1324] by, or at least built upon, its own rules and *primarily through the decentralised mechanism* of flag state jurisdiction.[1325] In this sense, it is worth to remind that the freedom of navigation does not belong or apply to the vessels *as such* but to the state which grants this freedom to the vessel by means of registration, remaining liable for the actions of its flagged-vessels (at least in UNCLOS).[1326]

[1316] See the ILC memorandum presented by the Secretariat, "Regime of the High Seas" (A/CN.4/32), 14 July 1950, p. 3: 'Freedom of the high seas implies the rejection of any effective sovereignty over the high seas, no matter what form it may take'.

[1317] 'The sea […] cannot be altogether proper unto any because nature doth not permit but commandeth it should be common'. GROTIUS, H (De Groot, H.), *The Free Sea. Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply. Edited and with an Introduction by David Armitage*, Indianapolis (2004), p. 26.

[1318] See note 469.

[1319] GUILFOYLE, D., 'Article 87 Freedom of the high seas', Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 3, p. 679

[1320] To be more precise Queneudec refers to it as '*un espace de <<non-droit->>*'. No law's water is a personal paraphrase of the expression 'no man's land'. QUENEUDEC, J-P., 'Pour un véritable ordre public de la mer', in Cudennec, A. (ed.), *Ordre public et mer. Actes du colloque de Brest, 12 et 13 mai 2011*, Paris (2011), p. 261.

[1321] The so-called *exclusive* flag state jurisdiction.

[1322] PAPASTAVRIDIS, *supra* note 132, p. 15.

[1323] On the definition and regime of the public order of the seas see, *ex multis*, KOH, T., *Building a new legal order for the oceans*, Singapore (2020).

[1324] MOMTAZ, D., '7. The High Seas', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 1, Dordrecht (1991), p. 400; OPPENHEIM, *ibid*.

[1325] *Ex multis,* O'CONNELL, D.P., *International law, second edition, Volume II*, Oxford (1984), p. 296; PAPASTAVRIDIS, E., The right of visit on the high seas in theoretical perspective: mare liberum versus mare clausum revisisted. *Leiden Journal of International Law*, 24(1)(2011), pp. 52-3; 'The maintenance of order on the high seas […] requires that some State has authority over vessels upon them (and over the conduct of persons aboard). Thus, given that 'the high seas are not subject to any national jurisdiction' nor 'centralised [governing] authority', the jurisdiction of a flag State over its vessels 'is the principal way in which order on the [high] seas is maintained.' GUILFOYLE, *ibid*., para. 1 p. 693.

[1326] ATTARD, MALLIA, *supra* note 452, pp. 246-7.

In Oppenheim's words, 'a certain *legal order* is created on the *high seas through the co-operation of rules of the Law of Nations with the rules of […] such states as possess a maritime flag.* […] this jurisdiction is not jurisdiction over the open seas as such but only over vessels.'[1327]

The almost absolute reliance on the action of flag states as guardians of the order of the high seas,[1328] in itself a consequence of the lack of any global authority governing the high seas,[1329] however, exposes the entire jurisdictional construction of the regime to some significant risks, and in particular, the risk that the *unwillingness or inability of flag states* to exercise effective jurisdiction upon its vessels may undermine the strength of the order of the high sea,[1330] as acknowledged in the Memorandum on the regime of the high seas.[1331]

Flag state jurisdiction (a corollary of the freedom of the high sea)[1332] *encompasses the full range of jurisdiction* (prescriptive, adjudicatory and enforcement) over the ships and the people within these ships, irrespectively of their nationalities.[1333] This is a particularly relevant point that deserves some attention as it may be wondered if a ship has a multinational crew -as it often happens-, it is registered in a nation different from that of the (legal or natural) person(s) who own it *etc.,* who should exercise jurisdiction on the vessel.

In *M/V Saiga (2),* the ITLOS acknowledged this potential *jurisdictional quagmire* affirming that 'the Convention *considers a ship as a unit*, as regards the *obligations of the flag State* with respect to the ship and the *right of a flag State*,' as otherwise 'undue hardship would ensue',[1334]

[1327] OPPENHEIM, *ibid.* para. 260, p. 594.

[1328] with the exceptions illustrated in the next Paragraph.

[1329] WARNER, R., 'The high seas regime', in Warner, R., Kaye, S. (eds.*), Routledge Handbook of Maritime Regulation and Enforcement*, Abingdon (2016), p. 20.

[1330] The so-called *flags of convenience.* On the rules concerning ships registration and the meaning of genuine link, *infra* Chapter V, para. 1.

[1331] *Supra* note 456, p. 4: 'If a ship on the high seas can only be called to order by its own national authorities as regards the proper use of the high seas, the resulting situation is far from satisfactory and definitely prejudicial to the general interest'. See MCDOUGAL, M.S., BURKE, W.T., *The public order of the oceans. a contemporary international law of the sea*, New Haven (1987), p. 797-

[1332] KIM, H.J., 'Section 6. La haute mer', in Forteau, M., Thouvenin, J.M. (eds.), *Traité de Droit Internationale de la mer*, Paris (2017), p. 425.

[1333] TANAKA, *ibid.*

[1334] While the Tribunal discussed the question of the legal status of a vessel from the viewpoint of determining who can seek reparation for loss or damage caused to the ship by acts of other States, this principle applies more generally to all the jurisdictional issues connected to the ship. ITLOS, *Saiga* (2), *supra* note 206, paras. 106-7, p. 48. See also: PCA, *Arctic Sunrise, supra* note 127, para. 170-2, pp. 39-40. See: PAIK, J., 'The Tribunal's Jurisprudence and Its Contribution to the Rule of Law', in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*. Leiden (2018), pp. 63-4.

ending the traditional understanding of flag state jurisdiction as a *kind of territorial* (floating) *jurisdiction*.[1335]

The rights and duties of flag states are provided in the *non-exhaustive* list contained in Article 94 UNCLOS.[1336] It requires flag states to '*effectively* exercise its jurisdiction and control in administrative, technical and social matters'.[1337]

The Convention does not define the meaning of administrative, technical and social matters. According to the literature, Article 94 operates on two complementary levels. On the one hand, it means that flag state competence encompasses criminal jurisdiction, as it serves as a precondition to exercising effective control over the crew.[1338] On another level, it opens the door to other flag State duties derived from different international treaties or customary international law.[1339]

Sticking to the activities expressly comprised under flag state duties, Article 94 dedicates particular attention to the issue of the *safety of vessels*.[1340] Its third paragraph, in fact, imposes coastal states to establish measures to ensure safety at sea, amongst which express reference is

---

[1335] 'the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. […] It is certainly true that-apart from certain special cases which are defined by international law-vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. […] A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so-called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.' PCIJ, S.S. *'Lotus', France v Turkey, Judgment, Judgment* No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), pp. 18-25. In this sense BONASSIES, P., 'La loi du pavillon et les conflits de droit maritime', *Recueil des Cours*, 128(III)(1969), pp. 514-6

[1336] There are clear linguistic indications of the openness of the list of duties attributed to flag states on the high seas: 'every state *in particular* [emphasis added] shall' (para. 2), 'every state shall take such measures […] necessary to ensure […] with regard, *inter alia*, to' (para. 3), 'such measures shall *include* [emphasis added]' (para. 4). *Ex multis* BARNES, R.A., 'Flag states', in Rothwell, D.R., et al. (eds.), *The Oxford Handbook of the law of the sea*, Oxford (2015), p. 314.

[1337] See in this sense Article 5 of the Geneva Convention on the High Seas, hereinafter HSC, (1958) establishing that '[t]here must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.

[1338] GUILFOYLE, *ibid.* para. 5.

[1339] ZWINGE, T., Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So, *Journal of International Business and Law* 10(2)(2011), p.301.

[1340] ATTARD, MALLIA, *supra* note 452, pp. 256-7.

made to 'the *manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments'*.

In other words, flag states must, at the very least, guarantee safe and decent working conditions on board vessels on the high seas. Not only, but under Articles 98 and 146, all states (including flag states) have a more general duty to protect human life both on the high seas and in the context of activities taking place in the Area[1341] and, as previously seen, states can recur to criminal jurisdiction to ascertain and sanction their violations.[1342] Great news… *in theory*.

There is, in fact, another and perhaps more critical principle in Article 94 UNCLOS: flag states 'shall *effectively* exercise its jurisdiction and control'. *Effectively is the keyword*.[1343]

In 1967, Meyers, reasoning on the requirement of effectiveness under Article 5 HSC (1958),[1344] affirmed that '[*e]ffective use of sovereignty* so as to observe international law is the content of every duty of a state. The exclusive sovereignty of the flag state over a ship and its users *implies the exclusive mandate to make use - of course effectively - of that sovereignty so as to cause international law to prevail on board. It is never strictly necessary to state the demand of effectivity explicitly. This demand is inherent in every duty*.'[1345]

In other words, the exclusiveness of flag state jurisdiction on the high seas found its logic and justification in the existence of an effective power on these ships. They were not abandoned to the *caprices* of the waves and the *unbridledness* (or anarchy) of the crew. Flag state jurisdiction was the guardian of the order of the seas. To use Gidel's eloquent words, *'la liberté de la navigation […] exige l'organisation de cette liberté ou tout au moins la certitude quel es atteintes à cette liberté ne demeureront pas systématiquement impunies .[…] la nationalité du navire est le moyen technique d'organiser la <<juridicité>> de la haute mer, c'est-à-dire de procurer l'establissement est le maintien d'un ordre juridique constantemment applicable à tout navire sur la haute mer.'*[1346]

[1341] PAPANICOLOPULU, I., 'The Law of the Sea Convention: No Place for Persons?', in Freestone, D. (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, Leiden (2013), p. 196.

[1342] *Supra* note 467. In this sense GAVOUNELI, *supra* note 3, p. 17, argues that flag states possess *all* powers and not just those relating to administrative, technical or social matters.

[1343] *Ibid.*, pp. 17-9.

[1344] *Supra* note 466. 'The High Seas Convention, […] the most widely accepted of the four treaties, claimed in its preamble to be "generally declaratory of rules of established principles of international law." Insofar as it was codificatory of custom, it represented rules that were binding on all states.' HARRISON, J., *Making the law of the sea: a study in the development of international law*, Cambridge (2011), p. 36

[1345] MEYERS, H., *The Nationality Of Ships*, The Hague (1967), p. 108. emphasis added. With respect to the notion of jurisdiction as a consequence of a state's *de jure* or *de facto* control over a situation, *supra* note 760.

[1346] GIDEL, G., *Le Droit International Public de la mer. Le temps de paix. Tome I, Introduction – la haute mer*, Chateauroux (1932), pp. 225, 230.

Articles 5 and 6 HSC made this point very clear through the *very order* in which it provided the various issues at stake. After having provided that it was up to the states to decide who should have flown their flags and upon which conditions, Article 5 reads that '*[t]here must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control*'.[1347]

This point is made particularly clear by O'Connell, who underlines that '*before* a state is justified in [...] permitting a ship to fly its flag, [...] there must be some *effective link* connecting the ship to the state'.[1348] The *genuine or effective link* and the *effective jurisdiction* of the coastal state, therefore, are not two separate elements, but together they provide the rationale and justification for the exclusiveness of jurisdiction *ex* Article 6 HSC.

As explained by the ILC, '[t]he absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State,'[1349]

A different order is followed under the UNCLOS, where Articles 91-2 and 94 lists: 1) Nationality, 2) Exclusive flag state jurisdiction, and 3) Flag state duties, although it is understood that Article 94 complements and strengthens the requirement of a *genuine link* under Article 91(1)[1350] as well as the principle of exclusive flag state jurisdiction under Article 92(1).[1351]

Eminent literature supports this idea of the continuity and interdependence of the genuine link and the effectiveness of flag state jurisdiction.[1352] Scovazzi, for instance, argues that the relevance of the genuine link is not limited to the genetic phase of the relationship between the

---

[1347] Emphasis added.

[1348] O'CONNELL, D.P., *International law, second edition, Volume two*, London (1970), p. 606. Emphasis added.

[1349] ILC, *Report of the International Law Commission covering the work of its eight session* (A/3159), Article 30, commentary, para. (1), *II YB ILC* 1956, p. 279, *reported in* 'Article 92' Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume III, Dordrecht (1995), para. 92.2, p. 123.

[1350] 'article 94', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume III, Dordrecht (1995), para. 94.8(a), p. 144.

[1351] *Ibid.*; GUILFOYLE, D., 'Article 94', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 6, p. 710.

[1352] PAPANICOLOPULU, I., '9 Due Diligence in the Law of the Sea', in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order,* Oxford (2020), pp. 160-1: 'States may—and often will— encounter problems in ensuring that every private actor under their jurisdiction complies with all its obligations all the time and everywhere. The reasons are twofold: first, practical considerations, such as the vastness of marine spaces, the scarcity of adequate means, and the remoteness of the vessel from a state's territory; second, the fact that often private actors are not directly bound by international norms. At the same time, not to hold states accountable at all would produce those situations of gross violations of fundamental norms that have characterised maritime operations in the past (and which have not been entirely eliminated even today).'

vessel and its flag state, '*but [it] continues in time, corresponding to the effective exercise of jurisdiction and control in administrative, technical and social matters over the ship*'.[1353] The responsibility for maintaining the order on the high seas, in other words, is the price or the counterweight to the freedom of the sea.[1354]

Yet, if flag states have a duty to exercise jurisdiction over their vessels, it is less clear whether there is a symmetric duty for vessels to fly a flag.[1355] As underlined by Singh and by older sources, the need for national registration of ships could be found in customary law as a consequence of the position of flag states as the (sole) guardians of the order of the high seas.[1356]

Apparently, this was the idea of the ILC with regard to the meaning of the formula 'ships shall sail under the flag of one State only' in the *travaux preparatoires* of the Geneva Convention on the High Seas,[1357] which remained unchanged in UNCLOS III.[1358]

This idea was, however, already criticised by Meyers, who argued that (in 1967), 'an obligation of registration [...] ha[d] by no means imposed in all states'.[1359] At the same time, whilst recognising the importance (*rectius,* the necessity) for ships to fly a flag to facilitate the identification of the vessel and the maintenance of the legal order of the high seas, he denied that flagless navigation was an internationally wrongful act *in itself* and that the mere flaglessness constituted a sufficient reason to interfere with the vessel in question. The only case when such interception would have been possible was when there was the suspicion that the vessel was engaged in the slave trade or piracy,[1360] under the doctrine of the right of visit.[1361]

[1353] SCOVAZZI, *supra* note 111, p. 221.

[1354] 'The legal order of the high seas is predicated primarily on the rule of international law that requires every vessel to possess the nationality of one state, which is, thus, responsible for maintaining the minimum public order of the oceans'. PAPASTAVRIDIS, E., The right of visit on the high seas in theoretical perspective: mare liberum versus mare clausum revisisted. *Leiden Journal of International Law*, 24(1)(2011), pp. 52-3; ROSEN, M. E., 'Chapter 2. Challenges to public order and the law of the sea', in Bekkevold, J.I., Till, G. (eds.), *International order at sea. How it is challenged. How it is maintained*, London (2016) p. 23.

[1355] In this sense MURDOCH, A., Chapter 7: Ships without nationality: interdiction on the high seas', in Galani, S., Evans, M.D. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?*, Cheltenham (2020), p. 166.

[1356] SINGH, N., 'International Law Problems of Merchant Shipping', in *Collected Courses of the Hague Academy of International Law* 107(1962), p. 40. In the same sense, *ex multis* VERZIJL, J.H.W., *International law in historical perspective*, *Part IV, stateless domain*, Leyden (1971), p. 40; O'CONNELL, *supra* note 466, p. 751; GIDEL, *supra* note 488, p. 83.

[1357] ILC, *Report of the international law commission*, eight session (A/3159), Articles concerning the Law of the Sea with commentaries 1956, Article 30, p. 279.

[1358] See in this regard Article 92' in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume III, Dordrecht (1995), pp. 123-7.

[1359] MEYERS, *supra* note 487, p. 155.

[1360] *Ibid.* pp. 163-4.

[1361] *Infra*, para. 4.1.1. in the same sense GUILFOYLE, D., 'Article 92', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017), para. 6, p. 702.

In this sense, it should be noticed that the -not into force- *United Nations Convention on Conditions for Registration of Ships* (1986), whilst seeking to strengthen the link between the vessels and their states of registration does *not* make the registration of ships a *compulsory requirement* for their sailing.

As previously mentioned,[1362] under Article 92(1) vessels are subject to exclusive flag state jurisdiction.[1363] The prohibition of interference is rooted in customary law,[1364] yet its absolute character is disputed in the literature.[1365] Persistent uncertainties also concern the question of whether the first part of the sentence under Article 92(1) may encompass customary exceptions[1366] and particularly *universal jurisdiction*. In this sense, as seen in Chapter III, whereas much has been written about universal jurisdiction,[1367] profound uncertainties remain on its regime, the conditions for its exercise (*absolute v. conditional* universal jurisdiction) non less than on the relationship between the criminal law rules on jurisdiction and the jurisdictional rules provided under the law of the sea.

To be more precise, it is not clear whether, when and upon what conditions a non-flag state may exercise adjudicatory or enforcement jurisdiction at sea[1368] under the customary

---

[1362] *Supra* notes 468-9.

[1363] See SINGAPORE, HIGH COURT OF THE REPUBLIC OF SINGAPORE, *Ng Kok Wai v Public Prosecutor*, [2023] SGHC 306, 27 October 2023.

[1364] See the Memorandum on the high seas, *supra* note 456, p. 5.

[1365] In the sense of the absolute character of the prohibition, *ex multis* KIM, *supra* note 470, p. 426. *Contra*, CHURCHILL, LOWE, SANDERS, *supra* note 4, p. 383; REULAND, R.C.F., Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, *Vanderbilt Journal Of Transnational Law* 22(5)(1989), p. 1167.

[1366] An *explicit reference* to customary law is provided by Article 221 with regard to *Measures to avoid pollution arising from maritime casualties*. Under this provision, it is established that '[n]othing [...] shall prejudice the right of States, *pursuant to international law, both customary and conventional*, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences,' defining maritime casualty as 'a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.' While the article in question only concerns powers connected to a specific range of problems (actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty), the norm, due to its the broad formulation, might likely have a significant ambit of application. Furthermore, it may be questioned whether, if this were the only reference to customary law, the absence of any other jurisdictional extension provided by customary law would rightfully entail its inapplicability to maritime issues.

[1367] It may be even provocatively suggested that perhaps too much has been written *on the subject of universal jurisdiction* and too little has been written *by using* such a jurisdictional base. *Infra* Chapter III.

[1368] CHURCHILL, LOWE, SANDERS, *supra* note 4, p. 381. emphasis added. in the same sense ITLOS, *The M/V "Norstar" Case (Panama V. Italy) List of cases: No. 25, Joint Dissenting Opinion Of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin And Lijnzaad And Judge Ad Hoc Treves*, para. 20, p. 6: 'a non-flag State is not excluded from extending, in

jurisdictional bases (objective territoriality jurisdiction, universal jurisdiction and the nationality, passive personality and protective principle).[1369]

4.1.1 UNCLOS Derogations To Exclusive Flag State Jurisdiction

Under UNCLOS[1370] there are three main sets of exceptions to flag state jurisdiction in relations to maritime crimes: 1) right of visit;[1371] 2) right of hot pursuit;[1372] 3) duty to cooperate to the fullest possible extent in the repression of piracy and arrest the persons and seize the property on board.[1373]

The right to visit is not *per se* an exercise of any adjudicatory jurisdiction,[1374] which is conferred by other norms, it is a measure which interferes with the freedom of navigation, allowing as it does the boarding of the ship, whose lawfulness strictly depends from the pursued purpose, *i.e.* inquire whether the ship is involved in piracy, slave trade *etc*.[1375] In a way, it could be said, it is *prodromic* to a *potential* adjudicatory activity which may or may not take place if there is no evidence of the ship's involvement in the crime.

---

conformity with international law, its *prescriptive jurisdiction* to the unlawful activities of foreign vessels or of persons on the high seas.' emphasis added.

[1369] GUILFOYLE, D., 'The high seas', in Rothwell, D.R., et al. (eds), *The International Law of the Sea*, Oxford (2010), p. 209. As noticed by Mendelson, however, not only is the interaction between treaty law and customary law complicated, but custom itself is not monolithic: 'what we have is a very complex interaction between treaty law (whether that of 1958 or 1982) and customary international law. The fragmentation is further accentuated by the fact that even the apparently general customary law is not entirely monolithic. This is partly because serious differences of interpretation can and do exist as to what the general customary rules require. This is due to some extent to the fact that states, in their interpretation of the rules, are (not surprisingly) motivated by self-interest. But sometimes it is genuinely difficult to determine with any certainty what the customary law on a particular subject requires.' MENDELSON, M.H., Fragmentation of the law of the sea, *Marine Policy* 12(3)(1988), p. 196. *Infra* Chapter IV, para. 2.1.

[1370] Article 92(1): 'save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.' See Kim, *supra* note 473, p. 428. In this Paragraph we will only consider the exceptions provided under UNCLOS, while the other extra-UNCLOS exceptions can be found in Chapter III.

[1371] Article 110.

[1372] Article 111.

[1373] Article 99; Articles 100 and 105.

[1374] GUILFOYLE, D., 'Article 110', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary, Munchen (2017)*, para. 11, p. 770.

[1375] FINK, *ibid.*: 'the purpose of the visit it is limited to certain types of situations, namely in the cases of piracy, slave trade, stateless vessels and unauthorized broadcasting. The purpose is clearly defined. It does not leave room to apply the right of visit to, for instance, drug-trafficking or suspected terrorist boarding operations. Third, *the authorities are limited to visit and search only. They do not expressly possess authority to attain seizures, or exercise enforcement jurisdiction. This authority still lies with the flag State. Based on reasonable suspicion, Article 110 UNCLOS only allows to board for the purpose of determining whether one of the four situations are ongoing.*' Emphasis added.

What needs to be discussed is the *rationale* behind the inclusion of certain crimes under Article 110.[1376]

Finally, before plunging into the abyss to discuss the regime of the Area, it is necessary to spend a few words on the scope of coastal states measures necessary to '*protect their coastline or related interests*, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.' (Article 221).[1377]

Remarkably, Article 221 does not make any explicit or implicit reference to criminal jurisdiction,[1378] as it generically mentions unspecified 'measures proportionate to the actual or threatened damage,' *i.e.* protective (or alleviative) *enforcement* measures.[1379] Nevertheless, it is still interesting to mention it as it affirms that *coastal*[1380] *states are allowed*, under conventional or *customary* (!) norms of international law to *enforce measures beyond the territorial sea*, *i.e.* in the EEZ, on the CS and even on the high seas.

The origins of this article can be traced back to environmental disasters such as the *Torrey Canyon* and the *Amoco Cadiz*,[1381] which required (or would have required in the second case) extraterritorial action to protect coastal states (or their interests, such as fishing, as exemplified by Article 221) from the deleterious consequences of maritime casualties, defined in Article 221(2) as 'collision[s] of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.'[1382]

[1376] With regard to piracy and slavery *infra* Chapter III.

[1377] Emphasis added.

[1378] 'A variety of measures have been taken by States confronted with a maritime casualty off their coasts. They include: the extreme action of setting the vessel and its cargo on fire by bombing the site; but also the decision to tow a disabled vessel further off the coast; to salvage the remaining oil of a sunken tanker or the wreck as a whole; to destroy the wreck; and to use oil booms to contain the spilled oil and skim it from the sea, or chemically dissolve it.' BARTENSTEIN, K., 'Article 221. Measures to avoid pollution arising from maritime casualties', in Proelβ, *supra* note 260, para. 17, p. 1519.

[1379] *ibid.*, para. 11, p. 1517.

[1380] *rectius*, 'in contrast to the usual specification of the quality of the States concerned by a given provision, Art. 221 simply refers to 'States'. They *take action as coastal States in their EEZ and as a sui generis category of States in the high seas*.' Emphasis added. *ibid.* para. 12.

[1381] KWIATKOWSKA, B., Creeping jurisdiction beyond 200 miles in the light of the 1982 law of the sea convention and state practice. *Ocean Development and International Law* 22(2)(1991), p. 173.

[1382] As explained by Tanaka, ''marine casualty' under Article 221 does not include a pollution incident resulting from dumping or operational pollution.' TANAKA, *supra* note 3, p. 361.

This Article, therefore, adds a significant exception to the exclusivity of flag-state jurisdiction linked to the necessity of preserving the environment.[1383] Concerning the kinds of actions allowed by Article 221, some authors have suggested a *potential inclusion of the prosecution of the perpetrators* of the disaster amongst the measures available to the affected or endangered states: 'The wording of Article 221 does not limit the measures available to a coastal State beyond its territorial sea in the same way as that of Article 220 (i.e., to requests for information and so on). Furthermore, its application is not conditional on the existence of any "clear grounds for believing" or "clear objective evidence" that a violation has occurred [...]. Article 221 *only requires the measures taken by the coastal State to be "proportionate to the actual or threatened damage". In principle, the enforcement measures* set forth in Section 6 of Part XII UNCLOS *may be employed* by States taking *preventive or punitive action* against foreign vessels and crews that allegedly have failed to conform to applicable national laws and regulations, or international rules and standards, intended to prevent marine pollution.'[1384]

The *indeterminacy of the measures*, therefore, although historically linked to physical/technical action on the vessel (*e.g.* the British bombing of the *Torrey Canyon* and the relative cargo to prevent the oil spill from reaching the Cornish shores)[1385] might be understood as encompassing legal actions against those responsible for having threatened or damaged the environment. In this sense, it is crucial to quote Papanicolopulu's reasoning on the lack of references to seafarers in the UNCLOS, since it is impossible (or at least patently illogic) to confer jurisdiction over a particular activity without -at least implicitly- including within it what has previously been called its '*human engine*',[1386] in more intelligible words, its authors.

'They are the people who run the ship and who actually commit any activity which the ship is considered as having performed: fishing, exploiting resources, navigating, transporting drugs, polluting the marine environment, and so on. Thus, states are given the right to exercise jurisdiction over the master and crew to prevent them from entering into conduct that is prejudicial for the state's or the common interest (such as the prohibition of pollution of

---

[1383] In this sense: ECJ, *Bosphorus Queen Shipping Ltd Corp. V. Rajavartiolaitos*. Reports of Cases before the Court of Justice and the Court of First Instance, Opinion Of Advocate General Wahl delivered on 28 February 2018, paras. 57-8, p. 12.

[1384] POZDNAKOVA, A., 'Part Three Criminal Enforcement Jurisdiction in Ship-Source Pollution Cases', in *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution*, Leiden (2013), pp. 146-7. Emphasis added.

[1385] BARTENSTEIN, *supra* note 462, para. 4, p. 1514.

[1386] *Supra* note 290.

the marine environment or the prohibition to fish without license); […] and provide sanctions for non-compliance with these prohibitions and duties.'[1387]

Even more notably, perhaps, Article 221 reaffirms that *'even countries that have ratified UNCLOS will be [still] governed by general principles of international law'*.[1388] This reference may suggestively open the door to a potentially unlimited range of subjects; hence its relevance *per se* and for the clues of permeability of the UNCLOS regime it (combined with other provisions) gives, which might *mutatis mutandis* encompass criminal jurisdiction in subjects or circumstances not foreseen by the *Constitution of the Oceans*.[1389] This interpretation appears to be strengthened by Articles 228 and 231 establishing the procedure to be followed to exercise jurisdiction over cases of maritime pollution. The procedure under Article 228(1) stipulates that '[p]roceedings to impose penalties in respect of […] pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings *shall be suspended* upon the *taking of proceedings* to impose penalties […] *by the flag State* within six months […] *unless* those proceedings relate to a case of *major damage to the coastal State* or the flag State in question has *repeatedly disregarded its obligation to enforce effectively* the applicable international rules and standards.'[1390] Such mechanism, in its essence, relies on an alternative -much like the *aut dedere aut judicare*- according to which either the flag state activates the necessary proceedings or it relinquishes *per facta* (in)*concludentia* the exercise of jurisdiction to the coastal state.

What if instead the flag state clearly manifests the intention not to act against its own vessel? Is it necessary to reach a minimum number of disregards (two, three…) to switch jurisdiction or on the contrary, is it sufficient for the flag state to adopt (even just once) behaviours clearly incompatible with its duties? The French Supreme Court *Carthage* case (2017)

[1387] PAPANICOLOPULU, I., '12 Seafarers as an Agent of Change of the Jurisdictional Balance', in Ringbom, *supra* note 237, p. 309.

[1388] NEWMAN, A., Abortions on the High Seas: Can the Coastal State Invoke Its Criminal Jurisdiction to Stop Them, *Ocean Yearbook* 17(2003), p. 514.

[1389] *Infra* Chapters 4-5.

[1390] Emphasis added. In this sense, as argued by Pozdnakova, '[a]rticle 97 does not make any explicit reference to damage to the marine environment caused by a collision or other incident of navigation and does not clarify what implications a discharge of harmful substances from a ship involved in such an incident may have for the jurisdiction of the flag State. The phrase "incident of navigation" clearly covers a collision involving one or more ships and can, by analogy, be extended to include a "maritime casualty" as defined in Article 221(2) UNCLOS'. POZDNAKOVA, *supra* note 470, p. 123. See: PAPANICOLOPULU, *supra* note 476, p. 306: 'Customary international law, as developed over past centuries, provides two criteria for establishing the state that can exercise jurisdiction over seafarers: nationality of the person and nationality of the vessel (in other words, the flag). This double criterion is endorsed, for example, in the UNCLOS rule relating to collisions at sea or other incidents of navigation'.

seemed to nod in this direction when it held that 'la convention internationale a *pour seul objet d'aménager les relations diplomatiques entre les Etats* signataires mais ne constitue pas, contrairement à ce que soutient la défense, une « garantie procédurale » dont le respect pourrait être invoqué devant les juridictions répressives par les personnes poursuivies'.[1391] The core of Article 228(1), according to the transalpine judges, is 'simply' to govern the relationships between states to prevent them from overstepping onto each others fins (pun intended).

Following this reasoning with specific regard to *crimes of international concern*, it may not be unrealistic, therefore, to assume that, for instance, coastal states may invoke Article 221 to prosecute individuals suspected of having caused massive environmental catastrophes as in the circumstances considered by the proposed Article 8-*ter* ICC Statute (*ecocide*).[1392]

4.2 The Area

Even though Part XI UNCLOS[1393] is devoted to the discipline of the International Seabed Area,[1394] its regime is delineated in many provisions around the Convention. In particular, its definition can be found in Article 1(1)(1), whilst Article 133[1395] only deals -confusingly[1396]- with the resources of the Area for the exclusive sake of Part XI.

The Area and its resources are *the common heritage of mankind*[1397] and, like the high seas, '[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.'[1398]

The meaning of the *common heritage of mankind* is somehow explained by Article 137(2) which clarifies that this formula entails that '[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act'. *Heritage*, therefore, is understood

---

[1391] COUR DE CASSATION, CHAMBRE CRIMINELLE - Formation restreinte hors RNSM/NA, 19 avril 2017, n° 16-82.111, ECLI:FR:CCASS:2017:CR00789.

[1392] "Article 8 ter. Ecocide. 1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.' *Infra* Chapter I, para. 6.2.

[1393] Articles 133-91.

[1394] Hereinafter, the Area.

[1395] For the purposes of this Part: (a) "resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules; (b) resources, when recovered from the Area, are referred to as "minerals".

[1396] SCOVAZZI, T., 'Article 133 Use of terms', in Proelβ, *supra* note 260, para. 2, pp. 936-7.

[1397] Article 136.

[1398] Article 137(1).

in *exquisitely practical, material and patrimonial terms* as opposed to cultural heritage, which has an immaterial component, a moral and metaphysical value. Historically, this regime dates back to the 1970s when the technological advancements of the previous decades had made accessible to human exploration and exploitation[1399] the extraordinary riches of the deep oceanic seabed and its subsoil.[1400]

To avoid controversies and ensure *fair and equitable access* to them,[1401] the US proposal,[1402] contrary to the CS where coastal states maintained sovereign rights, provided that the resources of the Area were defined as a *res communis,*[1403] and that nature of *res communis* was to be retained by suboceanic materials even after their extraction.[1404] To manage the *exploration and exploitation* by distributing *licenses*, a *trustee* -the International Seabed Authority-[1405] vested with

---

[1399]. On the development of the regime of the Area, see TANAKA, *supra* note 5, pp. 217-9; ORREGO VICUÑA, F., National Laws on Seabed Exploitation: Problems of International Law, *Lawyer of the Americas* 13(2)(1981), pp. 139-56.

[1400] See AUBURN, F.M., The International Seabed Area, *The International and Comparative Law Quarterly* 20(2)(1971), pp. 173-94.

[1401] 'Article 152 Exercise of powers and functions by the Authority 1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area. 2. Nevertheless, special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part shall be permitted.'

[1402] Essentially accepted in UNCLOS to the provisions of which we shall refer in this Paragraph.

[1403] See VÖNEKY, S., HÖFELMEYER, A., 'Article 136 Common heritage of mankind', in Proelβ, *supra* note 260, para. 14, p. 954: 'The concept of common heritage of mankind has its roots in the idea of universal solidarity, both in terms of time and space: not only does it address mankind as a whole, stating that certain resources are of common interest, but it also reaches from present to future generations. The evolution of the principle can be seen in the context of two tendencies currently reshaping public international law: on the one hand, the shift from an 'international law of coexistence' to an 'international law of cooperation'; and on the other hand, the development of a so-called 'third generation of human rights' attributing a legal position to groups of human beings rather than individuals. Furthermore, it is in line with the growing awareness of the significance of global environmental protection and its implications for mankind in general. The evolution of the common heritage principle is also associated with the emergence of the notion of 'global public goods'.'

[1404] *Contra*, TANAKA, *ibid*: 'Here the appropriation of the Area on the basis of the principle of sovereignty is clearly negated. At the same time, it should be noted that the appropriation of 'its resources' is also prohibited. It follows that there is no freedom to explore and exploit natural resources in the Area. On this point, the Area must be distinguished from res communis. Consequently, the two traditional
principles in the law of the sea are excluded in the legal framework governing the Area.'

[1405] Hereinafter, ISA. 'Article 157 Nature and fundamental principles of the Authority 1. The Authority is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area. 2. The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area. 3. The Authority is based on the principle of the sovereign equality of all its members. 4. All members of the Authority shall fulfil in good faith the obligations assumed by them in accordance with this Part in order to ensure to all of them the rights and benefits resulting from membership.' Its regime is delineated in Section 4, Arts. 156-85. See TANAKA, *supra* note 5, pp. 220-1.

international legal personality and immunity[1406] was to be established to ensure that all mankind could benefit.[1407]

Moving onto the issue of the jurisdictional regime of the Area and the potential intersection with crimes of international concern, Article 135 establishes that '[n]either this Part nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters.'

Echoing Article 78,[1408] this provision reaffirms the distinction between the regime of the soil and subsoil, subject to the discipline of Part XI UNCLOS, and the overlying water column, subject to the freedom of navigation of the high seas[1409]. As observed by Scovazzi,[1410] 'Art. 135 relates to a quite interesting situation from the legal point of view. It occurs where different regimes apply to two different vertical space layers, namely the seabed beyond national jurisdiction and the high seas'.

As with the CS, this parallel and dualistic regime of the soil and subsoil, on the one hand, and the water column, on the other, opens the door to several hermeneutic issues.

While the focus of the Area lies in the *exploration and exploitation* of the oceanic soil and subsoil beyond national jurisdiction, to reach the depth, extract the materials *etc.* it is necessary to employ vessels which, in the absence of any specific provisions, would fall under the ordinary discipline of the high seas.

The 2011 ITLOS Seabed Dispute Chamber's[1411] *Advisory Opinion*[1412], however, stated that the meaning of 'activities in the Area,' subject to the discipline of Part XI UNCLOS *ex* Article 139,[1413] is not limited to 'the recovery of minerals from the seabed and their lifting to the water

---

[1406] Articles 176-7.

[1407] 'Article 140. Benefit of mankind. 1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions. 2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i).' see also Arts. 153 ff.

[1408] *Supra* note 375.

[1409] As *per* the definition of Article 1(1)(1).

[1410] SCOVAZZI, T., 'Article 135 Legal status of the superjacent waters and air space', in Proelβ, *supra* note 260, para. 2, p. 946.

[1411] Hereinafter, SDC.

[1412] ITLOS, SEABED DISPUTE CHAMBER, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, p. 10.

[1413] 'Article 139 Responsibility to ensure compliance and liability for damage 1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or

surface',[1414] but it also encompasses '[a]ctivities directly connected with [...] the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea'[1415] and, *more significantly*, 'transportation within that part of the high seas, when *directly connected with extraction and lifting*, should be included in activities in the Area'.[1416]

On the contrary, the SDC excluded from it '"[p]rocessing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land',[1417] and '[t]ransportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates [...] as it would be incompatible with the exclusion of transportation from "activities in the Area" in Annex IV, article 1, paragraph 1, of the Convention'.[1418]

In synthesis, not only do water and soil follow different regimes, but on (or in) the water, different activities (and the vessels performing them) are subject to different rules under their *functional or ancillary link* with exploration and exploitation performed in the high seas.

In particular, among the various provisions applicable to the Area, three deserve to be cited and discussed.

Article 145 begins by reaffirming the fundamental imperative of preserving the environment.[1419] Curiously, the article uses a convoluted formula which avoids any reference to the recipient of the duty to take measures, concentrating all the attention on the task to be pursued:[1420] '[n]ecessary measures shall be taken in accordance with this Convention with respect

---

natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.'

[1414] *Supra* note 525, para. 94, p. 37.

[1415] *Ibid.* para. 95.

[1416] *Ibid.* para. 96, emphasis added.

[1417] *Ibid.* para. 95.

[1418] *Ibid.* para. 96.

[1419] VÖNEKY, S., BECK, F., 'Article 145 Protection of the marine environment', in Proelβ, *supra* note 260, para. 1, p. 1010.

[1420] *Ibid.* para. 19, pp. 1017-8: 'The first sentence of Art. 145 provides that necessary measures 'shall be taken', but does not state explicitly who is required to take such measures According to the wording used in the Declaration of Principles, the duty to take measures was still with the States ('States shall take necessary measures [...]'). In the Convention text, this wording changed into passive voice when the power of enacting rules and regulations, contained in the second sentence, was transferred to the Authority. The first sentence now indicates the establishment of a general obligation addressed to all relevant actors who can be bound by the Convention. These are, besides the Authority, primarily the States Parties. They are already obliged to protect and preserve the marine environment by, inter alia, Arts. 192, 194 and 209.'

to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities.'[1421]

As explained in the Commentary, the purpose of this article is two-fold. On the one hand, it serves to stipulate the *erga omnes* duty to protect and preserve the environment.[1422] On the other, it specifies the competence of the ISA with regard to adopting 'appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.'

As highlighted in the literature, 'Article 139(1)[1423] provides that states have the obligation to ensure that activities in the Area shall be carried out in accordance with Part XI […] The fact that states have to 'ensure' that the contractors will carry out the activities in the Area in accordance with Part XI means that states are under a due diligence obligation. In other words, states have to make an effort towards the result specified in Article 139 LOSC'[1424]. Similarly, also the ISA is under a *due diligence* obligation.[1425]

Articles 139(1) and 145 are further complemented by Articles 208 and 209: 'Pollution from seabed activities subject to national jurisdiction. Coastal States shall adopt laws and regulations to *prevent, reduce and control pollution of the marine environment* arising from or in connection with seabed activities subject to their jurisdiction […]. 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution'.[1426]

'Pollution from activities in the Area 1. *International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area* […]. 2. Subject to the relevant provisions of this section,

---

[1421] From an exquisitely *Kelsenian* perspective it might be argued that the exercise of *prescriptive* and adjudicatory jurisdiction in reaction to the (environmental) offences is an inescapable condition for their validity and effectiveness.
[1422] Article 192. General obligation.
[1423] *Supra* note 528.
[1424] PLAKOKEFALOS, I., 'Environmental Protection of the Deep Seabed', in Schechinger, J., Nollkaemper, A., Plakokefalos, I. (eds.), *The Practice of Shared Responsibility in International Law,* Cambridge (2017), pp. 385-6.
[1425] *Ibid.*: 'The obligation of the ISA towards the protection of the environment is also an obligation 'to ensure'. The ISA must 'adopt appropriate rules, regulations and procedures' to this end'.
[1426] Emphasis added.

States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.'[1427]

The question is what kind of measures may be taken to that aim and whether they may encompass the adoption and enforcement of criminal provisions. The formulation is deliberately vague, and the Commentary skips the issue of the potential state measures to focus -briefly- on the Authority Regulations on the various materials, which, however, do not contain any reference to criminal measures, *e.g.* regulation 33(5) of the *Regulations on prospecting and exploration for polymetallic sulphides in the Area* requires the adoption of the 'necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible, applying a precautionary approach and best environmental practices'.[1428]

Nevertheless, it would not seem unreasonable to conceive that amongst these measures, alongside technical ones, there might also be criminal provisions inflicting sanctions either directly for the damage or threat caused to the environmental damage or for the violation of environmental regulation.[1429] What appears from the text of the various regulations is the *necessity of the effectiveness* of whatever measure is adopted, the ascertaining of which should logically be attributed to some authority vested with punitive powers.

Moving onto the next article of the Convention, Article 146 provides one of the very few references to human rights in UNCLOS,[1430] as it establishes that '[w]ith respect to activities in the Area, *necessary measures shall be taken to ensure effective protection of human life*. To this end,

---

[1427] Emphasis added.

[1428] See Regulations 31-3 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013); Regulations 33-6 of the Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area (2010) and Regulations 33-6 of the Regulations on prospecting and exploration for polymetallic sulphides in the Area.

[1429] In this sense, GAVOUNELI, *supra* note 3, p. 144.

[1430] PAPANICOLOPULU, *supra* note 277, p. 869: 'Part XI is probably the one that gives more space to persons. They can exploit the resources of the Area, they can bring claims against the staff of the International Seabed Authority, and they can initiate and be parties to judicial proceedings before the ITLOS Seabed Disputes Chamber. Furthermore, Art. 137, para. 3, is probably the only provision in the entire Convention expressly attributing a right to persons, albeit with a negative formulation. However, the scope of these provisions is limited to Part XI and persons are not fully fledged actors, given that their capacity to act depends on the previous sponsorship of a state, with the latter also retaining ultimate responsibility to ensure compliance and liability for damage for the acts of persons sponsored by it.'

the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties'. Again the question: does this encompass criminal provisions?[1431] As explained in the Commentary, 'Art. 146 generally requires measures involving operational safety that serve the protection of human life. This includes an obligation to also prevent accidents of any kind, whether they have lethal effects or not.'[1432]

If the obligation is to enact measures protecting human life, it would be pretty reasonable to postulate that their violation might give rise to criminal responsibility. Still, the uncertain formulation of UNCLOS does not give many indications as to the sense to be given to these provisions. What Professor Scovazzi observes -quite magnanimously- of Article 149[1433] does not seem inappropriate also to describe Articles 145-6: '[i]t is difficult to find another instance where two excellent ideas are included in a treaty provision that is so poorly drafted from a textual and logical point of view'[1434]. As the proverb says, the *road to hell is paved with good intentions*.

Leaving, however, the issue of the *final judgment* to the finer discussions of the theologians and moving back to more *ephemereal* judgments, it should be wondered whether and what space may be possibly found for crimes of international concern in the Area.

To provide a tentative answer to this dilemma, it ought to remind the distinct regimes applicable to the soil/subsoil and the suprajacent water column and, within the latter, between activities considered as 'activities in the Area'.[1435] As previously seen, for all the actions not falling under this definition, the legal framework is the high seas one.[1436]

With regard to the 'activities in the Area', it appears that the ISA is only competent to set up the framework within which state measures should be adopted and to release the licenses

---

[1431] VÖNEKY, S., BECK, F., 'Article 146 Protection of human life', in Proelβ, *supra* note 260, paras. 2-3 pp. 1029-30: 'The systematic approach taken in the present provision resembles that of Art. 145: Similar to that provision, the first sentence of the present article stipulates a general requirement that 'necessary measures shall be taken' without expressly stating who bears that obligation. The second sentence provides that the Authority shall adopt rules, regulations and procedures to this end. Due to its rather broad wording, Art. 146 encompasses a wide array of measures, ranging from technical precautions in the design and operation of vessels and installations and training of personnel to the observance of safe working practices in seabed mining. However, since the Authority may only 'supplement existing international law as embodied in relevant treaties', its competence may be limited by a test of necessity'.

[1432] *Ibid.* para 10, p. 1032.

[1433] Article 149. Archaeological and historical objects. All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

[1434] SCOVAZZI, T., 'Article 149. Archaeological and historical objects', in Proelβ, *supra* note 260, para. 9, p. 1054.

[1435] *Supra* notes 529-32.

[1436] *Infra* Part II para. 2.1.

for the exploration and exploitation.[1437] In this context, no (criminal) enforcement jurisdiction is vested in the ISA,[1438] which remains, therefore, with states according to the principles applicable to the high seas.[1439]

Overall, it is hard to discuss criminal jurisdiction for crimes of international concern perpetrated in the Area. Whilst many crimes come to mind that may impair the exploration and exploitation of this maritime zone, or that committed in the context of the exploration and exploitation of this common treasure may affect the health, wealth and rights of many (from the *looting* of the seabed sources to *pollution* and *causation of dangerous earthquakes or tsunamis* or the more 'ordinary' *human rights abuses* that might take place on the vessels involved in the operations in the area), UNCLOS is silent *-or maybe just terribly cryptic-* on their jurisdictional regime, apart from the possibility of applying the law of the high seas to several conducts.

5. Conclusions

Since the very beginning of this Chapter it has become apparent the severe fragmentation and obsolescence of many provisions of UNCLOS. Starting from the *internal waters*, the Convention is remarkably silent with respect to their jurisdictional regime.[1440] Yes, we know that these waters are under coastal state sovereignty, then what? What are the concrete consequences of their subjection to coastal state sovereignty? In the absence of any positive specific indication from the UNCLOS, the most reasonable view -based on systematic considerations seeking to maintain coherence between the regime of the internal waters and the territorial sea- appears to be that with regard to innocent passage within a state's internal waters, its regime is assimilated to the territorial waters, hence the applicability of the regime of the latter also to innocent passage in internal waters.[1441] Yet even the regime of the innocent passage, although innocent, is not unproblematic. Whilst it is comparatively uncontested that the limitations of coastal state

[1437] TANAKA, *supra* note 5, p. 222: 'The task of the Authority is limited in essence to organise, carry out and control activities in the Area. Thus States may carry out other activities unconnected with the exploration and exploitation of the Area's mineral resources […] without the permission of the Authority.'
[1438] *Ibid.:* 'the Authority has legislative and enforcement jurisdiction with respect to activities in the Area'. Tanaka also argues that 'Concerning enforcement jurisdiction, Article 153(5) confers on the Authority the right to take at any time any measures provided for under Part XI with a view to ensuring compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract.' (*ibid.* pp. 222-3).
[1439] 'Article 139 confirms the supervisory role played by the states parties to the Convention in regulating the activities in the Area'. PLAKOKEFALOS, *ibid.*
[1440] *Supra* note 72.
[1441] *Supra* note 75-7.

sovereignty cease to exist when the vessels are not transiting innocently,[1442] it is not too clear under which circumstances can the passage be deemed to be not innocent. Arguably, every international crime, wherever and whenever committed, devastates humanity and shatters any hope of *peace, good order or security* both within and among states. *A fortiori*, an international crime committed within the *mare terrae proximus*, a narrow area subject to its sovereignty and adjacent to its land, necessarily reverberates upon the state, violating the peace, good order or security of the coastal state. Genocide, war crimes, crimes against humanity and the crime of aggression are the most violent manifest and blatant denials of the existence of peace, order and security.[1443] More controversial, on the contrary, is whether the mere passage of WMDs violates the peace, good order and security of the state.

To obviate these hermeneutic difficulties, it is suggested that by referring to crimes of international concern as a specific legal category encompassing the conducts currently falling (more or less felicitously) under international and transnational crimes would also precise the terms of *innocent passage in internal waters*, as its terms are not defined under the UNCLOS, thus overcoming the doctrinal perplexities as to the exact limits of coastal state jurisdiction.[1444]

Moving onto the contiguous zone, *drug trafficking and trafficking in persons* are commonly believed to fall under coastal state jurisdiction and there are indications of the potential extension of coastal state jurisdiction over the crimes of *terrorist financing or smuggling contraband* into a state for use in a terrorist offence as long as these crimes contravene the interests protected in the CZ. Interestingly, the intersection between IUU fishing and illegal migration may also extend coastal state powers over the former. Hence, it seems possible that states may arguably invoke the illegal presence of the involved individuals (or employed means) in the maritime zones under their sovereignty as jurisdictional leverage to repress other crimes beyond those listed under Article 33. Furthermore, as the contiguous zone forms an integral part of the EEZ, to which the regime of the high seas applies by virtue of the reference in Article 58(2) UNCLOS, there is strong support in the literature for the extension of the jurisdictional regime of piracy also to the CZ.[1445]

With regard to the EEZ, the open (or non-exhaustive) formulation of the matters subject to coastal state jurisdiction, together with the explicit statement of the exclusiveness of coastal state jurisdiction over manmade structures in the EEZ, is generally understood in the sense that

[1442] *Supra* note 135-6.
[1443] *Supra* note 148.
[1444] *Supra* notes 238-9.
[1445] *Supra* notes 276-82.

coastal state jurisdiction: 1) is 'general and exclusive'; 2) it consists of legislative, enforcement and adjudicatory competences; 3) it encompasses all offences committed on or against artificial islands, installations and structures and the persons thereon. Even if this was not the case, it could reasonably be said that if crimes of international concern were committed on or against these elements, they would probably interfere with the coastal state's sovereign rights, as suggested in *Arctic Sunrise*.

In particular, with respect to the possibility of extending coastal state jurisdiction over fishing-related human rights abuses, it is suggested testing *whether the exercise of fishing was made possible by a certain activity* (*e.g.* the violation of workers' rights) *or at the very least whether that activity was the primary (or at least, one of the main) instruments for fishing*.

To give an example: 'on board vessel X all the fishing was done in precarious, unsafe and barbarous conditions by fishers A, B and C who were forced to work in inhuman and degrading conditions etc. Would have been possible to catch some fish on board vessel X if A, B and C had not been subject to these abominable conditions? As an alternative, was the fish caught principally caught by the poor A,B and C or at least, did the fishing activity benefit from the work -in such dire circumstances- by A,B and C?'

Adopting a rigorous case-by-case assessment, it would appear that any perplexity over the risk of an unreasonable extension of coastal state jurisdiction over not-so-clearly fishing directly connected activities should be addressed.[1446] in conclusion, it is safe to assume that coastal state enforcement jurisdiction in the EEZ encompasses both IUU fishing and environmental degradation as well as, arguably, violations of workers' rights or human rights abuses perpetrated against them due to the qualified link between these abuses and the operation and activity of the vessels.[1447]

With regard to the Continental Shelf, as its regime draws its principles from the rules applicable to the EEZ and the exploration and exploitation in the EEZ, and the CS presents common traits, it is reasonable to conclude that the jurisdictional rules connected to crimes of international concern relating to violations of coastal states sovereign rights committed in the EEZ may also be applied *mutatis mutandis* to the CS. In particular, it is reasonable to affirm that eventual environmental damages or human rights violations presenting a *qualified link* (or a *direct*

[1446] *Supra* note 380.
[1447] *Supra* note 414.

connection, using the lexicon of the *Virginia G* case) with violations of coastal state sovereign rights should fall under its jurisdiction.[1448]

Finally, the high seas. Notwithstanding the evident fragility of the mechanism ensuring the persistence of public order on the high seas, in the absence of any national jurisdiction thereon, law and security are still maintained by flag states exercising exclusive jurisdiction over their vessels. Still, under five circumstances foreign warships or state-operated vessels may interfere with navigation on the high seas: the right of visit, of hot pursuit, the duty to prevent and punish the transport of slaves, the duty to cooperate to the fullest possible extent in the repression of piracy and arrest the persons and seize the property on board, and finally, the duty to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances and unauthorized broadcasting from the high sea.[1449]

A particularly debated issue of this regime is the meaning to be given to the slave trade and whether it can be understood to encompass contemporary forms of slavery. No diriment answers can, unfortunately, be found either in the legal literature or in state practice. Still, it appears that at least the *gravest and coercion-ridden cases of human trafficking*, can be considered to be amounting to slavery for the sake of the exceptions to exclusive flag state jurisdiction under Articles 99 and 100 UNCLOS.[1450]

[1448] *Supra* notes 435-7.
[1449] *Supra* notes 503-7.
[1450] *supra* note 587-9.

CHAPTER IV: *Capita selecta*. Flag state jurisdiction and the jurisdiction over ships without nationality, warships and the immunity of publicly operated vessels: putting the finger on the open sores of maritime jurisdiction

In Chapter IV, it has been illustrated in general terms the jurisdictional framework of the law of the sea as delineated by UNCLOS.

In this Chapter, we will explore more deeply -as '*capita selecta*'- the pivotal problem of the nationality of ships and the relating pathologies[1451] and the impact of ineffective flag state jurisdiction over conducts perpetrated on the high seas.

To better understand the underlying issues, in Paragraphs 1 and 1.1 the nationality of ships, its historical development, its function and operation[1452] in the dialectic between the genuineness of the link and the freedom to determine the conditions of registration of ships.

This will serve to introduce the challenges posed by the so-called *flags of convenience* and the potential jurisdictional loophole created by *purely nominal control* over ships flagged with flags of convenience and the remedies thereto, analysed in Paragraph. 1.1.1.[1453]

Next, it will be the turn of *ships without nationality*. As it will be seen, it is contentious whether there is a generally agreed duty for ships to be matriculated in some jurisdiction. In this sense, attention will be given to the regime of smaller vessels, as they are usually exempted from any such duty,[1454] with the ensuing question of whose jurisdiction they fall under.

Finally, this Chapter will very briefly consider the status of warships and other publicly operated vessels and the impact of the sovereign immunity attached to them on the repression of maritime crimes of international concern perpetrated on or in connection with these vessels.

1. Nationality of ships: notion and function

[1451] Namely flags of convenience, ships without nationality and the peculiar regime of publicly operated vessels. The expression 'publicly operated vessels' focuses on the purpose for which the vessels are used, rather than their ownership. In this sense MOMTAZ, D., 'The High seas', in Dupuy, R.-J., Vignes, D. (eds.), *A handbook on the New Law of the Sea*, vol. 1, Dordrecht (1991), pp. 408-9.

[1452] or rather, *how it should be supposed to be working*.

[1453] See PAPANICOLOPULU, I., '9 Due Diligence in the Law of the Sea', Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order*, Oxford (2020), pp. 154-61.

[1454] *Infra* Chapter III.

As seen in the previous Chapter, whereas the high seas do not fall under the land-centric paradigm of the territorial sovereignty of states, '*cela ne signifie pas qu'elle* [the sea] *constitue un espace échappant au droit*.'[1455]

The legalness[1456] of the sea, *i.e.* its public order, is ensured by the jurisdictional control exercised by the state of nationality of the ships (flag state jurisdiction).[1457]

The nationality of ships, therefore, serves two purposes. First, it is a means to maintain the *juridicité* or public order of the high seas; second, it is a guarantee to the *freedom of navigation* of vessels, as the nationality, as explained by Higgins, '*sert de base au contrôle et à la protection exercés par l'etat du pavillon*'.[1458] For centuries -even before the notion of nation and nationality emerged- states have claimed some form of rights over what they considered to be their ships[1459] due to their *vested interests in the operators, crew, passengers and cargo* of the vessels.[1460] At the same time, ships were protected by 'their state' against the interference of third states. This relationship, also referred to as the attachment or legal connection[1461] (*attachément*),[1462] existing between a ship and a particular state, is described in terms of *nationality*.[1463]

An attempt to establish common rules clarifying the requirements of this attachment had been made in 1896 by the *Institut de Droit International* in Articles 2-3 of the *Règles relatives à l'usage du pavillon national pour les navires de commerce* (1896), which provided that 'Pour être inscrit sur ce registre, le navire doit être, *pour plus de moitié*, la propriété: 1° de nationaux, ou 2° d'une société [...] dont plus de la moitié des associés personnellement responsables sont nationaux, ou 3° d'une *société par actions* [...] *nationale, dont deux tiers au moins des membres de la direction sont nationaux*; la même règle s'applique aux associations et autres personnes juridiques possédant

---

[1455] GIDEL, G., *Le Droit International Public de la mer. Le temps de paix. Tome I, Introduction – la haute mer*, Chateauroux (1932), p. 225

[1456] *Juridicité* in French.

[1457] In the same sense, HIGGINS, A.P., Le Régime juridiques des navires de commerce, *Recueil des Cours*, 30(V)(1929), p. 19.

[1458] *Ibid.* p. 20.

[1459] MEYERS, H., *The Nationality Of Ships*, The Hague (1967), p. 1.

[1460] *Ibid.* p. 25. In the same sense, HIGGINS, A.P., *ibid.*, p. 5.

[1461] 'Article 91', in Nandan, S.N., Rosenne, S., Grandy, N.R., United Nations convention on the law of the sea 1982: a commentary, volume III, articles 86 to 132 and documentary annexes, para. 91.9(a), p. 106.

[1462] ALOUPI, N., *La nationalité des véhicules en droit international public*, Paris (2020), paras. 19-20 pp. 27-8. With regard to the origins of the principle see: CANTILLON DE TRAMONT, P., *De la nationalité des navires*, Montauban (1907), pp. 16-7; GIDEL, *supra* note 3, pp. 72-3. Significantly, according to the dictionary, attachement may also mean *commitment* (at least when used with the preposition *à*): 'attachement', in CORRÉARD, M-H. et al. (eds.), *Le grand dictionnaire Hachette-Oxford. Français-anglais, anglais- Français*, Oxford (2007), p. 706.

[1463] The expression was already used in 1826 in the literature, diplomatic correspondence and legal practice. O'CONNELL, D.P., SHEARER, I.A., *The International Law of the Sea: Volume II (1st Edition)*, Oxford (1984), p. 751.

des navires. Article 3. L'entreprise (qu'il s'agisse d'armateurs individuels, de sociétés, ou de corporations) doit avoir son *siège* dans l'Etat dont le navire doit porter le pavillon et où il doit être enregistré.'[1464]

Along these lines, in the early 1900s, these principles had apparently been accepted (at least in the literature). For instance, Cantillon de Tramont listed four general conditions for the attribution of nationality, namely: 1) the place of construction of the ship; 2) the nationality of the captain and the officials; 3) the nationality of the crew;[1465] 4) the nationality of the owner.[1466] Similarly, according to Gidel, the conditions for the registration of ships were 1) the ownership of the vessel, 2) the origin/place of construction of the ship, and 3) the composition of the crew (of the majority thereof) or of the officers.

Despite this widespread convergence, though, almost forty years after the *Regles* of the Institut de Droit International, he still complained about the (persistent) necessity of adopting '*des règles entièrement uniformes* [...] *du moins d'opérer un rapprochement entre les lois des differents Etats quant aux principes fondamentaux de la matière*',[1467] revealing the existence of a variety of rules derived by the *freedom of states* to determine their conditions of registration of ships.[1468] It is, henceforth, on these rules (or rather, to the current rules) that the analysis must hereby turn.

1.1 Conditions of nationality: *freedom of states v genuine link*. An historical perspective

UNCLOS addresses the issue of the nationality of ships. As seen in the previous Chapter, the principle of the freedom of states to determine the conditions of registration of ships[1469] and the requirement of a genuine link between a vessel and its flag state are set by Article 91(1), which provides that '[e]very 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. [...] There must exist a genuine link between the State and the ship.'

[1464] Emphasis added.

[1465] According to this notion, the nationality does not attach to the object-vessel as such but rather to the 'navigating community' ('*comunità viaggiante*'), defined as the 'collectivity on board'. FLORIO, F., *Nazionalità della nave e legge della bandiera*, Milano (1957), pp. 23-5.

[1466] *Id*. p. 32.

[1467] *Supra* note 3, pp. 81, 231-3.

[1468] In this sense, OPPENHEIM, L., *International Law: a treatise. Vol. 1 -peace*, London (1937), p. 474: 'a state is *absolutely* independent on framing the rules concerning the claim of vessels to its flag'. Emphasis added.

[1469] PCA, *Muscat Dhows Case, France V. Great Britain*, 8 August 1905: 'generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants'.

The formulation of Article 91, nevertheless, is remarkably vague as to the limits and meaning of the freedom to determine the conditions and the *genuineness* of the link.

In the *travaux préparatoires* of the CHS, the ILC admonished against the excessive fragmentation and dematerialisation of the link between a vessel and its flag:[1470] 'national legislation on the subject must not depart too far from the principles adopted by the majority of States, which may be regarded as forming part of international law. Only on that condition will the *freedom* granted to States *not give rise to abuse* and to friction with other States. With regard to the national element required for permission to fly the flag, […] there must be a *minimum national element*.'[1471]

Still, the ILC considered that the 1896 Rules elaborated to this aim by the *Institut de Droit International* 'could not fulfil the aim it had set itself' since the proposed amended Rules would have faced a far too divergent state practice and the Rules would have therefore been of no use.[1472] As explained by McConnell, it was unclear whether the control effective control over the ship was *itself the genuine link* or rather *a result of a pre-existing genuine link*.[1473] Nevertheless, despite the failure to while in the end, the HSC remained vague with regard to the requirements of the genuine link, the ILC commentary did not refrain from providing some guidance as to the application of the principle: 'While leaving States a wide latitude […] the Commission wished to make it clear that *the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link* with its new State. *The jurisdiction of the State* over ships, *and the control* it should exercise […] *can only be effective where there exists in fact a relationship between the State and the ship other than mere registration* or the mere grant of a certificate of registry.'[1474]

This principle echoed the famous statement by the ICJ in the *Nottebohm* judgment, which, although originally conceived with regard to natural persons, was understood to embody a *general rule*:[1475] 'nationality is a legal bond having as its basis a social fact of attachment, a genuine

---

[1470] ATTARD, D., MALLIA, P., 'The High Seas', in Attard, D. J., Fitzmaurice, M., Martìnez Gutiérrez, M.A. (eds.), *The Imli Manual On International Maritime Law Volume I: The Law of the Sea*, Oxford (2014), p. 248.
[1471] ILC, *Articles concerning the Law of the Sea, with commentaries, 1956*, Article 29, Yearbook of the International Law Commission (1956), para. 1 pp. 278-9. Emphasis added.
[1472] *Ibid.* para. 3.
[1473] MCCONNELL, M. L., Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, *Journal of Maritime Law and Commerce*, 18(3)(1987), p. 438.
[1474] *Id.* emphasis added.
[1475] *Ex multis* OXMAN, B.H., Jurisdiction of states, *Max Planck Encyclopedias of International Law* [MPIL], november 2007, para. 19.

connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.'[1476]

According to Mann, jurisdiction should be recognised to *'the State which has a close, rather than the closest, connection with the facts, a genuine link, a sufficiently strong interest.* Yet not every close contact will be legally acceptable. The question *whether the contact is sufficiently close*, though a question of degree, *is answered, not by* the idiosyncrasies or *the discretion of States* […] *but by the objective standards of international law.* […] It must be possible to point to a *reasonable relation*, that is to say, to the absence of abuse of rights or of arbitrariness.'[1477]

In other words, any kind of jurisdiction should be based on a *qualified relationship* between the state and the natural or legal person over which it seeks to apply. *Easier said than done.*

Apparently, that was the idea inspiring the work of the III UN Conference on the Law of the Sea, which, rather than dwelling any further on the burdensome issue of the genuine link, the UNCLOS focused on other instruments to ensure a higher level of safety on board vessels, and particularly port state jurisdiction.[1478]

Even this system, however, was far from perfect. One of the greatest weaknesses of flag state jurisdiction was (and to an extent still is) represented by the phenomenon of the so-called *flags of convenience.*[1479]

[1476] ICJ, *Nottebohm Case* (second phase), Judgment of April 6th, 1955: I.C. J. Reports 1955, p. 23. ONG, D., 'International Law of the Sea', in Bowman, M., Kritsiotis, D. (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties,* Cambridge (2018), p. 738.

[1477] MANN, F.A., The Doctrine of Jurisdiction in International Law, *Collected Courses of the Hague Academy of International Law* 111(1964), pp. 46-7. Emphasis added.

[1478] *Ex multis* MOLENAAR, E. J., 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in Freestone, D., Barnes, R., Ong, D. (eds), *The Law of the Sea: Progress and Prospects,* Oxford (2006), pp. 192-3. *Infra* Chapter III. OUDE ELFERINK, A.G., 'The genuine link concept: time for a *Post Mortem*', in Dekker, I.F., Post, H.H.G. (eds.), *On the foundations and sources of international law*, The Hague (2003), p. 48.

[1479] Hereinafter, FoC.

Panama,[1480] Liberia and Honduras (often cited together as *Panlibhon*[1481]) during the 1950s acquired notoriety for their distinctly *relaxed* approach to the requirements for registration, requiring very simple (and inexpensive[1482]) formalities.[1483]

To address this phenomenon, in 1974,[1484] the UNCTAD was tasked with looking for mechanisms[1485] for clarifying, substantiating the ship-flag relationship and harmonising the requirement of genuine link and effective flag-state control over their vessels. The choice of this forum rather than the more seemingly natural ILC was due to the economic concern taken in FoCs, as states were primarily interested in understanding the *economic repercussions* (sic!) of the flags of convenience.

Differently put, it was not the *concern for the effectiveness of the jurisdiction or the veracity of the link* between the ship and the vessel that mattered, but rather the *unfair competition* between flags of convenience and other states…[1486]

During the negotiations of the 1986 *UN Convention on Conditions for Registration of Ships*[1487] there were different positions amongst states relating to the freedoms and the requirements for the attribution of nationality.

First, there were the states affected by the proliferation of the FoCs. They complained about the negative impact of open registries[1488] on the conservation of the expansion of their commercial fleets, their *loss of fiscal revenues* and the *subpar* living, security and working *conditions* allowed by these states. Then, there were the FoCs, whose economies greatly benefitted from the business of the FoCs and, finally, the countries providing the working force used in the

---

[1480] Originally used (in particular) by American-owned vessels to enjoy the protection of the nationality of a non-belligerent nation during WWII. BETTINK, H.W.W, Open registries, the genuine link and the 1986 convention on registration conditions for ships, *Netherlands Yearbook of International Law* 18(1987), p. 71.

[1481] See NAESS, E.D., *The Great PanLibHon controversy. The fight over the flags of shipping*, Epping (1972).

[1482] Also referred to as '*cheap flags*' (*billige Flaggen*) in the German-speaking world. SEIDL-HOHENVELDERN, I., 'Flags of convenience', in Vukas, B. (ed.), *Essays on the new law of the sea 2*, Zagreb (1990), p. 299.

[1483] BOCZEK, B.A., *Flags of convenience: an international legal study*, Cambridge (1962), pp. 4, 9-11; BETTINK, *ibid.* p. 72.

[1484] In parallel with the ongoing works on the law of the sea by the ILC.

[1485] *Ibid.* pp. 97, 99-109.

[1486] MOMTAZ D., La Convention des Nations Unies sur les conditions de l'immatriculation des navires, *Annuaire français de droit international* 32(1986), p. 716.

[1487] *Ex multis*, BOISSON, P., 'Law of maritime safety', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016), pp. 190-2.

[1488] *Infra* para. 1.1.1.

vessels flying FoCs, profiting from the wages of their nationals and not wholly against the FoCs.[1489]

These tensions *telegraphed* unto the texture of the Convention, which, despite its attempts to strike a compromise[1490] between divergent urges, *never came into force*.[1491] Furthermore, regardless of the *grand* enunciation of aims and purpose contained in Article 1,[1492] all in all, the Convention was hardly innovative or outstandingly remarkable.[1493]

Again, the genuine link, of which the Convention did not provide any explicit definition,[1494] relied on the traditional elements of the participation by nationals in the ownership and/or manning of ships,[1495] ownership of ships,[1496] manning of ships[1497] and the establishment of a ship-owning company (or subsidiary thereof) in the territory of the state.[1498] All these conditions, however, could be derogated by states which remained essentially free to establish their own rules. Furthermore, the (potential) sphere of application of the Convention did not encompass vessels under 500 *gross registered tons*.[1499]

Back to UNCLOS, the ITLOS has, on multiple occasions, sought to clarify the meaning of the genuine link and the rules concerning the registration of ships.

In *Saiga(2)*, the Tribunal, having reaffirmed that the '[d]etermination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State',[1500] held that 'the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to *secure more*

[1489] ASSONITIS, G., *Réglementation internationale des transports maritimes dans le cadre de la CNUCED*, Paris (1991), pp. 170-95.

[1490] Or rather, as explained by Momtaz, more simply to harmonize the conditions for the matriculation of ships. This was to be obtained through the adoption of very general and flexible criteria *de minimis* for the conferral of nationality. Each state would thus have been able to fix its parameters according to the necessities of its national policy (including the need for FoCs). MOMTAZ, *ibid.* p. 735.

[1491] SEIDL-HOHENVELDERN, I., *ibid.* p. 306.

[1492] 'For the purpose of *ensuring* or […] *strengthening the genuine link* between a State and ships flying its flag, and *in order to exercise effectively its jurisdiction and control* over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention.' Emphasis added.

[1493] *Ex multis*, GAVOUNELI, M., *Functional Jurisdiction in the Law of the Sea* (2007), p. 17; MCCONNELL, *supra* note 20, p. 449. *Partially contra* BENHAM, A., FAUST, P., Twilight of Flag State Control, *Ocean Yearbook* 17(2003), pp. 180-3.

[1494] MANSELL, J.N.K., *Flag State Responsibility Historical Development and Contemporary Issues*, Berlin (2009), p. 29.

[1495] Article 7.

[1496] Article 8.

[1497] Article 9.

[1498] Article 10. OUDE ELFERINK, *supra* note 23, pp. 48-50.

[1499] Article 2.

[1500] ITLOS, *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, Para. 65 p. 37.

effective implementation of the duties of the flag State, and *not* to establish *criteria* by reference to which the *validity of the registration* of ships in a flag State may be challenged'.[1501]

On the same line, in the *Virginia G* case, the Tribunal explained that 'article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.'[1502] In this sense, 'once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of "genuine link".'[1503]

The judges thus conflated the separate yet interrelated notions of genuine link and effective jurisdiction.[1504] The effectiveness of flag state jurisdiction is (or rather, should be understood as) a *duty of the matriculating state*, while the presence of a genuine link is (or should be understood as) the *precondition of such effectiveness*.[1505]

The flag state should ensure effective jurisdiction and control over the ship, but at the same time, it should also ensure that whenever it accepts a ship in its registry, that ship must have a connection with it.[1506] To put it in *amorous* terms, the flag and the ship must be engaged in a *serious and committed relationship*, not just a *casual one-night stand* limited to the bureaucratic moment of the registration.[1507]

[1501] *Ibid.* para. 83, p. 42. Emphasis added.

[1502] ITLOS, *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, Para. 110, p. 44.

[1503] *Ibid.* para. 113, p. 45.

[1504] In this sense CHURCHILL, R., LOWE, V., SANDER, A., *The law of the sea*, fourth edition, Manchester (2022), p. 469. The utter illogicality of the conclusion of the ITLOS is highlighted by Scovazzi, who explains that '[w]here the approach taken by the ITLOS appears unbelievable, speaking with all the due respect, is in the passage stating that "the purpose of the pro- visions of the Convention on the need for a genuine link between a ship and its flag state is to secure more effective implementation of the duties of the flag state".' According to the ITLOS, a rule in a treaty that provides for a quite precise obligation, as the rule on the genuine link does, would exist only for the benefit of the state that has allegedly violated the obligation in question. SCOVAZZI, T., '15 ITLOS and Jurisdiction over Ships', in Ringbom, H. (ed.), *Jurisdiction over Ships*. Leiden (2015), p. 386.

[1505] SCOVAZZI, *id.*: 'the ITLOS did not consider whether the wording "there must exist a genuine link between the State and the ship" is in itself sufficient to reach the conclusion that the existence of a genuine link is a condition for the recognition of the flag granted to ships by a given state. […] The consequence to be drawn from this assumption is that, if there is no genuine link, the right to grant the national flag cannot be exercised'.

[1506] The same idea can also be inferred from the *obiter* in *Virginia G* (*supra* note 46, para. 114, p. 45), in which the Tribunal held that 'there is no reason to question that Panama exercised effective jurisdiction and control over the M/V Virginia G *at the time of the incident*'. Emphasis added. What matters, according to the Tribunal, is that the flag state consistently exercises effective jurisdiction and control over the ship. CHURCHILL, LOWE, SANDERS, *supra* note 48, p. 470.

[1507] In this sense ROSELLO, M., *IUU Fishing As A Flag State Accountability Paradigm : Between Effectiveness And Legitimacy*, Leiden (2021), p. 32: 'It is now broadly accepted that the genuine link implies a domestic jurisdictional

Judge Wolfrum has beautifully explained this idea in his Declaration to the *Grand Prince* judgment: "*The registration of ships has to be seen in close connection with the jurisdictional powers which flag States* have over ships flying their flag and their *obligation concerning the implementation of rules of international law in respect to these ships*. […] The *subjection of the high seas to the rule of international law is organised and implemented by means of a permanent legal relation between ships flying a particular flag and the State whose flag they fly. This link not only enables but, in fact, obliges States to implement and enforce international as well as their national law governing the utilisation of the high seas*. The Convention upholds this principle. Article 94 of the Convention establishes certain duties of the flag State. Apart from that, article 91, paragraph 1, third sentence, of the Convention states that there must be a genuine link between the flag State and the ship. *This means the registration cannot be reduced to a mere fiction*'.[1508]

Significantly, along these lines, under Article III.3 of the *FAO Compliance Agreement*,[1509] '[n]o Party shall authorise any fishing vessel entitled to fly its flag to be used for fishing on the high seas *unless the Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities* under this Agreement in respect of that fishing vessel.'[1510]

The following Paragraph 8 reinforces this provision by establishing that '[e]ach Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be *of sufficient gravity as to be effective* in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities.'[1511]

As observed in the literature, these provisions operate in a complementary manner to *increase both the genuineness of the link and the effectiveness of flag state measures*.[1512]

---

nexus that is established by the municipal law of the flag State, and that it must be of sufficient quality to enable the flag State to exert prescriptive and enforcement control over the vessels flying its flag.'.

[1508] ITLOS, *"Grand Prince" (Belize v. France), Prompt Release,* Judgment, ITLOS Reports 2001, Declaration of Judge Wolfrum, para. 3. Emphasis added.

[1509] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993). The agreement is currently in force in 45 states.

[1510] Emphasis added.

[1511] *Id.*

[1512] ROSELLO, *supra* note 50, p. 48.

However, despite its merits, the *FAO Compliance Agreement* (1993) only provides a sectorial and limited exception to the more general and lax UNCLOS discipline for the registration of ships. Under the latter, ultimately, states are free to establish their conditions of registration according to their (if one may say so) *more or less genuine understanding of the necessary genuineness of the link*. To remain in the *amorous* metaphor, seriousness and commitment are open to interpretation. For some states, a written piece of paper and a fee is a sufficiently genuine link, while according to others the criteria are more stringent:[1513] a patent absurdity.[1514]

Beyond the irritatingly confused international framework of the nationality of ships, it is vital to verify -at least summarily- the current state practice.

In elementary terms, state practice follows two patterns. On the one hand, there are states usually defined as having *closed* or *national registries* (also referred to as national flags), *i.e.* limiting the conferral of their flag to ships owned by their nationals.[1515] On the other hand, there are the so-called *open or international registries* (also referred to as flags of convenience), which shall be discussed in the following Paragraph.

With regards to the former,[1516] for instance, the UK *Merchant Shipping (Registration of Ships) Regulations* (1993) require for a vessel to be matriculated in its registry, that it is either: a) a British national (or a national of the Commonwealth or other British overseas territories dependencies etc.) or at the very least a non-British national settled in the UK;[1517] b) bodies (legal entities) incorporated in the UK or the Commonwealth or British overseas territories etc.;[1518] or c) the majority of the ship is owned by any of the previously listed owners, or the owner has a qualified interest in the UK (it has places of business, representatives etc). In all these cases, it is

---

[1513] *Ex multis* STEPHENS, T., ROTHWELL, D. R., The LOSC framework for maritime jurisdiction and enforcement 30 years on. *International Journal of Marine and Coastal Law*, 27(4)(2012), p. 706.

[1514] 'Open registry states-states providing flags-of-convenience-are almost entirely free to self-interpret the genuine link requirement according to their own standards." Ironically, international efforts to close this critical loophole through the U.N. 1986 Convention on Conditions for Registration of Ships" failed because the intended addressees-by ultimately using this very same freedom to act autonomously were free to reject the treaty.' MARTIN, J., Transnational law of the sea, *Chicago Journal of International Law*, 21(2)(2021), p. 437.

[1515] MUKHERJEE, R., 'Ship Nationality, Flag States and the Eradication of Substandard Ships: A Critical Analysis', in Mukherjee, P.K., Mejia, M.Q., Xu, J. (eds.), *Maritime Law in Motion. WMU Studies in Maritime Affairs*, vol 8, Cham (2020), pp. 586-7; IMO, Registration of ships and fraudulent registration matters, https://www.imo.org/en/OurWork/Legal/Pages/Registration-of-ships-and-fraudulent-registration-matters.aspx#:~:text=Some%20countries%20only%20register%20vessels,for%20international%20trade%20at%20all.

[1516] For a more comprehensive analysis see MATLIN, D.F., Re-evaluating the Status of Flags of Convenience Under International Law, *Vanderbilt Journal of Transnational Law* 23(5)(1991), pp. 1039-42. *Infra*, para. 1.1.1.

[1517] Article 7(1)(a)-(ec).

[1518] Article 7(1)(ed)-(h).

believed that the state has a sufficient interest, a sufficiently strong link with the ship, to allow for its matriculation.[1519]

Similarly, under Article 143 of the Italian Navigation Code (*Codice della Navigazione*), a ship can be registered in the Italian naval registries: a) the ships owned, for a share higher than twelve *carats*[1520] by Italian or other EU states individuals, corporations or other legal entities; b) newly constructed ships or ships formerly registered in non-EU states, belonging to non-EU individuals, corporations or other legal entities directly undertaking the management of the ship through stable organisations established in the Italian or EU territory and managed by a responsible Italian or EU national residing in the place of registration of the ship.[1521] Other states include *inter alia*, France,[1522] the US,[1523] the Netherlands, China and Russia.[1524]

In 2021, over 70% of the world's shipping tonnage was registered under *flags of convenience*:[1525] in 2020, the Panamanian fleet (alone) comprised around 16% of the global shipping fleet, equal to the US and China combined.[1526]

The legal regime of the flags of convenience and the problems arising from them will be discussed in the following Paragraph. As a preliminary *caveat*, since the explosion of the phenomenon of the flags of convenience in the 1950s, an impressive amount of literature has been written on the topic. Rather than providing an impossibly comprehensive overview of it, in the following Paragraph, we will focus our attention on their main critical issues as they may be

---

[1519] LORENZON, F., CAMPÀS VELASCO, A., 'chapter 2: shipbuilding, sale, finance and registration', in Baatz, Y. (ed.), *Maritime Law* fifth edition, Abingdon (2021) pp. 96-8.

[1520] *Interestingly*, under Article 258 of the Italian Navigation Code, the ownership of Italian vessels is expressed in *carats* (like precious metals). As with gold, then, *twenty-four carats means a hundred percent of the shares* of the vessel, Hence, twelve carats means that at least one-half of the shares must be owned by Italian or EU nationals. On the rather curious etymology and history of the use of carats in maritime law, see (in Italian) AZUNI, D.A., *Dizionario Universale Ragionato Della Giurisprudenza Mercantile Del Senatore D. A. Azuni Nella Quale È Fusa La Nuova Giurisprudenza Dall'avvocato Giuliano Ricci*, Tomo I, Livorno (1834), p. 297; NEMNICH, P.A., *Comtoir lexicon in neun sprachen für handelsleute rechtgelehrte und sonstige geschäfftsmanner*, Hamburg (1803), p. 722.

[1521] See MANCUSO, R., *Istituzioni di diritto della navigazione, seconda edizione*, Torino (2008), pp. 145-6; LEFEBVRE D'OVIDIO, A., PESCATORE, G., TULLIO, L., *Manuale di diritto della navigazione tredicesima edizione*, Milano (2013), pp. 251-6.

[1522] Very similar to the Italian legislation, except for the absence of the *carats*. See Article L5112-1-3 of the *Code des transports* (as amended by the *Ordonnance n°2021-1843 du 22 décembre* 2021 - art. 18). BONASSIES, P., SCAPEL, C., *Droit Maritime*, Paris (2006), paras. 178-88, pp. 129-36.

[1523] US, *Code of Federal Regulations*, Title 46 Chapter I Subchapter G Part 67 Subpart C, in particular para. 67.30 (Requirement for citizen owner) and para. 68.5 (Requirements for citizenship under 46 U.S.C. App. 883-1.).

[1524] See LI, K.X., WONHAM, J., Registration of Vessels, *The International Journal of Marine and Coastal Law*, 14(1)(1999), pp. 146-9.

[1525] 'Largest Countries of Ship Registry' 2020, in RODRIGUE, J-P ET AL. (eds.) *The Geography of Transport Systems*, (2020) https://transportgeography.org/contents/chapter5/maritime-transportation/tonnage-country-registery/.

[1526] RAUNEK, Top 10 Largest Flag States in the Shipping Industry, *Marine Insight*, 6 april 2022 https://www.marineinsight.com/maritime-law/top-10-largest-flag-states-in-the-shipping-industry/.

functional to understand the overall regime of maritime jurisdiction over crimes of international concern.

1.1.1 Flags of convenience

Since the 1950s, the amount of scholarly and institutional production on the flags of convenience has been far too abundant to be surgically examined in this Paragraph.[1527]

In this ocean of sources, many definitions have been suggested for the flags of convenience.[1528] As of 2023, around forty registries are considered to be FoCs: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, Cambodia, Cameroon, Cayman Islands, Comoros, Cook Islands, Curacao, Cyprus, Equatorial Guinea, Faroe Islands, Gibraltar, Honduras Jamaica, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, Moldova, Mongolia, Myanmar,

[1527] See *ex multis* BOCZEK, *supra* note 31; CARLISLE, R., *Sovereignty for sale. The origins and evolution of the Panamian and Liberian flags of convenience*, Annapolis (1981); METAXAS, B.N., *Flags of convenience*, Aldershot (1985); MAESTRO CORTIZAS, A.M., *La nacionalidad de los buques y los pabellones de conveniencia*, Cizur Menor (2022); MURPHY, D.D., *The structure of regulatory competition: corporations and public policies in a global economy*, Oxford (2004), pp. 45-71; VUKAS, B., VIDAS, D., 'Flags of convenience and high seas fishing: the emergence of a legal framework', in Schram Stokke, O. (ed.), *Governing high seas fisheries: the interplay of global and regional regimes,* Oxford (2001), pp. 53-90; MENSAH, T.A., 'Flags of convenience: problems and promises', in Mejia, M.Q. (ed.), *Selected issues in maritime law and policy. Liber amicorum Proshanto K. Mukherjee*, New York (2013), pp. 25-52; DeSombre, E.R., *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea,* Cambridge (2006); SEIDL-HOHENVELDERN, *supra* note 31; O'CONNELL, SHEARER, *supra* note 10, pp. 755, 757-61; COLES, WATT, *supra* note 58, pp. 23-67; READY, N.P., 'Nationality, Registration and ownership of ships', in Attard, D. J., Et Al., *The IMLI Manual on the International Maritime Law, vol. II: Shipping law*, Oxford (2016), pp. 32-9; BRUWER, C., 'Blue frontiers: In pursuit of smugglers at sea', in Gallien, M., Weigend, F. (eds.), *The Routledge Handbook Of Smuggling*, Abingdon (2022), pp. 419-20; FERRELL, J.K., Controlling Flags Of Convenience: One Measure To Stop Overfishing Of Collapsing Fish Stocks, *Environmental Law*, 35(2)(2005), pp. 323–90; BROWNLIE, I., The Human Environment: Problems Of Standard-Setting And Enforcement, *Natural Resources Journal* 12(2)(1972), pp. 187–94; CALLEY, D. S., *Market Denial and International Fisheries Regulation*, Leiden (2011), pp. 9-74; CASAGRANDE, M., 'Flags of Convenience and Port State Control' in *Seaports in International Law*, Cham (2017), pp. 73-82; NEGRET, C., Pretending to be liberian and panamanian; flags of convenience and the weakening of the nation state on the high seas, *Journal of Maritime Law and Commerce*, 47(1)(2016), pp. 1-28; KIM, S., KIM, J., Flags of convenience in the context of the OECD BEPS package, *Journal of Maritime Law and Commerce*, 49(2)(2018), pp. 221-38; POWELL, E., Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience, *Annual Survey of International & Comparative Law*, 19(2013), pp. 263-300; DE CONING, E., Why Are Some Flag States Unable or Unwilling to Address IUU Fishing?, *International Community Law Review* 22 (2020), pp. 487–512; ANDERSON, H., The nationality of ships and flags of convenience: economics, politics, and alternatives, *Tulane Maritime Law Journal*, 21(1)(1996), pp. 139-70.

[1528] See *ex multis* MANSELL, J.N.K., *Flag State Responsibility Historical Development and Contemporary Issues*, Berlin (2009), pp. 95-6. On a model-based cluster analysis of the likeliness for a flag state to be a FoC, see FORD, J.K., WILCOX, C., Shedding light on the dark side of maritime trade – a new approach to identify countries as flags of convenience, *Marine Policy* 99(2019), pp. 298-303.

North Korea, Palau, Panama, Sao Tome and Príncipe, Sierra Leone, St Kitts and Nevis, St Vincent, Sri Lanka, Tanzania (Zanzibar), Togo, Tonga, Vanuatu.[1529]

In general terms, it is possible to define these flags as 'any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever reasons, are convenient and opportune for the persons who are registering the vessels'.[1530]

As summarised by Pinto, these advantages were of an essentially economic, fiscal and commercial character. They allow to avoid governmental restrictions and taxes, tolerate lower safety conditions *et similia*,[1531] The convenience of these ships is *eminently* ed intrinsically of a *capitalistic* nature, facilitating, from an eminently intrinsically capitalistic perspective,[1532] the movement of goods and diminishing the fiscal and bureau burdens *etc*.[1533]

Truth be told, that has not always been the case. Even though there had been traces of pre-WWII use of FoCs,[1534] a significant turning point (as with much of international law) and an exception in their development was WWII: by reflagging their ships (in particular) as Panamanians, the US were able to maintain their neutrality (up until Pearl Harbour), while supporting the UK in its struggle for survival against the Axis.[1535]

In the aftermath of WWII, the resumption (or, should I rather say, the explosion) of marine trade found in the availability of cheap and lax naval registries a major incentive for the expansion of their business. Several developing Countries (Liberia, Panama, Cyprus and Singapore) thus began a (*de*)regulatory competition to attract shipowners to their registries.[1536] *The laxer the better*,[1537] at least according to shipowners and FoCs states.[1538]

[1529] INTERNATIONAL TRANSPORT WORKERS' FEDERATION, Current registries listed as FOCs: https://www.itfseafarers.org/en/focs/current-registries-listed-as-focs.

[1530] BOCZEK, *ibid*. p. 2.

[1531] PINTO, R., Flags of convenience, *Journal de Droit International* 87(2)(1959), pp. 344-8.

[1532] In a critical perspective, VAN FOSSEN, A., Flags of Convenience and Global Capitalism, *International Critical Thought* 6(3)(2016), pp. 359-77.

[1533] *Ex multis*, YANNOPOULOS, G. N., The Economics of "Flagging Out", *Journal of Transport Economics and Policy*, *22*(2)(1988), pp. 197–207.

[1534] See in this sense CARLISLE, *supra* note 73, pp. 1-71; DIMITRIOU, E., Flags of Convenience and international law, *Thesaurus Acroasium*, 7 (1977), p. 535.

[1535] CARLISLE, *ibid*. pp. 73-97; LANGEWIESCHE, W., *The outlaw sea: A world of freedom, chaos, and crime*, New York (2004), p. 5.

[1536] See COUPER, A.D., '1. Historical perspectives on seafares and the law', in Fitzpatrick, D., Anderson, M. (eds.), *Seafarers' rights,* Oxford (2005), paras- 1.42-8, pp. 24-8.

[1537] MURPHY, *supra* note 73, pp. 48-58.

[1538] FoCs states have significant economic interests in the maintenance and expansion of their naval registries. It is widely recognised (with some *caveats*) that the economic dependency of many developing states pushed them towards the creation and enhancement of these regimes as a source of revenues for their economies. SEIDL-HOHENVELDERN, *supra* note 31, p. 302; ANDERSON, *supra* note 73, pp. 158-61; BARTON, J.R. Flags Of Convenience': Geoeconomics And Regulatory Minimisation, *Tijdschrift voor Economische en Sociale Geografie* 90(2)(1999), pp. 142-55.

In this Paragraph, we will concentrate on two critical aspects of FoCs regulations: a) t*he genuine link and the effectivity of flag state jurisdiction*; b) the regulations circumvented through the use of FoCs. The aim of this analysis is not to provide a comprehensive overview of the different interpretations and practices surrounding the principle of the genuine link applied to FoCs nor to surgically dissect the safety, labour and environmental regulations undermined by the FoCs.[1539]

Whilst the great majority of the contemporary literature expresses concern over the perceived lack of genuineness of the link between FoCs and their ships and, as a consequence, lack of effective jurisdiction, this idea has not been historically uncontested.

Dismissing the alleged lack of effectiveness of FoCs, Pinto -reasoning in fervently positivist terms- argued that since Article 5 of the HSC did not set any criteria beyond the rather evanescent requirement of a 'genuine link', every state was free to do as it pleased in order to confer its nationality upon vessels. Consequently, he claimed that '[i]f effective jurisdiction and control do not govern conditions on which the right to fly the flag may be granted, they must then be a consequence of this grant. *Control must follow the flag.*' [1540]

According to him, control[1541] cannot be determined *in abstracto,* and it is 'fair to require a specific and concrete proof of such a lack of effective jurisdiction'.[1542] Hence, in his view, there is a *presumption of the effectiveness of flag state jurisdiction* (even of the FoCs) as a consequence of its statehood and the consequent state sovereignty. Seeking to disregard the effectiveness of a FoC

Interestingly, the OECD 1973 report on the FoCs refers the case of Costa-Rica which repealed its legislation as a FoC since 'only a fraction of the ships under her flag had paid even the low registration fees that she required and that certain were being used for illegal activities'! OECD study on flags of convenience. *Journal of Maritime Law and Commerce*, 4(2)(1973), p. 235. On the abuses perpetrated on seafarers on FoCs, see *ex multis* CHAPMAN, P.K., *Trouble on board. The plight of international seafarers*, Ithaka (1992), pp. xxiii, 87-132.

[1539] See *ex multis* WALTERS, D., BAILEY, N., *Lives in Peril: Profit or Safety in the Global Maritime Industry?*, Basingstoke (2013); CARTNER, J.A.C., FISKE, R.P., LEITER, T.L., *the international law of the shipmaster*, London (2009), pp. 169-87, 199-227; CADDELL, R., THOMAS, R. (eds.), *shipping, law and the marine environment in the 21st century: emerging challenges for the law of the sea – legal implications and liabilities*, Witney (2013); ILO, *Report V(2), substandard vessels, particularly those registered under flags of convenience*, international labour conference 62nd (maritime) session (1976); RASPAIL, H. (ed.), *les droits de l'homme et la mer, actes du colloque du Mans, 24 et 25 mai 2018*, Paris (2020); CALLEY, *supra* note 73 pp. 47-74; MUKHERJEE, R., 'Ship nationality, flag states and the eradication of substandard ships: a critical analysis', in Mukherjee, P.K., Mejia, M.Q., Xu, J. (eds.), *Maritime law in motion*, Cham (2020), pp. 581-606; ANTOLA, E., the flags of convenience system: freedom of the seas for big capital, *Instant Research On Peace And Violence IV*(4)(1974), pp. 201-5; KINDRED, H.M. ET AL., in Chircop, A., McDorman, T.L., Rolston, S.J. (eds.), *The future of ocean regime-building. Essays in tribute to Douglas M. Johnston*, Leiden (2009), pp. 319-610; PAPANICOLOPULU, I., *International Law and the Protection of People at Sea*, Oxford (2018).

[1540] PINTO, *supra* note 76, pp. 356-62. Emphasis added.

[1541] *Rectius*, the lack thereof.

[1542] *Ibid.* p. 366.

for its lack of effective jurisdiction over a ship amounts to a denial that the flag state is a genuine state.[1543] This is a fairly isolated position nowadays.

Reflecting the trend associated with the widespread and systematic use of FoCs in IUU fishing[1544] and other criminal activities, FoCs are sometimes referred to as *flags of non-compliance*. More in general, there is a vast catalogue of appellatives used with regards to the FoCs highlighting their feebleness: 'pirate flags', 'bogus maritime flags', 'fictitious or nominal flags',[1545] '*banderas fantasma*' *etc.*[1546]

Looking at the criteria for matriculation in Panama and Liberia (the two world's largest commercial fleets),[1547] it is easy to grasp the frailty of the nexus between FoCs and the vessels subject to their jurisdiction and *control*.

Under Article 3 of the Panamian *Ley General de Marina Mercante* (2008), *'[q]ualquier persona, natural o jurídica,* sin requerimiento especial de nacionalidad o domicilio, *podrá registrar una o más naves de su propiedad en la Marina Mercante, cumpliendo con los requisitos y formalidades establecidos para tal fin.*'[1548]

As long as the shipowner has a Panamanian resident agent of the ship and presents the documents required by the law (Article 27 of the *Ley General*), anyone can register his or her ship in Panama.[1549] Equally *inexigent* are the rules concerning the nationality of the crew. Under Article 266(1) of the *Código de Trabajo* (1995), '*[t]odo capitán de nave panameña dedicada al servicio internacional está en la obligación de mantener en lista de tripulación* no menos del 10 por ciento de marinos de nacionalidad panameña *o de extranjeros casados con panameñas o con hijo o hijos de madre panameña, siempre que dichos marinos estén domiciliados en la República de Panamá.*'[1550]

[1543] *Ibid.* pp. 367-8.

[1544] See, *ex multis*, CCAMLR, *Resolution 19/XXI* (Flags of non-compliance)(2002); BOISTER, N., *An introduction to transnational criminal law,* Oxford (2018), pp. 202-3*;* PETROSSIAN, G.A. ET AL., Flags for sale: An empirical assessment of flag of convenience desirability to foreign vessels, *Marine Policy* 116 (2020), p. 2; KURUC, M., 'Monitoring, Control and Surveillance Tools to Detect IUU Fishing and Related Activities', in Vidas, D. (ed.), *Law, technology and science for oceans in globalisation: IUU fishing, oil pollution, bioprospecting, outer continental shelf*, Leiden (2010), p. 102. As seen in the previous Chapters, IUU fishing is one of the most devastating crimes perpetrated at sea and an incubator for a great deal of serious human rights abuses.

[1545] BOCZEC, *supra* note 31, p. 6

[1546] MAESTRO CORTIZAS, *supra* note 73, pp. 188-9.

[1547] Just to give an idea of the magnitude of the phenomenon of the FoCs and the relevance of the considered states, as of 2017 Panama and Liberia accounted, respectively, for 8.64% and 3.54% shares of the world total, amounting to the 18.44% and 30.23% of the world dead-weight tonnage. WATT, COLES, *supra* note 58, p. 273.

[1548] Emphasis added.

[1549] WATT, COLES, *ibid.*, pp. 222-9.

[1550] Emphasis added.

Still, being Panama a comparatively small and scarcely populated state in which it may be impossible to find a sufficient number of local crew, Article 266(3) and (4) explicitly provide the derogable nature of the manning requirement: *'La Dirección General de Trabajo, previa comprobación de la falta de marinos panameños disponibles en la República de Panamá, podrá autorizar que se altere temporalmente el porcentaje anterior. Cuando por cualquier circunstancia ajena al capitán del barco, se altere en la tripulación el porcentaje de marinos panameños, el cónsul de la República en el puerto respectivo concederá el permiso de zarpe, previa la comprobación de la falta de marinos panameños en dicho puerto.'*

Only a tenth of the crew should be composed of Panamanian nationals. When even this very low threshold cannot be reached, though, a(n even) lower percentage of Panamanian seafarers can be accepted. A Panamanian vessel, in other terms, could be entirely held and manned by foreigners with no personal connection with Panama whatsoever.

In Liberia,[1551] § 51(1) and (2) of the *Maritime Code*,[1552] set that for ships to be eligible to registration in Republic of Liberia, they must be owned by a citizen or national of Liberia. §51(5)(b) and (c), however, provide that the Commissioner or the Deputy Commissioner when '[i]t has been *satisfactorily demonstrated that there is an absolute and genuine need for such waiver*; and [t]he *owner*, […] of the vessel qualifies for, secures and maintains registration in the Republic of Liberia as a foreign maritime entity and either *maintains at all times an operating office in the Republic or appoints a qualified registered agent* in the manner prescribed by law.'[1553]

Foreigners may henceforth satisfy the registration requirements, similarly to Panama, simply by having a registered agent in the state.[1554] Furthermore, contrary to Panama, Liberian law sets no (even derogable) nationality requirement for the manning of its ships.[1555] Again, only a thin paper (or, in our age, digital) chain links Liberia to its fleet.[1556]

[1551] WATT, COLES, *ibid.*, pp. 184-8. On the history and evolution (highly similar to the Panamian) of the Liberian FoC see CARLISLE, *supra* note 73, pp. 110-33.
[1552] Title 21 of the *Liberian Code of Law*, 1956.
[1553] Emphasis added.
[1554] Similarly, Cyprus, *The Merchant Shipping (Registration Of Ships, Sales And Mortgages)* Laws Of 1963 To 2005, §§ 5(1)(a)(ii) and 5A https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/77455/82090/F1622631335/CYP.77455.pdf.
[1555] Although the Liberian population is one of the fastest growing ones, as of 2023, it has not reached yet 5.5 millions.
[1556] For a general overview of the Liberian shipping registry see LADAS, K., *Symposium on Flag State Responsibilities and the Future of Article 91 of UNCLOS*, 5 march 2020 https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/9%20Panel%203_Ladas.pdf.

A common feature of the Panamanian, Liberian, Cypriot, and Bahamian registries is that these registries are not administered by the states but by private entities[1557] to which all the checks and procedures for the registration are delegated. Furthermore, these states have a tendency to allow the incorporation of foreign-controlled LLCs (often referred to as *paper or brass plate companies*),[1558] which are empty shells exclusively aimed at creating an illusory and artificial connection with the FoCs[1559] while hiding their owners behind the *corporate veil* (one acronym of which is, curiously, *evil*).[1560]

A widespread phenomenon closely connected to FoCs is *bareboat charter registration*. Without seeking to provide a complete overview of this practice,[1561] a definition of it can be found in § 23B of the Cypriot *Merchant Shipping Laws*: "Bareboat chartering" is a chartering by virtue of which the *charterer for the agreed period of time, acquires full control and possession of the ship, has the nautical control and management of the ship, appoints and dismisses the master and the crew of the ship, is responsible towards third parties as if he was the shipowner and, generally, so long as the chartering continues, substitutes in all respects the shipowner,* save that he has no right to sell or mortgage the ship'.[1562]

With bareboat charter, in other words, the charterer[1563] hiring the ship gets control of the *bare hull* of the ship, its naked and 'empty' structure. By registering the ship in a second, *ad hoc* registry in a (usually) lower-income country or tax heaven or a state which, for whatever reason, appears to be more favourable or appealing to the charterer than the owner's one, the charterer can circumvent fiscal, security, labour *etc.* regulations of its (primary) flag state.[1564]

Doubts have been raised concerning the compatibility of this practice with Article 92(1) UNCLOS, stating that '[s]hips shall sail under the flag of one State only'. In the literature,

---

[1557] See DE CONING, E., STOLSVIK, G., Combating Organised at Sea: What Role for the United Nations Office on Drugs and Crime. *International Journal of Marine and Coastal Law*, 28(1)(2013), p. 202.

[1558] BOSCO, D., *The Poseidon project: the struggle to govern the world's oceans*, Oxford (2022), pp. 133-5.

[1559] See *ex multis* OECD, Ownership And Control Of Ships, March 2003 https://seafarersrights.org/wp-content/uploads/2018/03/INTERNATIONAL_REPORT_OWNERSHIP-AND-CONTROL-FOR-SHIPS_2002_ENG.pdf. A particularly vivid and passionate account of ghost flags and shipowners: VASINO, G., *Bandiere ombra e armatori fantasma*, Milano (1976).

[1560] *Ex multis*, MANSELL, *supra* note 42, pp. 109-10; WATTERSON, C.J., OSBORNE, S., GRANT, S., Open registries as an enabler of maritime sanctions evasion, *Marine Policy* 119 (2020).

[1561] See on this topic, *ex multis,* ADEMUNI-ODEKE, *Bareboat Charter (Ship) registration*, The Hague (1998); BRODIE, P., *Commercial Shipping Handbook, third edition*, Abingdon (2015); DAVIS, M., *Bareboat Charters, second edition*, London (2005), in particular with regards to the application for vessels registered in a bareboat charter register, pp. 201-5; WATT, COLES, *supra* note 73, pp. 62-74.

[1562] Emphasis added.

[1563] Oftentimes, a(nother) paper company.

[1564] COUPER, *supra* note 81, para. 1.41, p. 23.

however, it has been argued that the bareboat registration (although of an unclear character) has the effect of suspending (for the duration of the lease) the applicability of the owner's flag in favour of the charterer's one.[1565] If so, bareboat registration would not be inconsistent with Article 92(1) since, at any given time, a ship flies under just one flag (of convenience).[1566]

According to the statistics, FoCs are -despite their gradually improving standards- nearly *twice as like to perish at sea* than regular or national ones.[1567]

Many FoCs are comparatively small and scantly populated states which do not have the means to inspect and control every single vessel flying their flags scattered all over the world. Even if they did, they would often have fairly limited adjudicatory and enforcement options against the owners who[1568] are, in many cases, nothing more than empty corporate shells *only formally* established in the countries of registrations but without any real connection with them.[1569]

It does not come as a surprise, therefore, that FoCs are related or, more bluntly, have prepared the ground for tragedies and crimes. In 1981 the UNCTAD identified *ten potential reasons behind the subpar safety of FoCs*: 1) the real owners of the ships are not easily identifiable (either due to objective difficulties or due to a lack of motivation thereto) and they are henceforth more likely to take greater risks than closely monitored national registries ships; 2) the real owners may hide behind brass-plate companies not to be identified as substandard operators; 3) as the shipmaster and the crew are not nationals of the flag state they have no reasons to visit it and be subject to its laws; 4) foreign owners can easily defy flag state jurisdiction by not attending the inquiries and proceedings actioned against them; 5) the shipowners are not motivated to maintain

---

[1565] ADEMUNI-ODEKE, *ibid.* p. 27; BARNES, R.A., 'Flag states', in Rothwell, D.R., et al. (eds.), *The Oxford Handbook of the law of the sea*, Oxford (2015), p. 307.

[1566] *Paradoxically*, if a vessel registered in state X -but managed and manned by nationals of state Y- were to fly the latter's flag due to the bareboat charter agreement, the bareboat registration could actually serve to establish a more genuine link between the ship and its flag.

[1567] NÆVESTAD, T., *Safety in maritime transport: Is flag state important in an international sector?*, Oslo (2016), p. 16. INTERNATIONAL CHAMBER OF SHIPPING, *Shipping Industry Flag State Performance Table 2022/2023*, London (2023), p. 4 https://www.ics-shipping.org/wp-content/uploads/2023/01/Shipping-Industry-Flag-State-Performance-Table-2022-2023.pdf.

[1568] and similarly the charterers of the vessels.

[1569] As they normally have no or very insignificant assets to target in case of non-compliance. ALDERTON, T., WINCHESTER, N., Flag states and safety: 1997-1999, (2002), *Maritime Policy & Management*, 29(2)(2002), pp. 157 ff. In the same sense (although citing older data), LI, K.X., WONHAM, J., Who is safe and who is at risk: a study of 20-year-record on accident total loss in different flags, *Maritime Policy & Management*, 26(2)(1999), pp. 143-4: 'The worst players are Korea (South), Panama, Greece, Malta, Saint Vincent, Taiwan, Cyprus, and Honduras whose aggregated total loss rates are above 7.5½. The world's worst record belongs to Honduras fleet whose aggregated total loss rate is 13.13½, and mean total loss rate is 20.77½, three and five times more than the mean average respectively.'

good relationships with the flag states and cooperate with their authorities; 6) FoCs have weak or inexistent seamen trade unions; 7) FoCs vessels owners can more easily put pressure on the masters and crews to take risks as there is no appropriate government to which complain about these risks; 8) port state control is weaker since port states can only report to flag states which, in case of FoCs, have no control over the owners; 9) if the shipowners have troubles with the crews, they can sack them and replace them at whim; 10) as FoCs registries are quintessentially maintained for reasons of profit and they owe their success to the graces of regulations-avoiding owners, enforcement of standards is not in the charts.[1570]

The *Deepwater Horizon* oil spill is a great example[1571] of what is wrong with the FoCs. To make the (very) long story short, the *Deepwater Horizon* was a semi-submersible drilling unit built in South Korea in 2001 for its owner, the Swiss incorporated *Transocean Ltd* (previously registered in the Cayman Islands).[1572]

As a *caveat*, it ought to pinpoint that the *status of oil rigs and floating platforms* as vessels or structures is highly *contentious* due to the largely static nature of these devices and their link to the soil and the subsoil.[1573] Generally speaking, rigs and platforms are differentiated between each other as a consequence of two elements: a) the depth of the water; b) the depth of the drilling. Whereas rigs and platforms in shallow waters can be built upon concrete legs or pillars reaching the seafloor, in very deep waters -as, *e.g.*, the *Deepwater Horizon*, operating in a stretch of water some 1500 meters deep- on the contrary, the seabed is too far to be reached by legs, pillars or

---

[1570] UNCTAD, *Action on the question of open registries*, TD/B/C.4/220 (1981). See also READY, N.P., *Ship registration, third edition,* London (1998), pp. 22-4; PAPANICOLOPULU, I., 'Due Diligence in the Law of the Sea', in Krieger, H., Peters, A., Kreuzer, L. (eds.), *Due Diligence in the International Legal Order,* Oxford (2020), p. 154: 'activities formally under the jurisdiction and control of a state are carried out by private subjects more closely linked to another state. This is evident in the case of the use of flags of convenience: most vessels registered under the flags of developing states are in reality owned by companies based in developed states. The strict application of the public/ private divide, according to which the due diligence obligation would relate to the capacity of the state to ensure compliance with a certain standard, rather than with the capacity of the private actor to comply with that standard, has caused a lowering of protection in shipping which has benefitted private actors to the detriment of communitarian interests of an environmental or social nature.'

[1571] Not to mention, a fairly well-done movie on the dynamic of the incident: BERG, P. (directed by), *Deepwater Horizon* (2016).

[1572] US, *Securities And Exchange Commission Form 10-K, Annual Report Pursuant To Section 13 And 15(D) Filing Date: 2010-02-24 | Period Of Report: 2009-12-31 Sec Accession No. 0001451505-10-000023, Filer Transocean Ltd.*, p. 3 http://edgar.secdatabase.com/1568/145150510000023/filing-main.htm.

[1573] WALKER, G. K. (ed.), *Definitions for the Law of the Sea,* Leiden (2011), p. 57; VAANGAL, K., Legal Status of Offshore (Deep-Water) Oil Rigs: Coastal State Jurisdiction and Countering Oil Spills Threats, *Lex Portus* 7(5)(2021), pp. 42–68; Are Offshore Rigs & Platforms Jones Act Vessels?, Arnold & Itkin, https://www.offshoreinjuryfirm.com/offshore-injury-blog/2021/june/are-offshore-rigs-platforms-jones-act-vessels-/.

other form of support. In these circumstances, rigs and platforms, have no alternative to floating,[1574] and here is the question: are these floating, semi-static platforms ships?

Still, in 2005 the US Supreme Court seems having endorsed a broad understanding of vessels, affirming in *Stuart v. Dutra* (2005) that, contrary to the finding of the appellate judgment, that a dredge 'is not a "vessel" because its primary purpose is not navigation or commerce and because it was not in actual transit at the time of [the victim's] injury. Neither prong of that test is consistent with […] general maritime law's established meaning of "vessel." […] require[ing] only that a watercraft be "used, or capable of being used, as a means of transportation on water," not that it be used primarily for that purpose.'[1575]

That said, to provide a comprehensive answer to the classification of platforms and rigs it would be first necessary to establish *what a ship under international law is*, a fundamental question that cannot be examined -for evident time and organizational reasons- in this Dissertation.[1576]

Between 2001 and 2013 the *Deepwater Horizon* was leased to *BP*[1577] which was drilling an exploratory well at the Macondo Prospect, some 40 miles off of the Louisiana coast, flying the flag of the Marshall Islands.[1578] On the 20 April 2010, a well blowout and a failure of the emergency mechanisms of the rig triggered a series of massive explosions which shattered the *Deepwater Horizon* and caused the release of around 500.000 m^3 of oil (covering an area of over 112,000 km^2 of the ocean surface, roughly equivalent to one-third of the size of Italy or 2.5 times the extension of The Netherlands) and gas with catastrophic effects on the environment.[1579]

[1574] How Do Semisubmersibles Work?, *Rigzone* https://www.rigzone.com/training/insight/?insight_id=338&c_id=24.

[1575] SUPREME COURT OF THE UNITED STATES, Syllabus, *Stewart v. Dutra Construction Co., Certiorari to the United States Court of Appeals for the First Circuit*, no. 03-814. Argued November 1, 2004, Decided February 22, 2005, p. 3 lett.(d). In the same sense MARPOL - International Convention for the Prevention of Pollution from Ships, Amended by Resolution MEPC.111(50), Amended by Resolution MEPC.115(51), Amended by Resolution MEPC.116(51) - Articles of the International Convention for the Prevention of Pollution from Ships, 1973, Art. 2(4): '"Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.'

[1576] *Ex multis*, LAGONI, R., Merchant Ships, *Max Planck Encyclopedia of Public International Law* [MPEPIL], January 2011, paras. 1-2; GAUCI, G.M., Is It a Vessel, a Ship or a Boat, Is It Just a Craft, Or Is It Merely a Contrivance?, *Journal of Maritime Law & Commerce* 47(4)(2016), pp. 479 ff; PETERS, D.W., What Is a Vessel in Admiralty Law, *Cleveland State Law Review* 6(1957).

[1577] *Rectius*, a joint venture in which the *BP* (65%), *Anadarko Petroleum* (25%) and *MOEX Offshore* (10%) shared ownership in the lease, with BP as the lease operator.

[1578] In this sense, it should be noticed that the US authorities consider(ed) the Marshall Islands to be a FoC but one which maintains high standards over its ships. See: HAGERTY C. L. RAMSEUR J. L., *Deepwater horizon oil spill : selected issues for congress*, Washington (2010), p. 38.

[1579] BEYER, J. ET AL., Environmental effects of the Deepwater Horizon oil spill: A review, *Marine Pollution Bulletin* 110 (2016), pp. 28–51.

In the ensuing investigation, the Coast Guard report held that '[t]his investigation also revealed that *the oversight and regulation of Deepwater Horizon by its flag state, the Republic of the Marshall Islands* (RMI), was *ineffective* in preventing this casualty. By delegating all of its inspection activities to "recognised organisations," *without conducting on board oversight surveys by administration officials, the RMI effectively abdicated its vessel inspection responsibilities*.'[1580]

Yet, as observed in an article published in *The Guardian*, it is patently absurd that a remote scattered archipelago of the Pacific Ocean with a population of scantly 65.000 individuals and a GDP 700 times less than the capitalisation of BP can control and inspect the vessels registered in its fleet (including the oil rigs owned by the *Transocean Ltd.*) navigating across the seas.[1581]

With specific regard to the enforcement of crimes of international concern, it is well acknowledged that *FoCs have been systematically employed by criminal networks in the context of IUU fishing*[1582] *and for the purpose of smuggling migrants, illicit traffic in drugs (primarily cocaine), illicit traffic in weapons, and acts of terrorism*,[1583] since these flags are either *unable or unwilling* to enforce their criminal jurisdiction.[1584] Besides IUU fishing, smuggling *etc.*, the use of FoCs exposes seafarers and fishers to a panoply of utterly inhuman and degrading treatments (low wages, forced

---

[1580] UNITED STATES COAST GUARD, *Report Of Investigation Into The Circumstances Surrounding The Explosion, Fire, Sinking And Loss Of Eleven Crew Members Aboard The Mobile Offshore Drilling Unit Deepwater Horizon In The Gulf Of Mexico, April 20 – 22, 2010*, p. viii: https://www.bsee.gov/sites/bsee.gov/files/reports/safety/2-deepwaterhorizon-roi-uscg-volume-i-20110707-redacted-final.pdf. Emphasis added.

[1581] CLARK, A., BP oil rig registration raised in Congress over safety concerns, *The Guardian*, 30 May 2010 https://www.theguardian.com/environment/2010/may/30/oil-spill-deepwater-horizon-marshall-islands. on the legal questions raised by the *Deepwater Horizon* incident, see *ex multis* OSOFSKY, H. M., Multidimensional governance and the BP Deepwater Horizon Oil spill. *Florida Law Review*, 63(5)(2011), pp. 1077-1138; HICKEY, J. E., 'Law-making and the law of the sea. The BP Deepwater Horizon oil spill in the Gulf of Mexico', in Liivoja, R., Petman, J. (eds.), *International Law-making: Essays in Honour of Jan Klabbers*, London (2013), pp. 269-80.

[1582] ROSELLO, M., *IUU fishing as a flag state accountability paradigm: between effectiveness and legitimacy*, Leiden (2021), p. 11; LIDDICK, D., The dimensions of a transnational crime problem: the case of IUU fishing, *Trends in Organized Crime* 17(2014), pp. 300-1.

[1583] Chapter I. In this sense it should be noticed that, according to Guilfoyle, whilst some commentators have argued that 'that terrorist vessels, flying a flag of convenience, would be immune from interference on the high seas and would face little likelihood of the flag state exercising effective enforcement jurisdiction over their activities', 'politically motivated violence involving an attack in international waters by one vessel against another falls within the scope of piracy at general international law or under UNCLOS.'GUILFOYLE, D., 'Piracy and the slave trade', in *Shipping Interdiction and the Law of the Sea*, Cambridge (2009), p. 41.

[1584] UNODC, *Transnational Organized Crime In The Fishing Industry. Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking*, Vienna (2011), pp. 4-5, 19: 'Some registries are targeted due to the inability or unwillingness of the flag State to exercise its criminal law enforcement jurisdiction in terms of international law or because they allow front companies to register as fishing vessels owners which makes the true beneficial owner difficult, if not impossible, to identify.' For a comprehensive account of the deadly interconnection of FoCs, IUU fishing and other crimes of international concern see also GIANNI, M. SIMPSON, W., *The Changing Nature of High Seas Fishing: how flags of convenience provide cover for illegal, unreported and unregulated fishing*, Canberra (2005) https://assets.wwf.org.uk/downloads/flagsofconvenience.pdf.

labour, violence *et similia*),[1585] which, in the most serious cases may amount to crimes of international concern.[1586]

As seen in the previous Chapter, though, *the inability or unwillingness of FoCs to exercise jurisdiction and control over their ships undermines the pillars of the public order of the sea*,[1587] creating what has been described as *zones of impunity* at sea or, at least, zones lacking substantial punishment.[1588]

Acknowledging the potential perils deriving from the lawlessness ensured by the FoCs, the international community has elaborated some *remedial mechanisms* to strengthen the old creaking structure of the public order of the sea against the threat posed by the FoCs.

First, under Article 94(6) UNCLOS,[1589] 'A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.'

As explained in the literature, despite the enthusiasm entrusted to it by the ITLOS in the *Saiga(2)* case,[1590] this provision appears to be affected by several ailments.

First, it is not clear what should be the clear ground to believe that the flag state omitted to exercise its jurisdiction dutifully. Furthermore, leaving the state to investigate its own omissions and provide the remedies thereto[1591] without allowing to challenge (and that is the real

---

[1585] See MUKHERJEE, *supra* note 61, pp. 591-6.

[1586] *Infra* Chapter I. CHARBONNEAU, A., 'Les droits sociaux fondamentaux des gens de mer', in Raspail, H. (ed.), *les droits de l'homme et la mer, actes du colloque du Mans, 24 et 25 mai 2018*, Paris (2020), pp. 211-29.

[1587] which is built and relies on the presumption of a genuine link between a ship and a flag state able and bound to maintain law and order on its ships *ex* Article 94 UNCLOS. See MCDOUGAL, M.S., BURKE, W.T., *The public order of the oceans. a contemporary international law of the sea*, New Haven (1987), pp. 1122-37; with regard to IUU fishing, see RAYFUSE, R.G., Non-flag state enforcement in high seas fisheries, Leiden (2004), pp. 17-50. See also KLEIN, N., *Maritime Security and the Law of the Sea*, Oxford (2011), p. 64; TSIMPLIS, M., 'Chapter 7: Implementation and enforcement of environmental regulations', in *Environmental Norms in Maritime Law*, Cheltenham (2021), p. 219.

[1588] BOSCO, *supra* note 103, p 160.

[1589] See in this sense GAVOUNELI, *supra* note 41, pp. 18-9.

[1590] ITLOS, *Saiga(2)*, *supra* note 45, paras. 82-3, pp. 41-2: '[another] State is entitled to report the [omission] to the flag State which is then obliged to "investigate the matter and, if appropriate, take any action necessary to remedy the situation". There is nothing in Article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag state over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. The conclusion of the Tribunal is that the purpose of the provisions of the convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.'

[1591] In 2015 the ITLOS introduce an additional obligation for the flag state: '[it] is obliged to investigate the matter upon receiving such a report and, if appropriate, take any action necessary to remedy the situation. The Tribunal is of the view that the flag State is under the obligation to inform the reporting State about the action taken.' ITLOS,

problem) the *less-than-genuine* link which determined the omission is hardly helpful.[1592] It merely shuts down the symptoms rather than curing the underlying illness.

1.2 Port state measures as a remedy against the ineffectiveness of flag state jurisdiction

In the early 1980s, the public outcry raised by the *Amoco Cadiz* disaster (1978) led several European countries to acknowledge the necessity of adopting a new comprehensive approach to elevate and strengthen shipping safety. These efforts culminated in the *Memorandum of Understanding on Port State Control* (1982).[1593] The *Paris MOU* focuses on three main targets: 1) increase maritime safety; 2) increase the protection of the marine environment; 3) improve living and working conditions on board ships.[1594] These goals are pursued through an improved and harmonised system of port-State control, strengthening cooperation, and exchanging information.[1595]

In extreme synthesis, under this (administrative) framework -subsequently emulated by several regional agreements such as the *Tokyo MoU*, the *Carribean MoU* and others[1596]- the maritime authorities of the member states are required to carry a certain number of inspections on foreign vessels to verify their compliance with the instruments listed in the MoU. The targeting factors according to which a vessel is designed for inspection are based on a complex algorithm seeking to identify potentially substandard ships consisting of the personal history of the ship as well as the performance of its flag. To indicate the level of risk connected to the ships belonging to a certain registry, the *Paris Mou* introduced three lists (black, grey and white) 'for flag State performance established annually, taking into account the inspection and detention history over the preceding three calendar years'. This allows the maintenance of an updated performance

Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, para. 118, p. 36.

[1592] GUILFOYLE, D., 'Article 94. Duties of the flag state', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary,* München (2017), para. 13, p. 713; SCOVAZZI, T., '15 ITLOS and Jurisdiction over Ships', in Ringbom, H. (ed.), *Jurisdiction over Ships,* Leiden, (2015), p. 384; KLEIN, *supra* note 133, p. 107.

[1593] Hereinafter, Paris MoU.

[1594] *Id.* Preambular para. 1.

[1595] *Id.* preambular para. 7.

[1596] OZCAYR, Z., The use of port state control in maritime industry and application of the Paris MoU, *Ocean and Coastal Law Journal,* 14(2)(2009), p. 217.

index of the various flag states, revealing the trends of compliance with maritime regulations across the state.[1597]

With specific regard to IUU fishing,[1598] several treaties and non-binding agreements have been adopted, such as the *FAO Compliance Agreement* (1993)[1599] and the *FAO Agreement On Port State Measures To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated Fishing* (2009).[1600] Whilst the effectiveness of these instruments primarily depends on the degree of ratification and compliance by flag states,[1601] as provided under Article 18 of the *UN Fishing Stock Agreement*,[1602] a central role is played, by port state jurisdiction.[1603] As declared by the FAO Director-General in his Foreword to the PSMA: '[t]hrough the implementation of defined procedures to verify that such vessels have not engaged in IUU fishing and other inspection and enforcement measures, fish caught from IUU fishing activities could be blocked from reaching national and international markets, thereby reducing the incentive for perpetrators to continue to operate.'

In particular, under Article 11(1), 'Where a vessel has entered one of its ports, a Party shall deny, [...] that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, inter alia, refuelling and resupplying, maintenance and drydocking, if: (a) the Party finds that

---

[1597] Paris MoU, Annex VII, para. 10. See DESOMBRE, E. R., '16 Environmental politics and global shipping trade: club goods as a solution to common-pool resource problems', in Gallagher, K.P. (ed.), *Handbook on Trade and the Environment*, Cheltenham (2008), p. 210.

[1598] See SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R., *Oceans, Seas and Marine Living Resources. In Principles of International Environmental Law* (pp. 455-568). Cambridge (2018), pp. 432-4. GILLESPIE, A., *Conservation, Biodiversity and International Law*, Cheltenham (2011), pp. 448-58.

[1599] *Supra* note 54.

[1600] Usually referred to as PSMA. See SCHATZ, V.J., Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State, *Gottingen Journal of International Law* 7(2)(2016), pp. 400-1.

[1601] In this sense Preambular para. 3 of the PSMA: 'measures to combat illegal, unreported and unregulated fishing should build on the primary responsibility of flag States and use all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market related measures and measures to ensure that nationals do not support or engage in illegal, unreported and unregulated fishing'. TANAKA, Y., 'Chapter 4: Jurisdiction of states and the law of the sea', in Orakhelashvili, A. (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham (2015), p. 142.

[1602] The United Nations 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 (2001), hereinafter UNFSA. See in particular para. 2: 'A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.' RAYFUSE, R.G., 'Article 117', in Ringbom, H. (ed.), *Jurisdiction over Ships,* Leiden, (2015), para. 17 pp. 810-1.

[1603] For a comprehensive overview of the binding and non-binding instruments addressing IUU fishing see GOODMAN, C., 'The Framework for Coastal State Jurisdiction over Fishing in the EEZ', in *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone,* Oxford (2021), pp. 43 ff.

the *vessel does not have a valid and applicable authorisation to engage in fishing or fishing related activities required by its flag State*; (b) the Party finds that the vessel does not have a valid and applicable authorisation to engage in fishing or fishing related activities *required by a coastal State in respect of areas under the national jurisdiction of that State*; (c) the Party receives *clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State*; (d) the flag State *does not confirm within a reasonable period of time,* on the request of the port State, that the *fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management organisation* […] or (e) the Party has *reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities* […] unless the vessel can establish: (i) that it was acting in a manner consistent with relevant conservation and management measures'.[1604]

In spite of its undeniable merits, the *PSMA* may have a weak point. As with flag state enforcement, it has been predicated in the literature that PSMA measures may push delinquent vessels into the merciful waters of *ports of convenience*, *i.e.* ports unwilling to take action against IUU fishing (and other maritime violations) for the sake of attracting business or facilitating the import of certain goods.[1605]

Before moving onto the issue of enforcement jurisdiction *vis à vis* unflagged vessels, it is finally worth mentioning the *Human Rights At Sea Arbitration*[1606] *initiative* inaugurated by the British NGO *Human Rights at Sea* and the global law firm *Shearman & Sterling LLP* in 2020.[1607]

The *Arbitration White Paper* recognises that human rights at sea claims are hardly ever raised by victims due to a number of reasons already delineated in this Dissertation. In particular,

---

[1604] Emphasis added.

[1605] PETROSSIAN, G.A., LETTIERI, J., CLARKE, R.V.G., 'Addressing the Security Issues Related to Illegal Commercial Fishing', in Gill, M. (eds.), *The Handbook of Security*, Cham (2022), pp. 435-41; MOLENAAR, E.J., '13. Port and coastal states', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015), p. 283; MOLENAAR, E. J., 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in Freestone, D., Barnes, R., Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* Oxford (2006), p. 193. *Contra:* ENVIRONMENTAL JUSTICE FOUNDATION, *Blood And Water: Human rights abuse in the global seafood industry* (2019), p. 20: 'The PSMA strengthens and unifies regional and international port state legislation while also helping to eliminate ports of convenience. Measures include improving dockside inspections, blocking entry to vessels known to be involved in IUU, and sharing information with the states whose vessels contain IUU product. The PSMA came into force in May 2016 and at the time of writing had 57 ratifications after several countries including the Philippines, Turkey, Libya and Sierra Leone ratified the agreement in 2018.'

[1606] Hereinafter, HRASARB.

[1607] All the news and documents relating to the initiative can be found on the website jointly managed by the NGO *Human Rights at Sea* and *Shearman & Sterling LLP*: https://hrasarb.com/. Amongst the founders of the HRAS Arbitration initiative it is worth mentioning, *ex multis*, Prof. Anna Petrig and David Hammond, Esq., recognised authorities on human rights at sea.

it is very hard to *identify either the abuses or the abuser*: disentangling the diabolic corporate *matryoshkas* of paper companies owning or managing the vessels scattered around any possible jurisdiction with equally variegated crews make the identification of the abusers a potential *probatio diabolica*.

Equally troublesome is the identification of the abuses since no state has the means to control what happens on board every vessel (potentially navigating through the most remote waters), flying its flag or even just passing through its water. It is impossible for a(ny) state to have its eyes and hands on every ship.[1608]

Furthermore, in many states, judicial authorities are not in a position to ensure justice for the victims, for reasons connected to corruption or lack of judicial independence or, more simply, the lack of expertise on HR violations perpetrated at sea. Add the fragmentation of the applicable legal frameworks, the different languages employed by the courts, and the costs or bureaucratic burdens involved: the perfect storm is served.[1609]

In the intention of its founders, the arbitration initiative will provide a neutral, flexible, familiar and specialised instrument able to address the weaknesses of the current system.[1610]

Still, the lawlessness of the oceans is not only connected to the FoCs. Using unregistered vessels or vessels not flying any flag (or flying a fraudulently registered one) challenges the public order of the sea, of which, as repeated *usque ad nauseam*, flag state jurisdiction and control are the pillars.[1611]

2. Stateless vessels

Stateless vessels[1612] are a persistent enigma of the law of the sea and a serious trouble for academics and practitioners, since while the Convention refers to ships without nationality, it

[1608] '*La mer est un théatre si vaste, si diflicilement soumis à une surveillance et à une police capables d'y garantir la vie, les biens et les droits tie chacun, qu'il n'est pas de trop pour cette garantie d'exiger des navires qu'ils se rattachent à une nation quelconque.*' ORTOLAN, T., *Regles Internationales et Diplomatie de la Mer*, 4th edition Paris (1864), vol. II, p. 165.
[1609] HRASARB, *Arbitration White Paper*, para. 10, pp. 4-5 https://hrasarb.com/wp-content/uploads/2020/07/20200324-HRAS_ShearmanLLP_Arbitration_Human_Rights_White_Paper-UPDATED_20200505-ORIGINAL-SECURED.pdf.
[1610] *Ibid.* paras. 12 pp. 5-7.
[1611] SHAW, M.N., *International law, seventh edition*, Cambridge (2014), p. 443; MCDOUGAL, BURKE, *supra* note 134, pp. 1084-5.
[1612] Whilst flaglessness refers to the formal absence of a flag painted on a ship or flown from a ship, in this paragraph the term will be used as an all-encompassing synonym for any ship not being formally recognised as pertaining or being attached to a specific state having exclusive flag state jurisdiction on the high seas. *Contra*: MURDOCH, A.,

carefully avoids to define their regime.[1613] Under Article 110(1)(d) UNCLOS, states enjoy the right to visit a *vessel without nationality*.[1614] Nevertheless, UNCLOS is admirably silent on what can be done after the visit, particularly on the possible enforcement jurisdiction of the vessel's flag state.[1615]

As previously seen,[1616] the *rationale* of the right to visit is precisely to verify the involvement of the visited ship in illegal activities and to identify the state having jurisdiction over the alleged crimes, as it is presumed that each vessel is subject to the protection and jurisdiction of a flag state.[1617]

Looking into history, already in the late 1800s the literature argued that a vessel without nationality threatened the fragile equilibrium of the public order of the sea and believed that such a ship would have been nothing more than a crew of pirates. Hence, vessels without nationality fell under universal jurisdiction.[1618]

'Ships without nationality: interdiction on the high seas', in Evans, M.D., Galani, S. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?* (2020), pp. 161-6.

[1613] PAPANICOLOPULU, *supra* note 85, p. 135.

[1614] The reference to ships without nationality was introduced only at the third session (1975) of the UN Conference on the law of the sea. 'Article 110. Right of visit', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea: a commentary*, The Hague (1995), p. 240.

[1615] Several cases relating to crimes involving stateless vessels have been previously examined in Chapter III, para. XYZ. GUILFOYLE, D., 'Article 110 Right of visit', in Proelβ, A., (ed.), *United Nations Convention on the Law of the Sea: a commentary,* München (2017). With specific regards to the physical characteristics of the flags in order to avoid the ship being considered stateless, see DUBNER, B., ARIAS, M. Under international law, must ship on the high seas fly the flag of state in order to avoid being stateless vessel: is flag painted on either side of the ship sufficient to identify it, *University of San Francisco Maritime Law Journal 29(2)(2016)*, pp. 99-154. With regard to the issue of nationality and statelessness of vessels with respect to which *the suspected flag states refuse either to affirm or deny the status of the vessels*, the US COURT OF APPEALS FOR THE NINTH CIRCUIT argued that the silence of the suspected flag-state 'could lead to the untenable result that neither the boarding state nor the claimed flag state have jurisdiction over a vessel so long as the claimed flag state does not confirm or deny nationality—undermining international law's role of facilitating the "achievement of common aims.' In these cases, according to the US judges, '[b]ecause there is no rule of international law speaking to this jurisdictional question, the United States does "not overstep the limits which international law places upon its jurisdiction," […] in choosing to treat vessels as stateless where the claimed nation responds that it can neither confirm nor deny the registry.' US COURT OF APPEALS, NINTH CIRCUIT, *US V. Marin et al.*, No. 22-50154 D.C. No. 3:21-cr-01021-DMS-2, No. 22-50155 D.C. No. 3:21-cr-01021- DMS-1, 19 july 2023.

[1616] *Infra,* Chapter III.

[1617] *A contrario,* with regard to the lack of jurisdiction and protection of the (missing) state of nationality of the ship, OPPENHEIM, L., JENNINGS, R., WATTS, A. (eds.), *Oppenheim's international law*, ninth edition, vol. 1, London (1992), p. 731.

[1618] '[U]n navire qui ne se rattache à aucune nation quelconque, et qui prétend naviguer en mer indépendant de tout Etat, de toute société, la situation est trop contraire la condition de la vie humaine elle-même, pour qu'on puisse l'admettre raisonnablement comme un droit. […] [c'est un] principe non-seulement de droit positif, mais aussi de pure raison, la nécessité pour tout bâtiment d'avoir une nationalité. La maxime contrire serait subversive de la sécurité de la navigation, et par conséquent de la liberté des mers.' ORTOLAN, *ibid*. pp. 165-6.

This idea of flagless vessels as pirate (or *quasi*-pirate) ships was, however, rejected in the XX century.[1619] In his commentary to the *Projet d'articles relatifs au regime de la haute mer* (1954), special *rapporteur* François criticised this theory, found the equation between flagless vessels and pirate ships to be unfair, stating that '*Le navire sans nationalite ne doit subir ce traitement que si, en fait, il commet des actes de piraterie*. Dans les cas contraires les batiments publics pourront exercer a son egard le droit de visite et de perquisition, l'amener dans un de leurs ports en vue d'un controle, et lui en refuser l'entree a des fins de commerce, mais ils ne pourront le traiter comme pirate.'[1620]

Whilst flagless vessels may certainly be used to commit crimes without (theoretically) being subject to any state's jurisdiction,[1621] not every flagless vessel is engaged in unlawful activities. Furthermore, neither under the HSC (nor UNCLOS) does an explicit duty of registration of ships appear to exist.[1622] On the contrary, Article 92(2) very firmly provides that 'A ship which sails under the flags of two or more States, […] may not claim *any* of the nationalities in question with respect to any other State, and *may be assimilated to a ship without Nationality*.'

The loss of any nationality in the case of dual registration of ships is one of the four main *hypotheses of ships without nationality*. The other two cases concern the *cancellation of registration*, the *matriculation by a non-recognised authority*[1623] or the *false registration of the ship in a genuine* existing *registry*, and finally, small ships *exempted from the nationality requirement*. Before inquiring

---

[1619] On the theory of flagless vessels as *quasi res nullius* or *quasi pirate ships*, see PAPASTAVRIDIS, E., *The Interception of Vessels on the High Seas. Contemporary Challenges to the Legal Order of the Oceans*, Oxford (2013), pp. 264-5, in part. note 21.

[1620] ILC, *Yearbook Of The International Law Commission 1954 Volume II Documents of the sixth session including the report of the Commission to the General Assembly* (1954), p. 10. Emphasis added.

[1621] See in this sense SCHOLAERT, F., SMIT-JACOBS, K., Addressing ship reflagging to avoid sanctions, *Think Tank European Parliament*, 13 march 2023 https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/745686/EPRS_ATA(2023)745686_EN.pdf; ROUCUNAS, E., 'Facteurs privés et droit international public', *Recueil des cours* 299 (2002), para. 312, pp. 203-4. As observed by Meyers, 'statelessness will be caused in particular by illegal conduct of the 'ship', by the absence of a "genuine link", or by apparent immatriculation by a political entity which has not been recognised as an international person'. MEYERS, s*upra* note 487, pp. 310-1. In a similarly nuanced position CARON, D., 'ships: nationality and status', in Bernhardt, R. (ed.), *Encyclopedia of public international law*, vol. 11, Amsterdam (1989), pp. 293-4: 'statelessness is not an internationally unlawful condition; it is, however, regarded as undesirable because statelessness permits unsafe conditions […] [it] makes it extremely difficult for a vessel to engage in legitimate trade or fisheries inasmuch as such a vessel would likely be deprived of important privileges […] it is generally accepted that any state may exercise jurisdiction over a stateless vessel'. In the same sense, PANCRACIO, J.P., *Droit de la mer*, 1er edition, Paris (2010), p. 330.

[1622] On the unsuccessful attemps to establish an obligation for every ship to have a nationality see MEYERS, H., *The Nationality Of Ships*, The Hague (1967), p. 310.

[1623] *Ibid*. pp. 311-8.

what the jurisdictional consequences of the lack of nationality of a ship are, it is worth examining -without any ambition of comprehensiveness- the four cases above.[1624]

The exemption of the duty of registration of small ships is directly provided under Article 94(1)(a) UNCLOS: 'every State shall [...] maintain a register of ships except those which are excluded from generally accepted international regulations on account of their small size.'[1625]

The *UN Convention on the registration of ships* (1986) defines those small vessels as 'any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both, with the exception of vessels of *less than 500 gross registered tons*.'[1626] A different classification is provided under Article 4(1)(b) of the UN International Convention on tonnage measurement of ships (1969), which does not apply to ships of less than 24 metres (79 feet) in length as they are considered to be 'small'.[1627]

This exception -of obscure historical reasons[1628]- is explained by Attard and Mallia with the fact that these small ships are not allowed to leave (their) territorial sea.[1629] Since coastal states enjoy sovereignty over their territorial waters, these vessels, notwithstanding their potential 'flaglessness' are not lost in some remote and lawless sea but have a clear *geographical and nationality link with the coastal state* in the territorial sea of which they are berthed and which (in theory) should exercise *control and jurisdiction over these small unregistered vessels*.[1630]

The problem lies in the parentheses: *in theory*. In practice, small, utterly unserviceable, barely floating things -unworthy to be even defined as ships- systematically cross the invisible

[1624] GUILFOYLE, D., 'The high seas', in Rothwell, D.R., et al. (eds), *The International Law of the Sea*, Oxford (2010), p. 217.
[1625] Another issue, not investigated in this Dissertation, concerns the issue of jurisdiction with reference to drones and whether they could (even) be considered as ships. See *ex multis* BARTLETT, M., Game of Drones: Unmanned Maritime Vehicles and the Law of the Sea, *Auckland University Law Review* 24 (2018); KLEIN, N., Maritime autonomous vehicles and international laws on boat migration: Lessons from the use of drones in the Mediterranean, *Marine Policy* 127(2021); VEAL, R., TSIMPLIS, M., SERDY, A., The Legal Status and Operation of Unmanned Maritime Vehicles, *Ocean Development & International Law* 50 (2019).
[1626] Emphasis added.
[1627] GUILFOYLE, *supra* note 138, para. 8 p. 711.
[1628] WATT, COLES, *supra* note 58, p. 42
[1629] ATTARD, D., MALLIA, P., 'the high seas', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea,* Oxford (2014), p. 256.
[1630] *ibid.*, pp. 255-6.

lines of the seas illicitly carrying humans,[1631] narcotic drugs,[1632] weapons[1633] and basically any other commodity on earth or to conduct IUU fishing.[1634]

In this regard, it should be highlighted that these nutshell-ships used to smuggle[1635] humans and illicit substances are oftentimes used only for the final step of the movement of these commodities (humans included). From New Zealand[1636] to the US[1637] to the Mediterranean sea[1638] larger vessels (referred to as 'mother-ships') carrying migrants and illicit substances are stationed on the high seas/bring their cargo to the high seas across their destination where they download their shipment in smaller vessels -frequently towed by the larger vessels hence abandoned at sea or reached by speedboats to complete their journey- to reach the coasts *in incognito*. Also, according to the Italian Supreme Court, 'it is necessary to recognise the Italian jurisdiction in the case of the trafficking of migrants [...] abandoned at sea in extraterritorial waters on wholly inadequate vessels in order to provoke a safety and rescue operation and to have the transported persons taken into [Italian] territorial waters by the rescuing vessels acting upon the state of necessity, *since the act of exposing persons to serious danger, which is an integral part of necessity, is directly attributable to the traffickers who provoked it, and is inextricably linked to the state of necessity* (...).'[1639]

[1631] *e.g.* NATIONAL CRIMINAL AGENCY, Prolific small boats people smuggling network dismantled as part of international operation, 6 july 2022 https://www.nationalcrimeagency.gov.uk/news/prolific-small-boats-people-smuggling-network-dismantled-as-part-of-international-operation; EUROJUST, Twelve arrested for smuggling migrants in small boats across the English channel, 30 September 2022 https://www.eurojust.europa.eu/news/twelve-arrested-smuggling-migrants-small-boats-across-english-channel. See PAPASTAVRIDIS, *supra* note 167, pp. 263-4.

[1632] UNODC, *Combating Transnational Organized Crime Committed at Sea, Issue Paper*, New York, (2013), p. 34; PAPASTAVRIDIS, E., 'The illicit trafficking of drugs', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014), p. 468.

[1633] CRAGIN, K., HOFFMAN, B., *Arms Trafficking and Colombia*, Santa Monica (Rand Corporation) (2003), p. 18.

[1634] SODIK, D., IUU fishing and Indonesia's legal framework for vessel registration and fishing vessel licensing, *Ocean Development and International Law*, 40(3)(2009), pp. 251-2.

[1635] *Rectius*, smuggle and traffic.

[1636] *e.g.* NICHOLS, L., Comancheros gang's 'mother ship' drug trafficking plan scuppered by global police sting, *The New Zealand Herald*, 8 June 2021 https://www.nzherald.co.nz/nz/comancheros-gangs-mother-ship-drug-trafficking-plan-scuppered-by-global-police-sting/KCHYT2C3752X3IQLIPKNWHOI5Q/.

[1637] *Ex multis*, SORENSEN, C. E., Drug trafficking on the high seas: move toward universal jurisdiction under international law, *Emory International Law Review* 4(1)(1990), p. 228; State Territory, Jurisdiction, and Jurisdictional Immunities, *Digest of United States Practice in International Law* (1980), p. 487.

[1638] ITALIAN COAST GUARD, Catturata la nave madre e fermati i membri d'equipaggio per favoreggiamento dell'immigrazione clandestina, *Press Release*, 23 February 2023 https://www.gdf.gov.it/it/gdf-comunica/notizie-ed-eventi/comunicati-stampa/anno-2023/febbraio/catturato-la-nave-madre-e-fermati-i-membri-d2019equipaggio-per-favoreggiamento-dell2019immigrazione-clandestina#documenti-allegati; MIRA, A.M., Migranti. Scoperta e bloccata la nave madre che ha trainato la "barca dei minori", *Avvenire*, 5 June 2021 https://www.avvenire.it/attualita/pagine/scoperta-e-bloccata-dalla-finanza-la-nave-madre-che-ha-trainato-la-barca-dei-minori.

[1639] CASS. I PEN., 27 March 2014 n. 14510. In the same sense, CASS. I PEN., 20 agosto 2014, n. 36052.

Other causes of flaglessness are the *deregistration or cancellation* of the ships from their registries.

A change in the nationality of the owners of the vessel[1640] may affect the conditions according to which a given ship was registered in a certain state since only vessels owned or manned by nationals (or at least a majority thereof) can fly the flags of national registries.[1641]

In this respect, however, in *Tomimaru*, the ITLOS held that '*the confiscation of a vessel does not result per se in an automatic change of the flag or in its loss. Confiscation changes the ownership of a vessel but ownership of a vessel and the nationality of a vessel are different issues.* […] The juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention. In view of the important functions of the flag State as referred to in article 94 of the Convention […] *it cannot be assumed that a change in ownership automatically leads to the change or loss of its flag.*'[1642] In other words, *the loss or change of flag is not an automatic consequence of the change of ownership of a vessel* (or at least, the change of ownership caused by confiscation, though the last sentence appears to signal the general applicability of the principle in question).[1643]

The final hypothesis of ships without nationality covers all the situations of *flawed registration of the ship*, which may arise from: 1) registration in a genuine, existing registry based on fake or flawed documents or requirements; 2) genuine registration in a registry that no longer exists; 3) counterfeit registration in an existing/no longer existing/inexistent registry; 4) combinations of the aforementioned.[1644]

All these cases share a common element, *i.e.* the ship was not stripped of its matriculation, but the matriculation *itself* was affected by some *flawed requirements* or, in the most extreme instances, the *papers* attesting the matriculation of the ship were *tout-court* forged,[1645] as a

---

[1640] Either due to a succession *mortis causa* or as a consequence of the sale of the vessel.

[1641] On the conditions of deregistration of vessels, see WATT, COLES, *supra* note 58, p. 526.

[1642] ITLOS, *"Tomimaru" (Japan v. Russian Federation),* Prompt Release, Judgment, ITLOS Reports 2005-2007, para. 70, p. 95. Emphasis added.

[1643] LEWIS, A., Flag verification on the high seas: understanding requirements for masters and commanders, *International Journal of Marine and Coastal Law*, 30(2)(2015), p. 354.

[1644] VASSALOTTI, TRAINER, *ibid.*

[1645] WINN, J. I., GOVERN, K. H., Maritime pirates, sea robbers, and terrorists: new approaches to emerging threats, *Homeland Security Review*, 2(2)(2008), p. 135: 'In some locations, almost eighty percent of maritime documents were discovered to be fraudulent or questionable according to the IMB as well as press sources. The IMB report notes that issuers of fraudulent documents are "well-organized, with effective links to maritime administrations, employers, manning agents and training establishments." Port officials and customs agents also collude with organized criminal groups to identify and track potential target ships and work together to prevent recovery of ships and cargos or the prosecution of offenders.'

consequence of which *the registration was invalid or impossible*. In sum, the *ship had no right to fly that flag* and, as a consequence of that, was under no state jurisdiction or control.

The problem of false/fraudulent flags should not be underestimated. Since 2018 there have been hundreds of accounts of ships flying flags to which they were not entitled to circumvent trade sanctions against certain states (*e.g.* North Korea) or to muddle the waters and make enforcement against them virtually impossible, as acknowledged very recently by the *Lloyd's*.[1646]

For instance, in early 2023, the Supreme Court of the Federate States of Micronesia[1647] found two of its citizens[1648] and an Indian-American national guilty of conspiracy to commit money laundering and the establishment of an unlawful international shipping registry in the FSM name. Up to 103 ships were unlawfully registered in it,[1649] with other fake ships registries having been set up in Fiji, Samoa, and DR Congo, providing documents for unknown ships.[1650]

In December 2019, the IMO highlighted the innate threats hidden inside fraudulent flags, particularly in light of the lack of provisions addressing them both in UNCLOS and the IMO instruments: 'the fraudulent registration of ships and the operation of fraudulent registries endanger the integrity of maritime transport, and undermine the legal foundation of the Organization's treaty and regulatory regime, […] not addressing the issues […] may lead to adverse impacts on maritime safety, security and protection of the environment'.[1651]

[1646] MEADE, R., Over 100 falsely flagged ships are trading in plain sight, *Lloyd's list*, 16 March 2023 https://lloydslist.maritimeintelligence.informa.com/LL1144324/Over-100-falsely-flagged-ships-are-trading-in-plain-sight; See also VASSALOTTI, TRAINER, *ibid.*; TRAINER, C., IZEWICZ, P., Unauthorized flags: a threat to the global maritime regime, CIMSEC 20 july 2020 https://cimsec.org/unauthorized-flags-a-threat-to-the-global-maritime-regime/.

[1647] Hereinafter, FSM.

[1648] Including the *former Secretary of Transport, Communications and Infrastructure* of the archipelago, Lukner Weilbacher.

[1649] See CLARK, R., Martin Jano Found Guilty of Conspiracy to Commit Money Laundering & Lukner Weilbacher Found Guilty of Conflict of Interest in Micronesia International Ship Registry Case, *FSM Information Services*, 31 January 2023 https://www.gov.fm/index.php/component/content/article/35-pio-articles/news-and-updates/699-martin-jano-found-guilty-of-conspiracy-to-commit-money-laundering-lukner-weilbacher-found-guilty-of-conflict-of-interest-in-micronesia-international-ship-registry-case?Itemid=177.

[1650] KENNEY, S., *Fraudulent Registries and their impact* https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/6%20Panel%202_Kenney.pdf: 'DRC: 73 fraudulent ships; Federated States of Micronesia: Over 100 fraudulent ships + Fake MISR and intent to defraud the Organization; Fiji: 91 fraudulent ships; Maldives 3 fraudulent ships; Nauru: Fake Nauru Maritime Administration International Ship registry; Samoa: 18 fraudulent ships; United Republic of Tanzania: 11 fraudulent ships; Vanuatu: Illegal Vanuatu international ship registry'. VASSALOTTI, TRAINER, *ibid.* other examples are discussed in IMO, *Report of the legal committee on the work of its 109th session, Measures to prevent unlawful practices associated with the fraudulent registration and fraudulent registries of ships*, 7 April 2022, paras. 6.16-7, p. 17. '

[1651] IMO, *Resolution A.1142(31)* Adopted on 4 December 2019, (Agenda item 11), *Measures to prevent the fraudulent registration and fraudulent registries of ships*, preambular paras. 5-6.

To fight this phenomenon, the IMO set out a new procedure for the communication of information to the IMO through the *Global Integrated Shipping Information System*. Whether it will succeed in fighting fraudulent vessels is yet to be seen.[1652]

Flaglessness, however, may not only be genetic, but may also follow as a consequence of the non-compliance of a given vessel with its nationality requirements or, to put it differently, be *deregistered by the national authorities proprio motu* as a consequence of the conduct of the vessels as a way of a sanction or a means to improve its reputation as a diligent and responsible flag state.[1653]

In this sense, the UNSC res. 2375(2017) commands all states to allow inspections on their vessels on the high seas suspected of smuggling goods and technology functional to the construction of WMDs into North Korea. *If flag states do not allow these inspections, they 'shall immediately deregister that vessel'*.[1654]

In response to this and similar measures undertaken by the UNSC, several states have adopted procedures to deregister[1655] vessels involved in sanctioned activities in *delinquent* states such as North Korea and Syria. For instance, under *Executive Decree* 32(2019), Panama provides the cancellation from its registry of every ship connected with terrorist activities (as provided under the *UN Terrorist Financing Convention*), and void any document regarding navigation in compliance with the UNSC resolutions.[1656]

2.1 Stateless vessels: the jurisdictional enigma

[1652] GIRVIN, S., 'Nationality requirements: implications for shipping enterprises', in Girvin, S., Ulfbeck, V. (eds.), *Maritime Organisation, Management and Liability. A Legal Analysis of New Challenges in the Maritime Industry*, Oxford (2021), p. 37.

[1653] *e.g.* Belize: FAO, *Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing*, Miami, 23-25 September 2003, p. 88.

[1654] UNSC, Resolution 2375 (2017), 11 September 2017, para. 8.

[1655] VASSALOTTI, O., TRAINER, C., Fake Flags: At-Sea Sanctions Enforcement and Ship Identity Falsification, *The Diplomat,* 26 september 2018 https://thediplomat.com/2018/09/fake-flags-at-sea-sanctions-enforcement-and-ship-identity-falsification/.

[1656] PANAMA, *Decreto Ejecutivo N° 32 (De lunes 04 de febrero de 2019) por medio del cual se toman acciones y medidas contra las naves registradas en la marina mercante de la República de Panamá y empresas marítimas vinculadas con la financiación del terrorismo*, Artts. 1-2 ff. In ottemperance with this decree, Panama has deregistered several dozen vessels formerly flying its flag. See ILLUECA, A., On Sanctions and Deregistration of Vessels: The Recent Practice of Panama, *Opinio Juris*, 24 july 2019 http://opiniojuris.org/2019/07/24/on-sanctions-and-deregistration-of-vessels-the-recent-practice-of-panama/.

As seen in the previous Paragraph, great uncertainty surrounds the jurisdictional regime applicable to ships without nationality, and in particular, the question of whether statelessness (*lato sensu*) allows boarding states to exercise criminal jurisdiction over the crew.[1657]

As a *caveat*, in this Paragraph, '*unflagged vessels*,' *'vessels without nationality'*, and '*stateless vessels*' will be used as synonyms since the aim of this analysis is not to dissect with surgical precision the nationality of ships and the ways it is conveyed to the outer world, but rather to question the impact of all these phenomena on maritime jurisdiction over crimes of international concern.

Technically speaking, these three expressions refer to slightly different and often overlapping circumstances. Unflagged vessels are ships which do not appear to fly or show in any other way a sign identifying their nationality.[1658] Instead, the formula 'vessels without nationality' is the legal status justifying wider assertions of jurisdictions under UNCLOS and other treaties.[1659] Stateless vessels, finally, are those with regard to which 'there is no apparent claimable nationality or-if there is a potential nationality-that State has rejected that claim', and the expression is generally used in pre-UNCLOS treaties.[1660]

According to the *restrictive* view, the lack of nationality of a vessel is not *per se* a sufficient condition for the exercise of jurisdiction by the boarding states. In particular, Papastavridis argues that '[t]he boarding States *would have to rely on another legal basis in order to exert jurisdiction* over persons and property on these vessels, since the statelessness itself would fall short of according them such jurisdiction. […] The States concerned *should have enacted legislation in accordance with a well-accepted principle of international jurisdiction that criminalises the conduct in question*, even on stateless vessels on the high seas, in order to lawfully arrest and subject the offenders to their criminal jurisdiction.'[1661]

Along the same lines, in a slightly more nuanced position, Attard and Mallia require the existence of '*some form of jurisdictional nexus* […] for a state to apply its laws to such a vessel and

---

[1657] *Supra* notes 161-7. The persistent uncertainty is also acknowledged by AMERI, M., 'La police de la mer', in Forteau, M., Thouvenin, J.M. (eds.), *Traité de Droit Internationale de la mer*, Paris (2017), p. 921, who refuses to take any position with regards to boarding states enforcement jurisdiction.

[1658] DUBNER, *supra* note 163.

[1659] MCLAUGHLIN, R., Article 110 of the law of the sea convention 1982 and jurisdiction over vessels without nationality, *George Washington International Law Review* 51(3)(2019), p. 378.

[1660] *Ibid.* p. 380.

[1661] PAPASTAVRIDIS, E., EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea, *QIL, Zoom-in* 30 (2016), p. 26. Emphasis added.

enforce its laws against it',[1662] and a similar view is also shared, *ex multis,* by Anderson, who highlights the necessity of safeguarding other involved interests relating to the ship, such as the nationality of the owners.[1663]

In Guilfoyle's opinion, the omission of a detailed provision on the enforcement powers under UNCLOS, the *UN Narcotics Convention*[1664] and the *FSA*[1665] is evidence that, beyond the right of visit and inspection, no agreement has yet been reached between states as to the status of stateless vessels and the jurisdiction thereupon.[1666] On the contrary, he contends that irrespectively of the flag or its absence, boarding states may exercise their *ratione personae* jurisdiction over the crew when the visiting warship and the crew share the same nationality.[1667]

Nevertheless, this position is not univocally reflected in state practice.[1668]

Under §70502(c)(1)(a) and (b) of the US *Shipping Regulation* (2021),[1669] 'the term "*vessel subject to the jurisdiction of the United State*s" includes— (A) a *vessel without nationality*; (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas.'

[1662] ATTARD, D., MALLIA, P., 'the high seas', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea,* Oxford (2014), p. 262.

[1663] ANDERSON, H., The nationality of ships and flags of convenience: economics, politics, and alternatives. *Tulane Maritime Law Journal*, 21(1)(1996), p. 143. In particular, he requires the existence of a 'nexus or, alternatively, [the ability] to articulate an exigent circumstance'. In the same sense CHURCHILL, LOWE, SANDER, *supra* note 49, pp. 404-5; SCANLON, Z., Taking action against fishing vessels without nationality: have recent international developments clarified the law, *International Journal of Marine and Coastal Law* 32(1)(2017), p. 56.

[1664] Article 17(11).

[1665] Art. 21(17). GUILFOYLE, D., *Shipping Interdiction and the Law of the Sea*, Cambridge (2009), p. 108.

[1666] *Contra* p. 334: 'The international law of the sea is conspicuously silent on the issue of stateless vessels, because the entire legal regime of the high seas is predicated on the assumption that every vessel has a nationality." The possession of a nationality is so essential to a vessel engaged in legitimate trade that many commentators simply could not envision a vessel not being properly registered in some country.'

[1667] *Ibid.*, p. 18. On the distinction between jurisdiction *in rem* (with regard to the ship as such) and *in personam* (over the crew), Papastavridis similarly argues that 'it is *mainly for in personam jurisdiction that the boarding States would have to rely on some positive basis to exercise jurisdiction over persons on these vessels*. If there is no relevant provision or any jurisdictional nexus that grants to the forum State jurisdiction to punish these persons, the State of nationality of the persons concerned must exercise jurisdiction in accordance with the well-established principle of nationality'. PAPASTAVRIDIS, E., Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas, *The International Journal of Marine and Coastal Law* 25 (2010), pp. 584-5. Emphasis added. To these hypotheses, Oppenheim, Jennings and Watts add that 'members of the crew who commit crimes when ashore and then return to the vessel may not be seized by the authorities of the littoral state, who can only request their surrender: if the requested is granted the local courts have jurisdiction to try the offender, but not if it is refused or if it is granted on conditions which exclude the exercise of jurisdiction.' On the contrary, they argue that the commander and the members of the crew ashore for official business are subject to the exclusive jurisdiction of their home states, whereas if they are engaged in pleasure or recreation, they are subject to the general regime of foreigners. OPPENHEIM, JENNINGS, WATTS, *supra* note 174, pp. 1169-70.

[1668] ATTARD, MALLIA, *Ibid.* For an overview of the domestic legislation supporting the broader approach, see MURDOCH, *supra* note 160, pp. 175-7.

[1669] US Code, Title 46. Emphasis added.

This position was expressed, *ex multis*, by the US Court of Appeals of the Eleventh Circuit in the *US v. Marino-Garcia* case (1982): '[t]hese restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels. *Vessels without nationality are international pariahs*. They have no internationally recognised right to navigate freely on the high seas. […] The absence of any right to navigate freely on the high seas coupled with the potential threat to order on international waterways has led various courts to conclude that international law places no restrictions upon a nation's right to subject stateless vessels to its jurisdiction. […] *Jurisdiction exists solely as a consequence of the vessel's status as stateless. Such status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions*.'[1670]

Italian practice adopts a similar interpretation of the regime of stateless vessels. In the Judgment n. *31652/2021*, the Italian Supreme Court held that: "the lawful (rectius: dutiful) exercise of police powers 'on the high seas' by the military or police vessel of the State Party to the Convention entails, as a logical and necessary consequence, the subjection of the accused to the jurisdiction of the State because the authoritative powers exercised on the occasion derive from the State's authority which, when exercised under the conditions provided for by the international conventions, encompasses the exercise of jurisdiction, as the principal and most obvious manifestation of the authoritative power of the State, since, in the absence of a 'flag State', the authority of another State is not at stake and since the conduct in question was carried out on the 'high seas', i.e. outside the territory of another State. [...] Thus, when a ship is not attributable to a State, that ship and the persons on board do not enjoy freedom of navigation at all.'[1671]

[1670] UNITED STATES COURT OF APPEALS, Eleventh Circuit, *United States v. Marino-Garcia* 679 F.2d 1373 (11th Cir. 1982) Decided Sep 7, 1982. Emphasis added. The judgment supports its finding holding that 'commentators discussing the issue have unanimously agreed that all nations have the right to assert jurisdiction over stateless vessels on the high seas. M. Whiteman, Digest of International Law 21 (1968); I. Brownlie, Principles of Public International Law 212, 222 (1967); H. Meyers, supra, at 318-20 (1967); 1 L. Oppenheim, International Law 546 (7th ed. 1948); 2 G. Hackworth, Digest of International Law 725 (1942); R. Rienow, Test of the Nationality of a Merchant Vessel 12-15 (1937).'

[1671] CASS. I PEN. n. *31652/2021*, 13 agosto 2021, paras. 2.3-4. In the same sense, *ex multis,* CORTE DI CASSAZIONE, sez. I Penale, sentenza n. *36837/2017, 25 luglio 2017*; TRIBUNALE DI CATANIA, Quinta Sezione Penale in sede di riesame ex art. 309 c.p.p., *Proc. n. 293/2014 R.I.M.C*, 20 february 2014: 'a ship without nationality or flying a flag that is not authorized to mast is subject to the control and interference, i.e., "jurisdiction" of any maritime state. This is a well-established principle of international law, which the above provision of the Montego Bay Convention further ratifies'. According to both the Italian and US judicial authorities, evidence of the consolidation of this principle can be found in JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, *Naim Molvan, owner of motor vessel "Asya" v. Attorney-*

The arguments advanced in favour of this interpretation focus on two aspects. On the one side, as already seen in the previously cited US and Italian case law, in the case of *ships without nationality, squarely and simply, there is no nationality to respect*[1672] *or violate* if a state exercises jurisdiction on a flagless vessel.[1673] On the other, the proliferation of stateless ships shakes the foundations of the *public order* of the sea and creates pockets of impunity and lawlessness.[1674]

This point is particularly elaborated by Anderson, according to whom the question of the jurisdictional effects of the statelessness of a ship is not as much a matter of immunity from non-flag state jurisdiction as it is of the *effectiveness of flag state jurisdiction*: 'The protection that a registered vessel enjoys on the high seas is in the nature of an immunity. […] the registration papers of a vessel immunise it against interference from other states. *The flag state does not gain its exclusive jurisdiction through the registration of the vessel. Rather, but for the registration, other states would have jurisdiction as well.*[1675] Any other result would end in chaos and anarchy on the high seas. If only a country of registration could exercise jurisdiction at all, under any circumstances, then an unregistered vessel would be immune from interference by anyone.'[1676]

In this sense, it is helpful to remind that exclusive flag-state jurisdiction/the immunity of ships from non-flag state jurisdiction derives its legitimacy from the *effectiveness* of flag-state jurisdiction under Article 94 UNCLOS. Flag state jurisdiction imposes duties on states to ensure (!) jurisdiction and control over all the matters relating to the ships. The jurisdictional hole left by the flaglessness of a ship cannot become a spot of lawlessness: *natura abhorret vacuum!*[1677]

The borderline philosophical question that needs to be asked is thus whether such an *absolute jurisdictional void* can exist in reality. Parmenides believed that being was 'something

---

General for Palestine, on appeal from the Supreme Court of Palestine, A.C. 351, 20 April 1948, which, for his part, entirely relies on the authority of Oppenheim. See BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, *British International Law Cases* vol. 1, London (1964), p. 678; OPPENHEIM, L., *International law: a treatise, vol. 1 – peace*, sixth edition, London (1947), pp. 546-7.

[1672] CONFORTI, B., IOVANE, M., *Diritto internazionale*, XI edizione, Napoli (2018), p. 319.

[1673] In this sense, MANSELL, *supra* note 42, p. 63.

[1674] MUKHERJEE, R. 'Ship Nationality, Flag States and the Eradication of Substandard Ships: A Critical Analysis', in Mukherjee, P.K., Mejia, M.Q., Xu, J. (eds.), *Maritime Law in Motion*, Cham (2020), pp. 581, 584; REULAND, R.C.F., Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, *Vanderbilt Journal of Transnational Law* 5(5)(1989), pp. 1196-201; RAYFUSE, R.G., *Non-flag state enforcement in high seas fisheries*, Leiden (2004), pp. 56-7.

[1675] Since 'The high seas are not res nullius, subject to the jurisdiction of no nation, but res communis, subject to the common jurisdiction of all nations.' ANDERSON, A. W., Jurisdiction over stateless vessels on the high seas: an appraisal under domestic and international law, *Journal of Maritime Law and Commerce* 13(3)(1982), p. 336.

[1676] *Ibid.* emphasis added.

[1677] ORESME, N., *Questiones Super Physicam*, Books I-VII, Leiden (2013), para. 115, p. 468.

physical and tangible,' hence 'empty spaces could only be found where being was not, but where being is not, there can only be non-being, i.e. empty space is non-existent'.[1678]

The metaphor of space seems especially fitting to describe jurisdiction. As seen in the Introduction to this Dissertation, the doctrine of jurisdiction recognises the *existence* (which, according to Parmenides, is *ontologically incompatible* with void) of several jurisdictional principles simultaneously applicable to a given context: territorial, personal (active and passive), effect, universality.

As affirmed by Papanicolopulu, 'a state may exercise its jurisdiction based on the nationality, the universality, the passive personality or another appropriate principle. […] there is no doubt that a state can legislate and can enforce its laws and regulations with respect to platforms used by its nationals […]. It could also be considered as a non-exorbitant form of jurisdiction the exercise by a state of criminal jurisdiction in the case that the victim of an illegal act committed by one of the persons on the platform has as its victim a national of that state. universality, possibly in the qualified form of comprising the aut dedere aut iudicare principle, could operate to prevent and punish conduct that is condemned under global treaties, such as the slave trade and human trafficking, threat to the safety and security, pollution of the marine environment or inhuman working and living conditions.'[1679]

It is hard to imagine a situation of crimes of international concern 'contained' within a ship, which does not reverberate or impact in some ways on a plurality of states creating jurisdictional links with what happens on board a stateless vessel.[1680] Even without recurring to universal jurisdiction, which, as it will be seen in Chapter II, is not really a panacea, *at least some states will have a nexus with the crime or at the very least, there will likely be exigent circumstances*[1681] *justifying or even mandating their exercise of jurisdiction*. If so, it would seem that absolute jurisdictional void at sea is a primarily academic concern, theoretical rather than practical.[1682]

That being said, I am not entirely satisfied or fully convinced that only a jurisdictional nexus allows the exercise of jurisdiction on board stateless vessels.

[1678] GUTHRIE, W.K.C., *A History of Greek Philosophy Volume 2. The Presocratic Tradition from Parmenides to Democritus*, Cambridge (1962), p. 33.
[1679] PAPANICOLOPULU, I., 'Chapter 17. A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea', in Schonfield, C., Lee, S., Kwon, M. (eds.), *The Limits of Maritime Jurisdiction*, Leiden (2014), p. 403.
[1680] See in this sense the comments made in the previous chapters relating to the impact and effect of crimes of international concern.
[1681] ANDERSON, *supra* note 207.
[1682] In this sense MURDOCH, *supra* note 160, p. 177.

First, with regard to the possible objection that without a qualified link with the ship, boarding states could abuse their rights, it must be noted that no state has exclusive jurisdiction over flagless vessels. This is a consequence of the status of the high seas as 'res communis, subject to the common jurisdiction of all nations'.[1683] When it comes to flagless vessels, boarding states only have a *limited functional and concurrent jurisdiction shared with the entire international community* (and, in particular, the states presenting qualified nexus).

Second, it may be said that limiting enforcement jurisdiction against flagless vessels to the states having a qualified link or justified by the exigent circumstances of the case does not leave any open sores since there are always some states which can claim to have a somehow more substantial reason to extend their enforcement jurisdiction over ships without nationality. This solution, however, relegates to the background the issue of the maintenance of maritime public order and the vital necessity of avoiding any loopholes allowing crime to remain unpunished.

Third and final, the restrictive approach does not seem to be fully consistent with the *negative freedom* on which the *Lotus* principle is *allegedly*[1684] based: 'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a *wide measure of discretion which is only limited in certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[1685]

There is no prohibition of enforcement against flagless vessels. On the contrary, several post-UNCLOS provisions, *e.g.* Article 8(7) of the *Smuggling Protocol* (2000), delegate the determination of the necessary measures to the authorities of the boarding states: 'A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by

---

[1683] ANDERSON, *supra* note 160.

[1684] In the literature, however, it has been argued by some authors that the *Lotus principle* has been incorrectly extrapolated from the eponymous judgment since it fails to provide due attention to the following paragraph of the reasoning of the Court: '[t]he first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.' PCIJ, *S.S. 'Lotus', France v Turkey, Judgment*, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), p. 18. According to Spiermann, 'the Lotus statement did not give expression to a presumption of freedom. Literally, it rejected a presumption against freedom'. SPIERMANN, O., 'Lotus and the Double Structure of International Legal Argument', in Boisson de Chazournes, L., Sands, P. (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge (1999), p. 142; HERTOGEN, A., Letting Lotus Bloom, *The European Journal of International Law* 26(4)(2016), pp. 907-8.

[1685] *Ibid.*, p. 19.

sea and is without nationality [...] may board and search the vessel. If evidence confirming the suspicion is found, *that State Party shall take appropriate measures in accordance with relevant domestic and international law*.'[1686]

In the puzzling silence of international law, what measures can be considered to be appropriate? Arguably, it is hard to think that the exercise of enforcement jurisdiction against crimes of international concern aimed at preserving maritime public order could be deemed inappropriate.

3. Sovereign immune vessels: organic and functional jurisdictional absolutism. *In rem* or *in personam*?

The final issue to be briefly examined in this Chapter concerns the jurisdictional regime of warships and state-owned vessels used for governmental purposes[1687] and the question of their sovereign immunity in relation to crimes of international concern.

In this sense, two preliminary *caveats* are mandated. First, this Dissertation is not and cannot be an encyclopaedia of maritime jurisdiction, hence the analysis is necessarily limited to the issues more relevant for the examination of crimes of international concern. In this regard, it ought to be reminded that marine warfare and marine war crimes are not the primary focus of this Thesis and, as a consequence, also the jurisdictional regime applicable to warships will only be delineated in very broad strokes.

Secondly, with specific reference to the principles of sovereign equality and immunity, they will be considered as agreed notions and, therefore, will not be examined in detail.

The principle of sovereign immunity attached to warships (and state-owned vessels used for non-commercial purposes, currently codified in Articles 95-6 UNCLOS, has long been recognised in public international law.[1688] Article 3 of the *Brussels Convention on the immunity of state-owned vessels* (1926)[1689] provided that '*ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State,* and used at the

---

[1686] Emphasis added.

[1687] Hereinafter collectively referred to as publicly operated vessels.

[1688] See *ex multis* BREAU, S.C., 'Chapter 8. Ships owned or operated by a state', in Hafner, G., Kohen, M., Breau, S. (eds.), *State practice regarding state immunities/La pratique des Etats concernant les Immunités des Etats*, Leiden (2006), pp. 126-37; OPPENHEIM, L., JENNINGS, R., WATTS, A. (eds.), *supra* note 174, pp. 735-6.

[1689] LEAGUE OF NATIONS, *International convention for the unification of certain rules relating to the immunity of state owned vessels*, 10 April 1926. Hereinafter, *Brussels Immunities Convention* (1926).

time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.'[1690]

The concept of the immunity of warships (largely accepted in customary law) and vessels used for governmental services was clarified under Article 2(1) of the *Brussels Additional Protocol* (1934),[1691] which established, once and for all,[1692] that such immunity 'may be relied on by States in respect of vessels owned or operated by them at the time of seizure, attachment or detention *if they are being used exclusively on Governmental and non-commercial service*.'[1693]

In extreme synthesis, the distinction between governmental and non-governmental services can be said to replicate the traditional *public-private divide* in the matter of state immunity, where this translates into the dichotomy between *acta jure imperii* and *acta jure gestionis*.[1694] According to this restrictive approach, almost unanimously accepted in the international community,[1695] immunity claims are limited to the *acta jure imperii, i.e.* exercises of public authority, and do not extend to those transactions and behaviours undertaken as a common commercial or private entity, which are not exclusive of states.[1696]

[1690] Emphasis added.

[1691] LEAGUE OF NATIONS, *Additional to the international convention for the unification of certain rules concerning the immunity of state-owned vessels, signed at Brussels on April 10th, 1926*, 24 May 1934.

[1692] See in this sense the *travaux préparatoires of* the HSC, whose Articles 8 and 9 are *verbatim* repeated in UNCLOS (the sole exception being the omission in Article 95 of the definition of warship provided under Article 8(2) HSC). With regards to the status of warships, the ILC *commentary simply (or rather, laconically) stated that '[t]his principle is generally accepted in international law.' The commission extended this regime also to commercial vessels exclusively used for governmental purposes*, underlying, however, that 'the assimilation referred to in article 8 concerns only the immunity of ships for the purposes of the exercise of powers by other States, so that there is no question of granting policing rights.' ILC, *Report of the International Law Commission Covering the Work of its Seventh Session 2 May - 8 July 1955, Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), Extract from the Yearbook of the International Law Commission:- 1955*, vol. II, p. 23.

[1693] Emphasis added.

[1694] 'States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts.' ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, para. 78 p. 135. ATTARD, MALLIA, *supra* note 178, p. 262.

[1695] CRAWFORD, J., *Brownlie's Principles of Public International Law*, 9th Edition, Oxford (2019), p. 473.

[1696] SIMMA, B., MÜLLER, A, T., '6. Exercise and limits of jurisdiction', in Crawford, J., Koskenniemi, M. (eds.), *The Cambridge Companion to international law*, Cambridge (2012), p. 151; FELLMETH, A.X., HORWITZ, M., *Guide to latin in international law*, second edition, Oxford (2021), p. 155. Against the distinction between *acta jure imperii* and *acta jure gestionis* see GUILFOYLE, *supra* note 209, pp. 300-1. According to him, there is no generally accepted test for distinguishing between governmental/sovereign and commercial/ordinary acts, '[n]or is the dichotomy itself inherently convincing or coherent: distinguishing the scope of 'government' activity necessarily involves policy judgements about 'the proper sphere of state activity'. In the same sense CRAWFORD, J., International Law and Foreign Sovereigns: Distinguishing Immune Transactions, *British Yearbook of International Law* 54 (1)(1983), p. 89. As he explains, '*not every legal system contains [a distinction between private and public law]*. […] Deprived of such contextual support, the distinction is radically defective and cannot claim to represent general international law.' for

As explained by the US Supreme Court in the *The Schooner-Exchange v. Mcfaddon & Others* case (1812), 'a public armed ship […] constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is *employed by him in national objects*. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity'.[1697]

In other words, warships (and other publicly operated vessels) enjoy immunity due to their *organic or functional position* as floating arms or legs of the state, under whose command they perform their duties.[1698] Given the particular regime of warships, this last element -the effective jurisdiction of the flag state- is uniquely important, as it is a condition for the persistence of immunity. Under Article 102 UNCLOS, in this sense, holds that 'acts of piracy, […] committed by a warship, government ship or government aircraft *whose crew has mutinied and taken control of the ship* […] are *assimilated to acts committed by a private ship* or aircraft.'[1699]

That being said, it is necessary to precise the meaning and limits of this immunity. In particular, it is necessary to discuss the applicability of sovereign immunity within areas under coastal state jurisdiction and whether such immunity extends to crimes potentially committed by the personnel of these vessels onboard or from them.

With regards to the geographical limits of state-owned vessels, in the *Ara Libertad* case, Ghana argued that the jurisdictional immunity referred e*x* Article 32 UNCLOS was inapplicable to warships and other public vessels as it collocated in the regime of the innocent passage in the territorial sea and UNCLOS did not 'refer to any such immunity when in internal waters and that "it was understood that the regime of ports and internal waters was excluded [. . .] from the 1982 Convention"'.[1700]

---

a comprehensive analysis of the *jure gestionis/jure imperii* divide see ORAKHELASHVILI, A., 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide', in Ruys, T., Angelet, N., Ferro, L. (eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge (2019), pp. 105-24.

[1697] US SUPREME COURT, *Schooner Exchange v. McFaddon*, 11 U.S. 116, 24 february 1812, p. 144. Emphasis added. on the development of the notion of sovereign immunity, see OKEKE, E.C., *Jurisdictional Immunities of States and International Organizations*, Oxford (2018), pp. 22-39.

[1698] UNCLOS, Article 29: '"warship" means a ship belonging to the armed forces of a State […] *under the command of an officer duly commissioned by the government of the State* […] and manned by a crew which is *under regular armed forces discipline*.' Emphasis added. ITLOS, "*ARA Libertad" (Argentina v. Ghana), Provisional Measures*, Order of 15 December 2012, ITLOS Reports 2012, para. 94, p. 348: 'warship is an expression of the sovereignty of the State whose flag it flies'.

[1699] Emphasis added. KOCHU THOMMEN, T., *Legal status of government Merchant ships in international law*, The Hague (1962), p. 4.

[1700] *Supra* note 245, para. 55 p. 343.

The Tribunal, however, quashed this argument stating that Article 32 does not specify the geographical scope of its application, and 'although Article 32 is included in Part II of the Convention entitled "Territorial Sea and Contiguous Zone", [...] some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in Article 29 of the Convention'.[1701] The Tribunal thus concluded that 'in accordance with general international law, a warship enjoys immunity, including in internal waters'.[1702]

Whilst the merits of the provisional measures appear correct (*i.e.*, state ships enjoy immunity in internal waters), the Tribunal's reasoning does not seem particularly well-founded or coherent.[1703]

In this sense, the *Joint Separate Opinion* of Judges Wolfrum and Cot provides an authoritative and articulated analysis of sovereign vessels' immunity in internal waters. The Judges affirmed that nothing in Article 32 UNCLOS establishes the immunity of state ships.[1704] On the contrary, according to them, this article 'takes for granted' the immunity of warships, as it provides that 'nothing in this Convention *affects the immunities'*. Logically, for the Convention to affect the immunities, they must already exist, and their existence is based on general international law (*i.e.* customary law),[1705] as affirmed in the last Preambular Paragraph of UNCLOS ('matters not regulated by this Convention continue to be governed by the rules and principles of general international law').[1706]

The strength of sovereign vessels' immunity is also implicitly recognised by Article 30 UNCLOS: even when a warship violates the laws and regulations of a coastal state, the latter may

---

[1701] *Ibid.* paras. 63-4, p. 344.
[1702] *Ibid.* para. 95, p. 348.
[1703] MCDORMAN, T. L., '4 Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions', in Ringbom, H. (ed.), *Jurisdiction over Ships*, Leiden (2015), pp. 86-7.
[1704] Contrary to Article 95, expressly providing for exclusive flag state jurisdiction on the high seas.
[1705] ITLOS, *Ara Libertad* (*supra* note 245), joint separate opinion of Judges Wolfrum and Judge Cot, paras. 41-7, pp. 374-5.
[1706] *Ibid.*: 'That warships in internal waters enjoy immunity from the exercise of coastal State jurisdiction, which includes immunity from judicial proceedings or any enforcement measure, is well established in customary international law and recognized in legal doctrine.' See in the same sense ITLOS, *Case Concerning The Detention Of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Request for the prescription of provisional measures*, case no. 26, Order, 25 May 2019, para. 110, p. 309: this reality [warships being an expression of the sovereignty of their flag states] is reflected in the *immunity it enjoys under the Convention and general international law.*' Emphasis added. Colombos in this sense explained that 'when the entry of foreign warships has been [...] allowed by the territorial state, its jurisdiction is waived, and no form of public or private process lies against the foreign ships.' COLOMBOS, J., *The international law of the sea, sixth revised edition*, London (1967), pp. 264-5.

(only) require it to leave *the territorial sea* immediately without recurring to any enforcement measure.[1707]

The second question needing to be examined is what kind of measures sovereign immunity of ships protects from. To be more specific, does sovereign immunity of warships and other publicly operated vessels also entail the immunity of those on board them? To be even more explicit, does the sovereign immunity of these ships shield their personnel or should the legal basis of such a potential immunity be looked at elsewhere?

As previously seen, Article 3 of the *Brussels Immunity Convention* (1926)[1708] understands ships immunity as immunity from 'judicial proceedings *in rem*'. In *Black's Law Dictionary*, *in rem* designates 'proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*. [...] in a strict sense, a proceeding *in rem* is one taken *directly against property, and has for its object the disposition of property, without reference to the title of individual claimants;* but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien.'[1709]

To put it differently, the immunity's focus is on the ship as state property, as a necessary limb of the state which must be protected against foreign claims over it. These claims, as evidenced above, are primarily concerned with the status and rights over sovereign immune vessels to prevent their loss as a consequence of any enforcement measure. *What matters for states is to be able to keep their ships*. No reference is made to their crew or any measures concerning them (including the exercise of criminal jurisdiction). Along the same lines, the UN *Convention on Jurisdictional Immunities of States and Their Property* (2004)[1710] is also silent on the matter of criminal jurisdiction. Article 16(1) and (2), rather generically, provides that warships or naval

---

[1707] RUIZ-CERUTTI, S., 'The UNCLOS and the Settlement of Disputes: The *ARA Libertad* Case', in del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015), p. 717; LANDO, M., State Jurisdiction and Immunity of Warships in the ARA Libertad Case, *Japanese Yearbook of International Law* 58 (2015), p. 353.

[1708] *Supra* note 236; KLEIN, *supra* note 133, p. 68.

[1709] CAMPBELL BLACK, H., *A law dictionary containing definitions of the terms and phrases of American and English Jurisprudence, ancient and modern and including the principal terms of international, constitutional, ecclesiastical and commercial law, and medical jurisprudence, with a collection of legal maxims, numerous select titles from the Roman, Modern Civil, Scotch, French, Spanish, and Mexican law, and other foreign systems, and a table of abbreviations*, St. Paul (1910), p. 608. Emphasis added.

[1710] Hereinafter, UN Immunities Convention.

auxiliaries or other vessels used only for non-commercial service[1711] enjoy 'immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship', without specifying what kind of proceedings does it refer to.

In this sense, though, it should be underlined that Article 19 expressly provides that '[n]o post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken', the sole exception being (in a markedly convoluted formula) that 'the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State'.

It would thus seem -according to the venerable brocard *ubi lex voluit, dixit; ubi noluit, tacuit*- that the Convention was *exclusively* concerned with the *patrimonial* dimension of state immunity, and, as stated by UNGA Res. 59/38(2004), 'it does not cover criminal proceedings'.[1712]

It goes without saying, though, that these considerations are simply and strictly based on the provisions of the *Brussels Immunity Convention* (1926) and the *UN Immunities Convention* (2004) and, thus, without a proper examination of the state practice and *opinio juris*, it cannot be excluded that these conventions do not reflect customary law.

A different yet closely related issue concerns the general status of armed forces and whether and to what extent and which kind of jurisdiction they enjoy. As previously seen, the immunity of publicly operated vessels appears to understand this immunity as a means to exclude actions against the ships as a whole, as instruments as such, rather than providing a detailed

---

[1711] In this sense, with regard to the sovereign immunity of a Spanish vessel sunken on the high seas close to Gibraltar, the US Eleventh Court of Appeals held that 'the *Mercedes* was not "act [ing] like an ordinary private person" in the marketplace […]. At the time it sank, the Mercedes was a Spanish Navy vessel […] assigned to the Spanish Navy fleet based at El Ferrol as one of nine frigate class ships. It was under the command of a Spanish Navy captain both when it left El Ferrol and when it was sunk. […] It was also carrying a substantial amount of Spanish Government specie and cargo, including money at the Minister of the Treasury's disposal, war donations, and copper and tin ingots. *Although the Mercedes did transport private cargo of Spanish citizens for a charge, the transport was of a sovereign nature. […] providing protection and safe passage to property of Spanish citizens was a military function of the Spanish Navy*, especially in times of war or threatened war. […] Because Spain was acting like a sovereign, not a private person in the marketplace, we conclude the *Mercedes* was not conducting commercial activity and is immune from arrest.' UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, *Odyssey Marine Expl. Inc. v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) • 23 Fla. L. Weekly Fed. C 425 • 2011 A.M.C. 2409, 21 September 2011. With regard to the sovereign immunity of a sunken XVI century French vessel and the public nature of the organization of a recovery operation by the French, see UNITED STATES DISTRICT COURT, N.D. FLORIDA, TALLAHASSEE DIVISION, *Global Marine Exploration, Inc. v. Republic of Fr.* 500 F. Supp. 3d 1296 (N.D. Fla. 2020), 16 november 2020. More *infra* Chapter V para. 4.

[1712] UN, United Nations Convention on Jurisdictional Immunities of States and Their Property, *General Assembly resolution 59/38* of 2 December 2004, n. 2. In the same sense DICKINSON, A. Status of Forces under the UN Convention on State Immunity, *International & Comparative Law Quarterly, 55*(2)(2006), p. 430. *Contra*: O'KEEFE, R., 'the general understandings', in O'Keefe, R., Tams, C.J. (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford (2013), p. 21.

discipline of the effects of this immunity.[1713] Deductively, it may be argued that the immunity of a ship should reasonably extend to those on board it.[1714] Nevertheless, it is worth comparing this principle with the status of armed forces in a foreign territory.

Under customary law, armed forces are generally recognised as a distinct group coming within its protection, although the exact contours of the issue remain unclear. In particular, it is unsettled *whether the rules applicable to visiting forces can be extended to armed forces merely crossing an area subject to the sovereignty of another state*[1715] and whether these apply to publicly operated vessels crossing foreign territorial waters.

In general terms, the question of the jurisdiction applicable to visiting armed forces sits at the crossroads of the competing jurisdictional interests of the sending state (maintaining discipline and control over its forces) and the receiving state (maintaining public order and controlling events likely to affect its people).[1716] The necessity of a compromise between these two opposite tendencies can be seen in the various agreements defining the legal position of a visiting military force deployed in the territory of a friendly State (SOFAS).[1717] These agreements, in spite of their substantial differences, conjugate the primary *functional immunity* of the sending state with the *residual territorial jurisdiction* of the receiving state.[1718]

[1713] KLEIN, *supra* note 133, p. 65: 'Although law enforcement powers at sea have been increased, the immunity of warships and other government vessels has not been altered in any way. To the extent that any maritime security threats or breaches are state sponsored, law enforcement powers against sovereign immune vessels are not available.' In the same sense, COLOMBOS, J., *ibid.*, p. 260.

[1714] *Infra* Chapter II, para. XYZ. ITLOS, *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment*, ITLOS Reports 1999, para. 106, p. 48; ITLOS, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment*, ITLOS Reports 2014, para. 127, p. 48; 'ITLOS, 'the M/V "Norstar […] is to be considered a unit and therefore […] its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity'; ITLOS, *M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment,* ITLOS Reports 2016, para. 231, p. 95; KITTICHAISAREE, K., *The International Tribunal for the Law of the Sea,* Oxford (2021), pp. 74-6; PAIK, J., 'The Tribunal's Jurisprudence and Its Contribution to the Rule of Law', in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*, Leiden (2018), pp. 66-8.

[1715] FOX, H., *The law of state immunity, second edition*, Oxford (2008), p. 717.

[1716] RENNER, L.E., International law and criminal jurisdiction over visiting armed forces: reconciling the concurrent jurisdiction discontinuity, *California Western International Law Journal* 14(2)(1984), pp. 351-2.

[1717] See CONDERMAN, P.J., Status of Armed Forces on Foreign Territory Agreements (SOFA), *Max Planck Encyclopedias of International Law* [MPIL], february 2013, para. 1; FARNELLI, G.M., A Controversial Dialogue between International and Domestic Courts on Functional Immunity, *The Law and Practice of International Courts and Tribunals* 14 (2015), pp. 264-5.

[1718] *e.g.* Article VII(1) and (2) of the NATO *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces* (1951). The NATO SOFA significantly attributes *concurrent jurisdiction of the sending and receiving states* over: 1) offences solely against the property or security of that state, or offences solely against the person or property of another member of the force or civilian component of that state or of a dependent; 2) offences arising out of any act or omission done in the performance of official duty. FOX, *ibid.* pp. 722-4. See also BARTON, G.G., Foreign Armed Forces: Qualified Jurisdictional Immunity, *British Year Book of International Law* 31(1954), pp. 341-70. FLECK, D., Are foreign military personnel exempt from international criminal jurisdiction under status of forces agreements, *Journal of International Criminal Justice* 1(3)(2003), pp. 656, 658: 'The purpose of SOFAs and

With specific regard to the rules applicable to foreign publicly operated vessels in territorial waters, earlier literature affirmed that in times of peace '*les crimes ou délits commis à bord de ces bâtiments, soit par des gens de l'equipage, soit par toutes autres personnes se trouvant à bord, tombent sous la compétence des tribunaux de la nation à laquelle le navire de guerre appartient, et sont jougés selon le lois des cette nation.*'[1719]

Some authors, whilst finding the absolute immunity of foreign warships in port *apodictic and weak*, reaffirmed that these theoretical fragilities 'by no means impeach the rule the exercise of jurisdiction over a foreign ship of war in territorial waters by direct interference with her.'[1720]

Current literature has stressed that UNCLOS does not provide any legal basis for the exercise of criminal jurisdiction on board publicly operated vessels passing in their territorial sea comparable to Article 27,[1721] as coastal states can merely require transiting warships to leave the territorial sea immediately, *i.e.* foreign warships are not subject to the (criminal) jurisdiction of the coastal state.[1722] Still, this is only partially true.

UNCLOS omissions do not mean that publicly operated vessels and those on board them are completely immune from any non-flag jurisdiction but simply that these exceptions to sovereign immunity must be found elsewhere, *e.g.* in the principle of *universal jurisdiction* or in other sources (*e.g.* ship-boarding agreements or UNSC resolutions).

Nevertheless, it may be equally possible -though fairly unlikely- to consider that the *omission of any recognition or express prohibition* of criminal jurisdiction on board state-operated vessels more simply means that UNCLOS *does not provide any regulation* in this respect.[1723] Hence, when it comes to criminal jurisdiction on board state-operated vessels, there would be *negative*

---

their practical effect is to limit, and not extend, the functional immunity of foreign armed forces as the result of a balance between the law of the sending state and the law of the receiving state. State immunity pertaining to armed forces of a sending state is an important exception to the general rules of international law applicable to territorial jurisdiction. *SOFA provisions recognize this exception, but they adjust recourse to functional immunity to the requirements of the receiving state.* SOFAs thus serve a shared interest in confidence building and good cooperation between the participating states. This is particularly true for clauses on jurisdiction over visiting forces.' Emphasis added.

[1719] ORTOLAN, T., *Règles internationales et diplomatie de la mer, trosième édition*, Paris (1856), pp. 298-301.

[1720] GREGORY, C.N., Jurisdiction over Foreign Ships in Territorial Waters, *Michigan Law Review* 2(5)(1904), p. 347.

[1721] *Ubi lex voluit…*

[1722] AQUILINA, K., '2 Territorial Sea and the Contiguous Zone', in Attard, D.J., Fitzmaurice, M., Martínez Gutíerrez, N.A. (eds.), *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea,* Oxford (2014), p. 54. Partially *contra* (in an isolated position), HONG, N., 'China', in Lee, S. (ed.), *Encyclopedia of Ocean Law and Policy in Asia-Pacific*, Leiden (2022), p. 35.

[1723] Even though the repeated juxtaposition of the adjective '*complete*' ('having all necessary parts, elements, or steps', 'total, absolute) next to jurisdiction referring to warships and other publicly operated vessels may be seen as (at least implicitly) excluding any exercise of jurisdiction on board sovereign vessels. See 'complete', *Merriam-Webster* https://www.merriam-webster.com/dictionary/complete.

liberty,[1724] or, less radically, there might reasonably be at least *some space* for allowing the exercise of criminal jurisdiction in limited, extraordinary circumstances.

3. Underwater cultural heritage

Dulcis in fundo, a few notes on underwater cultural heritage and the jurisdiction applicable to it. [1725] Article 303(1) UNCLOS establishes in very general terms the duty to protect and cooperate to protect objects of an archaeological and historical nature found at sea. Article 303(2) establishes instead (with a rather convoluted and hermetic formulation) that 'in order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article'.

As highlighted in the literature, it is a highly *infelicitous*[1726] article as, first, it does not provide any definition of archaeological or historical objects, and secondly, literally interpreted, the second paragraph appears somewhat confusing and tautological, as the removal without authorization would undoubtedly violate customs since as states ordinarily establish procedures for the lawful export of cultural heritage. Hence, the violations of the latter would be already covered by Article 33.[1727]

[1724] Against this reading of the *Lotus Principle*, *supra* note 239. Although the referred passage concerned presumptions relating to territorial jurisdiction, it may be argued that historically publicly operated vessels have enjoyed a wide degree of immunity and that creates a 'presumption against freedom' in their regard. Still, I contend that in the most extreme cases (*jus cogens* violations *et similia*), to paraphrase the liturgical hymn *Tantum Ergo* ('*et antiquum documentum novo cedat ritui*'), *et antiqua immunitas summorum criminum justae cedat jurisdictioni*.

[1725] On the regime of underwater cultural heritage see *ex multis* VARMER, O., Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf, *Stanford Environmental Law Journal* 33(2)(2014), pp. 251-88; DROMGOOLE, *supra* note 295; STRATI, *supra* note 290; SCOVAZZI, *supra* notes 290, 294; FLETCHER-TOMENIUS, P., FORREST, C., The protection of the underwater cultural heritage and the challenge of UNCLOS, *Art Antiquity and Law*, 5(2)(2000), pp. 125-58; AZNAR, M.J., The Contiguous Zone as an Archaeological Maritime Zone, *The International Journal of Marine and Coastal Law* 29 (2014), pp. 1–51.

[1726] In this sense WATTERS, D.R., The Law of the Sea Treaty and Underwater Cultural Resources, *American Antiquity* 48(4)(1983), p. 809: '*The issue of submerged cultural resources never was a high-priority item* on the agenda [of the Third Convention on the Law of the Sea], and thus it received cursory attention when compared with the lengthy deliberation given to the far more weighty issues that dominated UNCLOS III. Consensus that such provisions were even needed was wanting, and there was "a lack of interest by many States, passionate commitment by some and outright antipathy by other'. Emphasis added. in favour of an extensive interpretation of Article 303(1) UNCLOS: STRATI A., *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea*, The Hague (1995), pp. 124-5.

[1727] SCOVAZZI, T., 'Article 303', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017), paras. 8-17, pp. 1952-5.

In this sense, with regard to the aim and result of Article 303, Scovazzi affirms that '[r]ather than envisaging a substantive regime to deal with the new concern of the protection of the underwater cultural heritage, [states] were oriented in devising legalistic lucubrations (in this case presumptions) that in fact had the result of preventing of more concrete rights being granted to coastal States over the cultural heritage found in the contiguous zone.'[1728]

Furthermore, Article 303(2) only refers to the protection of cultural heritage in the CZ without mentioning the EEZ, CS and the high seas and, furthermore, only refers to the *removal* of cultural heritage. Paradoxically, therefore, it would appear that -under UNCLOS- coastal states would have no instrument to address the accidental or deliberate destruction of cultural heritage (*e.g.* in the context of fishing or mineral extraction or other activities).[1729] Treasure hunting[1730] (and/or submarine tourism damaging cultural heritage, as in the case of the *Titanic*),[1731] though, is no longer limited to the sea close to the shores as modern technology allows one to reach treasures lying at any depth everywhere in the world, which are, therefore, exposed to the threat of accidental or deliberate destruction and trafficking.[1732]

[1728] SCOVAZZI, *supra* note 290, para. 17, pp. 1954-5.

[1729] In this sense SCOVAZZI, *supra* note 111, p. 208: 'Besides, the coastal State, which is empowered to prevent and sanction the removal of the objects in question, is apparently defenceless if they, instead of being removed, are simply destroyed in the place where they had been found'.

[1730] See *ex multis* PETRIG, A., STEMMLER, M., Article 16 UNESCO convention and the protection of underwater cultural heritage, *International and Comparative Law Quarterly* 69(2)(2020), pp. 401-4: 'on the continental shelf or in the Area […] the ability of a State to protect endangered cultural heritage is considerably restricted since, unlike on their territory, States are not free to exercise their jurisdiction. In order to preserve underwater cultural heritage in these zones, States have to rely on jurisdictional bases that allow them to intervene in extraterritorial matters, notably the well-established active nationality and flag State principles.' In this sense UK, COURT OF APPEAL, CRIMINAL DIVISION, *Regina V John Simon Blight, Nigel Ingram*, EWCA Crim 280, case No: A2-201802762/A2-201802764, 12 February 2019, para. 24: 'wrecks of vessels sunk during the First World War are reasonably, in our view, described as they were by the judge as a "unique" source of information about the maritime heritage surrounding this country. They are, she said, a finite and fragile resource and the removal of items from such vessels constitutes stealing part of our national story.' With regard to the meaning and purpose of Art. 1(A) of the (para. 35), the court further explained that '[r]emoving and disposing of items taken from wrecks which were causing no obstruction without the consent of their owners cannot be regarded as a useful activity, all the less when it involved the plunder (as in some cases it did) of wrecks of historic interest. In these circumstances, we think it untenable to suggest that, if the appellants had declared to the receiver the items of wreck which they brought ashore, they would have been entitled to any salvage awards.'

[1731] BROAD, D.J., Scientists Warn That Visitors Are Loving Titanic to Death, *The New York Times*, 9 August 2003 https://www.nytimes.com/2003/08/09/world/scientists-warn-that-visitors-are-loving-titanic-to-death.html.

[1732] SCOVAZZI, *supra* note 290, paras. 19-20, pp. 1955-6; SCOVAZZI, T., Convention on the protection of underwater cultural heritage, *Environmental Policy and Law*, 32(3-4)(2002), p. 153: 'the danger of uncontrolled activities is aggravated by Art. 303, para. 3, UNCLOS, which goes as far as to subject the general obligation of protection of archaeological and historical objects to a completely different kind of rules: "Nothing in this article affects the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices with respect to cultural exchanges."'

In a way, Article 303 acknowledges the potential shortcomings of its regime, providing that '[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.' The development of these *extra-UNCLOS* international agreements and rules of international law[1733] may, therefore, correct some of the undesirable (at least from the perspective of the preservation of cultural heritage) consequences of the suboptimal formulation of Article 303.[1734]

Perhaps, though, it may also be suggested that, on the one hand, the general duty established in the first paragraph of Article 303 and the collocation of the provision in Part XVI UNCLOS (General provisions), on the other, should orient its interpretation in the sense of extending its applicability *ratione loci* beyond the CZ (at least) to the CS and the EEZ,[1735] *i.e.* the general applicability of Article 303 to all underwater cultural heritage.[1736]

As previously mentioned by Scovazzi, the overall framework for underwater cultural heritage designed by UNCLOS is fairly confusing.[1737] To make things (even) worse, many of these treasures can often be found in wrecks of (formerly) state-owned vessels which, at the time of their sinking, were engaged in public activities (*i.e.* vessels potentially vested with sovereign immunity),[1738] which opens the door to another litany of rather complex legal issues spacing from

---

[1733] The most important instrument in this sense is the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (*hereinafter*, UCPUCH), whose Article 3 ('Relationship between this Convention and the United Nations Convention on the Law of the Sea'), however, provides that '*Nothing* in this Convention shall *prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea*. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.' With specific regard to the CZ, Article 8 establishes that 'Without prejudice to and in addition to Articles 9 and 10, and *in accordance with Article 303, paragraph 2*, of the United Nations Convention on the Law of the Sea, *States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied*.' Emphasis added. as UNCLOS refers to the UCPUCH and in turn, the UCPUCH refers to the UNCLOS, the regime of underwater cultural heritage beyond the territorial sea is far from clear.

[1734] In this sense, *ex multis*, DROMGOOLE, S., 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *The International Journal Of Marine And Coastal Law* 18(1)(2003), p. 75.

[1735] Such an interpretation would remedy the paradoxes triggered by Art. 303(1) and (2). In this sense WATTERS, *supra* note 290, p. 813: 'There are obvious contradictions within Article 303. In 303(1), States are assigned protecting underwater cultural resources "found at sea," thereby apparently referring to all ocean zones. However, paragraph 2 then restricts coastal State jurisdiction to the contiguous zone. In other words, the duty to protect cultural resources in other ocean zones is article 303(1), but a coastal State's legal basis (jurisdiction) for fulfilling that obligation is limited to the contiguous zone by article 303(2)'. *Contra*: NORDQUIST, M.H., ROSENNE, S., SOHN, L.B. (eds.), *United Nations Convention on the Law of the Sea 1982: a commentary,* volume V, Dordrecht (1989), para. 303.10, pp. 161-2. According to them, beyond 24 nautical miles the coastal state has no particular standing under the UNCLOS, hence the matter is left to the regulation of a subsequent (in 1989) UNESCO agreement. As seen in note 296, nevertheless, the UCPUCH refers to the utterly confused provisions of UNCLOS, hence the *enigma* is far from solved.

[1736] *Contra* ŻENKIEWICZ, M., WASILEWSKI, T., The Galleon 'San Jose'. Almost Four Decades of Legal Struggles on the National and International Plane. *Comparative Law Review* 25(2019), p. 326.

[1737] *Supra* note 292.

[1738] *Infra* Chapter V para. 3.

whether a wreck can still be considered as a ship to whether a wreck is (still)[1739] covered by sovereign immunity.[1740]

[1739] In the sense of the functional dimension of sovereign immunity attached to warships and other state-operated vessels, Degan: '[i]n time of an armed conflict which was regular at the time of sinking, warships of all belligerents as being actors of their hostilities, lose their sovereign immunity. They were produced and are maintained as a means of warfare. If such a ship was sunken by the enemy belligerent its wreck cannot enjoy sovereign immunity of the flag State because it is not operational and as such is not anymore a State organ. Claiming its sovereign immunity is not more than a legal fiction. Therefore, important are here circumstances of sinking.' Quoted in Yearbook of Institute of International Law - Tallinn Session - Volume 76 (2015), 9ème Commission, *Le régime juridique des épaves des navires de guerre et des navires d'Etat en droit international The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law*, Rapporteur: Natalino Ronzitti, p. 327. Similarly, LOSIER, M.M., The Conflict between Sovereign Immunity and the Cargo of Sunken Colonial Vessels, *The International Journal of Marine and Coastal Law* 33(2018), pp. 535-6: 'Warships and other State-owned vessels qualify for immunity if they meet the requirements of Articles 29 and 96, respectively, of the United Nations Convention on the Law of the Sea ("1982 LOSC"), which implicitly require such vessels to be navigable consistent with other conventional law instruments. As non-navigable vessels arguably do not meet conventional law criteria, historically sunken State-owned vessels should not be cloaked with immunity, which they would otherwise enjoy because they exercise sovereign acts. And though they remain State property, as non-navigable, sunken wrecks incapable of exercising sovereign acts, serving, or being at the defence of the State, they should lose immunity.'. *Contra* ROACH, A.J., 'Warships, Sunken', in *Max Planck Encyclopedia of Public International Law (*2015), paras. 45-6: 'Some have argued that warships no longer meet this definition after they sink and therefore are not entitled to the immunities accorded to warships (reflected in Arts 32, 95, and 236 UN Convention on the Law of the Sea). However, because sunken warships remain the property of the government of the flag State until abandoned, the accepted rule is that the immunities of government property continue to apply to sunken military craft.'

[1740] *Ex multis* DROMGOOLE, S., The Legal Regime Of Wrecks Of Warships And Other State-Owned Ships In International Law: The 2015 Resolution Of The *Institut De Droit International*, *The Italian Yearbook of International Law Online* 25(1)(2016), pp. 181-3 ff.; RONZITTI, N., 'Sunken Warships and Cultural Heritage', in Crawford, J., Koroma, A., Mahmoudi, S., Pellet, A. (Eds.) *The International Legal Order: Current Needs and Possible Responses*. Leiden (2017), p. 477; DROMGOOLE, S., 'Sunken warships and other state vessels and aircraft'. In *Underwater Cultural Heritage and International Law*, Cambridge (2013); AZNAR-GOMEZ, M. J., Legal Status of Sunken Warships Revisited. *Spanish Yearbook of International Law* 9(2003), pp. 67-8.

CONCLUSIONS. RECONCILING THE *NÒMOI* OF LAND AND SEA IN THE NAME OF JUSTICE FOR (MARITIME) CRIMES OF INTERNATIONAL CONCERN

This Dissertation stems from an apparently straightforward and innocent question – who has the power to prosecute and punish individuals accused of perpetrating international and transnational crimes at sea? – which, in the course of my research, has revealed itself to be quite a treacherous one. Thus, it explains the reason for the substantial lack of systematic studies on jurisdiction over maritime crimes of international concern.

Most studies tend to focus on specific crimes, forms of jurisdiction, cases and contexts or choose to discuss them from either a criminal or a maritime perspective without seeking to develop (or at least, attempt to) a holistic overview of the issues analysed in the previous Chapters. The risk is either of writing something outrageously long and detailed or elaborating, on the opposite, something generic and merely compilatory. Finding a balance between the divergent needs for conciseness and completeness is indeed an arduous task which can only be achieved by omitting well worthy aspects and focusing on others.

As illustrated in the diagram in the Introduction, this Dissertation unfolds by interrogating how the separate principles of criminal jurisdiction and maritime jurisdiction interact, *i.e.* how does criminal jurisdiction apply at sea and how does the maritime element influence this application. It is, on closer inspection, an incredibly complicated issue calling into question historical and anthropological issues that are only peripherally touched upon in this Thesis but which constitute its inescapable rationale.

If, for centuries, the entire human existence has been mostly confined to the land and its close vicinity, echoing its spatiality and its division in a myriad of legally autonomous parcels (the states) having their original legal title in the very physical possession of these tesserae, it has not been possible doing it at sea. Hence the first point and the first fundamental dichotomy identified and discussed in this Dissertation: the opposition between land and sea and their respective paradigms.

These paradigms, as already noticed by Schmitt, had already been strained by the advent of aviation and the consequent opening of human geography to new spatial relationships, to a new *Nomos of the Earth*.

To a certain extent, the core dichotomy, even before the land-sea one, is between *what can be territorial and what cannot be territorial*, such as the sea, outer space, the web etc. even though these

considerations may appear *prima facie* abstract and philosophical, this cognitive land-centric (and anthropocentric) *bias* has a palpable impact on law.

Without lingering over amply discussed points, 'humanity-at-sea' is different -both in quantitative and qualitative terms- from 'humanity-on-land': fewer humans, less homogeneous, more remote from each other. Nonetheless, (criminal) law is still largely based on a land-centric archetype, as seen in the Introduction and Chapter II.

Applying unquestioningly rules and categories designed for the terrestrial sphere to the maritime sphere, however, generates severe distortions both in terms of the justness of the rules and in terms of their effectiveness.

As seen in Chapter II, for example, the application to maritime realities of gravity thresholds conceived with reference to terrestrial crimes gives rise to several perplexities since these are two radically different contexts and deserve to be acknowledged in their peculiarities, or, at least, it is necessary to be mindful of this ontological difference when dealing with maritime issues (in this Dissertation, non-purely domestic crimes).

In this sense, therefore, even before and regardless of the elaboration of a common, cohesive framework for land and sea -or even, more ambitiously, a comprehensive jurisdictional paradigm- the land-sea dichotomy may serve as a valuable methodological instrument to understand and address legal issues relating to the sea.

The sea, however, is also a prism enabling to decipher otherwise invisible legal and factual patterns. In particular, the sea clarifies the *continuum* existing between the so-called international and transnational crimes.

The second dichotomy examined in the Dissertation concerns, in fact, the taxonomical dichotomy between international and transnational crimes. As seen in the Introduction and Chapter III, the *inter- v. transnational* dichotomy appears to be built upon a series of theoretical and practical fallacies.

The critique of the mainstream dichotomy is essentially based on three cumulative principles: 1) the blurred boundaries between international and transnational offences; 2) the identity of the legal interests specifically offended by inter- and transnational offences; 3) the misconception that international offences have a higher degree of reprehensibility, malice and gravity compared to transnational offences (especially in the maritime context), which entails the illogicality of treating and regulating these offences differently. The idea is that the effects of these crimes, which at first glance may seem less shocking than their more sublime cousins, are qualitatively

and quantitatively comparable to the latter, as they affect the same legal interests in a systematic and pervasive manner.

As for the factual critique of the dichotomy, this relies on the almost inextricable, symbiotic link between so-called international and transnational crimes. This symbiosis can take two forms, one subjective and one objective.

As for the *objective* symbiosis, it refers to the practical unfolding of the crimes and their interdependence or causality. For example, the arms trade, arming the perpetrators of war crimes and crimes against humanity or trafficking in human beings as a means of financing their criminal endeavours. Another example is the smuggling and trafficking of migrants and its connection to 'modern' slavery. The idea is that offences usually defined as transnational organised crime should also participate in the 'crusade against impunity'. It would supposedly make much more sense to prune the tangled tree of non-ordinary/purely domestic crimes a little and simply define them as crimes of international concern that equally deserve not to go unpunished.

The importance of *impunity* lies in both deontic and utilitarian foundations. In international criminal law, its role is first and foremost an expressivist one, *i.e.* it "consists in the creation and consolidation of a legal order with common values". In this sense, expressivism (or communicativism) combines aspects of retributivism (especially in the sense of just desert), since punishment is imposed as a deserved consequence (*i.e.* retribution) for a person's offence, but also elements of prevention, both in the form of deterrence and re-education.

In any case, what matters is that impunity radically contradicts the self-proclaimed goal of international justice, *i.e.* its annihilation. Assuming this goal as the polar star of this Dissertation -plastically represented by the Biblical quote inserted in the title, all the proposed theories have been measured against their supposed ability to contrast it.

The sacred mission of international justice to deliver us from impunity, however, seems to be a primarily preambular principle, without much strength of its own and largely left to customary law and its uncertainties.

Another crucial point sketched in Chapter III relates to the jurisdictional impact of the interconnectedness, co-consequentiality or ancillarity between the so-called international and transnational crimes. Whereas, as very briefly seen, there seems to be some support for the qualification of transnational crimes connected to international crimes as *lato sensu* forms of complicity in the perpetration of the latter (being henceforth subjected to their jurisdictional regime as forms of secondary violations), it is argued that more simply the so-called international

and transnational crimes should not be considered as different categories with different regimes but rather be collectively qualified as crimes of international concern subject to universal jurisdiction. This should allegedly increase the overall effectiveness of the repression of these crimes. At least in theory. As seen in Chapter III, while universal jurisdiction as a principle suscitates vivid enthusiasm in Academia, states appear to be more tepid towards it due to the high economic, political, bureaucratic and logistic costs connected to its exercise, though I will suggest at the end of these Conclusions that at least some of these costs may be potentially reduced thanks to modern technologies.

Speaking of modern technologies, a *leitmotiv* emerged in the course of this Dissertation is the *cogent* need to avoid at any cost the obsolescence (and the consequent inapplicability) of the legal frameworks touched by maritime crimes of international concern.

Whether international and transnational criminal law are somehow young disciplines, the principles and the notions embedded in the law of the sea have in many cases centuries old roots.

One example for all, slavery and slave trade are in many ways still anchored to the stereotypes of *Gone with the wind* (1939), while slavery has evolved into forced labour, economic violence, situations in which the victims are not legally owned but are nevertheless deprived of any real self-determination and autonomy (*e.g.* fishers, seafarers etc.). There is a clear need to update these notions, systematically adopting forms of evolutive interpretation and systemic integration.

In this sense, it is also vital to acknowledge the extraordinary capabilities entrusted to humanity by modern technologies, such as remotely operated vehicles able to reach the remotest corners of our globe with little inconvenience, whether employed to explore deep marine wrecks and geo-biological formations, disable the Russian Black Sea Fleet, or threaten navigation, communication, and trade around the Red Sea.[1741] These technological prodigies need to be somehow governed by law alongside the old devices still used by humans in their maritime adventures and beyond.

As mentioned in the course of this Dissertation, one of the greatest challenges posed by the sea to the exercise of jurisdiction is the impossibility to control its immense surface and depth. No state can currently realistically claim to be able to invigilate and react to any ongoing activity upon or below the waves. Without venturing into audacious speculations on how modern

[1741] Out of curiosity, during the recent HILAC Lecture "The Red Sea crisis: assessing the international legal and maritime security implications" organised by the Asser Institute in The Hague on the 20th march 2024 there were serious troubles in connecting with one of the speakers intervening from South Africa since the Houthis had damaged the communications cables in the Red Sea.

technologies may assist in monitoring the activities on the seas together with the more traditional instruments, it seems comparatively reasonable to imagine that, at some point, drones may be used to conduct hot pursuit or anti-smuggling or other patrolling operations or control over natural resources. IA may also be taught how to recognise suspect activities from either satellite or drone imagery sending alarm signals to the authorities, which may send law enforcement forces or trigger, more benevolently, safe and rescue operations to humans in distress. The possibilities are virtually unlimited.[1742] With a *caveat: quis custodiet ipsos custodes?*

Far less problematic, and this is my last point, should be integrating technology with judicial activity. As COVID taught us, it is not science fiction holding hearings and trials remotely, sharing pieces of evidence etc. on the contrary, it may serve to alleviate the costs of extraterritorial adjudication.

FINIS

[1742] See *ex multis* KAPOGIANNI, V., MAGUGLIANI, N., 'When Aerial Surveillance Becomes the Sine Qua Non for Interceptions at Sea: Mapping the EU and its Member States' Complicity in Border Violence' In P. Czech, L. Heschl, K. Lukas, M. Nowak, & G. Oberleitner (Eds.), *European Yearbook on Human Rights*, Oxford (2023), pp. 475–506; Miller, R., High Seas Treaty aims to fill in gaps for ocean protection, Professional Mariner, 4 april 2024 https://professionalmariner.com/high-seas-treaty-aims-to-fill-in-gaps-for-ocean-protection/. LI J, XING Q, LI X, ARIF M, LI J. Monitoring Off-Shore Fishing in the Northern Indian Ocean Based on Satellite Automatic Identification System and Remote Sensing Data. Sensors 24(3)(2024); RUDOLPH, T.A. Seeing like an algorithm: the limits of using remote sensing to link vessel movements with worker abuse at sea. *Maritime Studies* 23(13)(2024).

BIBLIOGRAPHY

1. Books

- ADEMUNI-ODEKE, *Bareboat Charter (Ship) registration*, The Hague (1998);
- ALIGHIERI, D., *Vita Nuova*
- ALLAIN, J., 'Immanent Critique: International Law and the Dubious Case-Law on Slavery', in *The Law and Slavery* Leiden (2005)
- ALLAIN, J., *The Slavery Conventions. The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention,* Leiden (2008)
- ALOUPI, N., *La nationalité des véhicules en droit international public*, Paris (2020);
- AMATI, E., *et al (eds.), Introduzione al Diritto Penale Internazionale, terza edizione,* Torino (2016);
- AMBOS, K., *Treatise on International Criminal Law*, vol. I, Oxford (2013)
- AMBOS, K., *Treatise on International Criminal Law*, vol. II, Oxford (2014);
- ANAND, R.P., *Origins and development of the law of the sea*, The Hague Boston London (1983),
- ANDENAS, M., et al. (eds.)., *General Principles and the Coherence of International Law* (2019);
- ANDERSON, D., 'The Tribunal's Jurisprudence and Its Contribution to the Rule of Law', in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*, Leiden (2018),
- ANDERSON, D., *Modern Law of the Sea. Selected essays*, Leiden (2008),
- ANGELONI, M.M., SENESE, A., *Profili applicativi dei principali instituti del nuovo diritto del mare, seconda edizione*, Bari (2001);
- ANTONUCCI, A., PAPANICOLOPULU, I., SCOVAZZI, T. (eds.), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea,* Torino (2016)
- ANTUNES, N.M., *Towards the Conceptualisation of Maritime Delimitation. Legal and Technical Aspects of Political Process*, Boston (2003),
- AQUINAS, T., *Summa Theologiae*, Iib, Q108, argumenta 1,3; confutatio 1.
- ARENDT, H., *Eichmann in Jerusalem. A report on the banality of Evil.,* New York (2006),
- ASCENSIO, H., DECAUX, E., PELLET, A. (eds.), *Droit International Pénal,* Paris (2000)
- ASSONITIS, G., *Réglementation internationale des transports maritimes dans le cadre de la CNUCED*, Paris (1991)
- ATADJANOV R. 'The Protected Legal Interests of Crimes Against Humanity and Other Core Crimes Under International Law: A Comparative Analysis', in Atadjanov, R., *Humanness as a Protected Legal Interest of Crimes Against Humanity*, International Criminal Justice Series, vol 22, The Hague (2019)
- ATTARD CAMILLERI, F.L., *The application of the High Seas Regime in the Exclusive Economic Zones*, Lanham (2018),

- ATTARD, D. J., ET AL. *The IMLI Manual on the International Maritime Law, vol. I: the law of the sea* (2014);
- ATTARD, D. J., ET AL. *The IMLI Manual on the International Maritime Law, vol. II: the law of the sea* (2014);
- AZUNI, D.A., *Dizionario Universale Ragionato Della Giurisprudenza Mercantile Del Senatore D. A. Azuni,* terza edizione, nella quale è fusa la nuova giurisprudenza dall'avvocato Giuliano Ricci, Tomo I, Livorno (1834),
- BANTEKAS, I., International Criminal Law, fourth edition, Oxford (2010),
- BANTEKAS, I., NASH, S., *International Criminal Law Third edition*, Abingdon (2007)
- BARNES, J., *The noise of time* (2016)
- BARNES, R., LONG, R. (eds.), *Frontiers in International Environmental Law: Oceans and Climate Challenges. Essays in Honour of David Freestone*, Leiden (2021)
- BARNES, R., *Property Rights and Natural Resources,* London (2009)
- BARTON, W., *Dissertation on the Freedom of Navigation and Maritime Commerce, and Such Rights of States, Relative Thereto, as Are Founded on the Law of Nations: Adapted More Particulary to the United States; and Interspersed with Moral and Political Reflections, and Historical Facts,* Philadelphia (1802)
- BASSIOUNI, M.C., 'Specific Contents', in *Crimes against Humanity: Historical Evolution and Contemporary Application, Cambridge* (2011)
- BASSIOUNI, M.C., 'The sources and content of international criminal law: a theoretical framework', in: Bassiouni, M.C. (ed.), *International Criminal Law*, second edition (1998), vol. 1
- BASSIOUNI, M.C., *Crimes Against Humanity: historical evolution and contemporary application*, Cambridge (2011);
- BASSIOUNI, M.C., *Introduction to International Criminal Law*, New York (2003),
- BASSIOUNI, M.C., *Le fonti e il contenuto del diritto penale internazionale: un quadro teorico* (1999)
- BAUERSCHMIDT, F.C., BUCKLEY, J.J., *Catholic Theology: An Introduction*, Chichester (2017),
- BAYOUMI M. *Midnight on the Mavi Marmara: The Attack on the Gaza Freedom Flotilla and How It Changed the Course of the Israel*. New York (2010).
- BECCARIA, C., *On Crimes and Punishments. 1st ed.* Indianapolis (1986),
- BELAVUSAU, U., GLISZCZYŃSKA-GRABIAS, A. (eds.), *Law and Memory. Towards Legal Governance of History*, Cambridge (2017);
- BENTHAM, J., *Théorie des peines et des récompenses Rédigée en François, d'après les Manuscrits par M. Et. Dumont, de Géneve, tome prémiere*, Londres (1811),
- BERTACCINI, D., *Fondamenti Di Critica Della Pena E Del Penitenziario, Rielaborazione aggiornata dell'opera didattica di Massimo Pavarini, seconda edizione*, Bologna (2021),
- BIANCHI, A., *International Law Theories: an inquiry into different ways of thinking* (2016);
- BIBLIA VULGATA, *Ecclesiastes*
- BIBLIA VULGATA, *Exodus*

- BIBLIA VULGATA, *Proverbia*
- BLUMENTHAL, D.A., MCCORMACK, T. L. H. (eds.), *The legacy of Nuremberg: civilizing influence or institutionalized vengeance?,* Leiden (2008)
- BOAS, G., BISCHOFF, J.L., REID, N.L., *International Criminal Law Practitioner Library Series Volume III, Elements of Crimes under International Law* (2008)
- BOAS, G., WILLIAM S., *International Criminal Law Developments in the Case Law of the ICTY*, Leiden (2003)
- BOAS, J., CHIFFLET, P., *International Criminal Justice*, Cheltenham (2017);
- BOCZEK, B.A., *Flags of convenience: an international legal study*, Cambridge (1962)
- BÖECKEL, M., *Martini Böeckell Megapolitani Jur. Utr. Doct. de Jure Protectionis Clientelaris Commentarius Academicus In quo non solum juris hujus principia eruuntur, sed & de foederibus contrahendis, de religione defendenda, de vicinitate … disseritur: Ante XVI. & quod excurrit annos in Gryphisvvaldensi Academia, publicis lectionibus … propositus; Nunc autem Repetita lectione quibusdam locis emendatus, nonnullis auctior redditus, Cum Praefatione, Summariis & Indice. Adjecta sunt occasione capitis 7. part. 3. Trutina Statuum Europae; & ex Thoma Campanella quaestio: de Monarchia Orbis universali,* Lubeca (1656),
- BOHRER, Z., DILL, J., DUFFY, H., *Law applicable to armed conflict,* Cambridge (2020);
- BOISTER, N., *An introduction to Transnational Criminal Law* (2012);
- BOISTER, N., *An introduction to transnational criminal law,* 2nd edition, Oxford (2018),
- BONASSIES, P., 'La loi du pavillon et les conflits de droit maritime', *Recueil des Cours*, 128(III)(1969),
- BONASSIES, P., SCAPEL, C., *Droit Maritime*, Paris (2006)
- BOSCO, D., *The Poseidon project: the struggle to govern the world's oceans*, Oxford (2022),
- BRODIE, P., *Commercial Shipping Handbook, third edition*, Abingdon (2015);
- BROOMHALL, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford (2003);
- BYNKERSHOEK, C., *On Questions of Public Law in Two Books (1737) [Quaestionum Juris Publici, Libri Duo], of which the First is on War, the Second on Miscellaneous Subjects, by Cornelius van Bynkershoek. Based on a translation of the 1737 edition printed at the House of Johannes van Kerckhem (Leyden). Translated into English by Tenney Frank* (1929), available at https://lonang.com/library/reference/bynkershoek-questions-public-law/bynk-117/.
- CADDELL, R., THOMAS, R. (eds.), *Shipping, law and the marine environment in the 21st century: emerging challenges for the law of the sea – legal implications and liabilities*, Witney (2013);
- CAMPBELL BLACK, H., *A law dictionary containing definitions of the terms and phrases of American and English Jurisprudence, ancient and modern and including the principal terms of international, constitutional, ecclesiastical and commercial law, and medical jurisprudence, with a collection of legal maxims, numerous select titles from the Roman, Modern Civil, Scotch, French, Spanish, and Mexican law, and other foreign systems, and a table of abbreviations*, St. Paul (1910),

- CANTILLON DE TRAMONT, P., *De la nationalité des navires*, Montauban (1907);
- CANTON, R., *Why Punish?: An Introduction to the Philosophy of Punishment*, London (2017);
- CARLISLE, R., *Sovereignty for sale. The origins and evolution of the Panamian and Liberian flags of convenience*, Annapolis (1981);
- CARR, C.L., JOHNSON, L., *Law, Cultural diversity, and criminal defense*, Abingdon (2019);
- CARTER, L.E., ELLIS, M.S., JALLOH, C., *The International Criminal Court in an Effective Global Justice System*, Cheltenham (2016);
- CARTNER, J.A.C., FISKE, R.P., LEITER, T.L., *The international law of the shipmaster*, London (2009),
- CARUSO, G.D., *Rejecting Retributivism: Free Will Punishment and Criminal Justice,* Cambridge (2021);
- CASEY-MASLEN, S., HAINES, S., *Hague law interpreted : the conduct of hostilities under the law of armed conflict,* Oxford (2018)
- CASSESE, A. et al., *Cassese's International Criminal Law*, third edition, Oxford (2013)
- CASSESE, A., (ed.) *Realizing Utopia: the future of International Law,* Oxford (2012)
- CASSESE, A., *International Criminal Law* , Oxford (2003)
- CASSESE, A., *The Human Dimension of International Law: selected papers,* Oxford (2008)
- CASSESE,A., *International law, second edition*, Oxford (2005),
- CHADWICK, M. *Piracy and the Origins of Universal Jurisdiction: On stranger tides?* Leiden, (2019);
- CHAPMAN, P.K., *Trouble on board. The plight of international seafarers*, Ithaka (1992)
- CHAUMETTE, P. (ed), *Maritime areas: control and prevention of illegal traffics at sea / Espaces marins: surveillance et prévention des trafics illicites en mer* (2016)
- CHEHTMAN, A., *The Philosophical Foundations of Extraterritorial Punishment* (2010);
- CHURCHILL, R., LOWE, V., SANDERS, A. (eds.), *The law of the sea. Fourth edition*, Manchester (2022),
- CHURCHILL, R.R., LOWE, A.V., *The Law of The Sea*, Manchester (1988)
- CICERO, M.T., *De Officiis* 107
- CICERO, M.T., *In Verrem* II.4. 20;
- CICERO, M.T., *De Amicitia,* 17, in Cicero, M.T., *On Old Age. On Friendship. On Divination, Translated by W. A. Falconer,* Harvard (1923)
- CLAPHAM, A., T*he Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity,* In: Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international (2007);
- COGLIATI-BANTZ, V.P., *Means of Transportation and Registration of Nationality: Transportation Registered by International Organizations,* Abingdon (2015);
- COHEN, D., TOTANI, Y., *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence*, Cambridge (2018);
- COLES, R.M.F., READY, N.P. (eds.), *Ship registration*, London (2002);

- COLOMBOS, C.J., *Diritto Internazionale Marittimo. Nuova edizione completamente rifatta e aggiornata del trattato di A. Pearce Higgins e C. John Colombos*, Roma (1953)
- COLOMBOS, J., *The international law of the sea, sixth revised edition*, London (1967),
- CONFORTI, B., IOVANE, M., *Diritto internazionale*, XI edizione, Napoli (2018),
- CORRÉARD, M-H. et al. (eds.), *Le grand dictionnaire Hachette-Oxford. Français-anglais, anglais- Français,* Oxford (2007),
- CRAWFORD, J., *Brownlie's Principles of Public International Law*, 9th Edition, Oxford (2019),
- CRAWFORD, J., *Multilateral Rights and Obligations in International Law*, Collected Courses of the Hague Academy of International Law, vol. 319 (2006);
- CRAWFORD, J., *The creation of states in international law,* second edition, Oxford (2006);
- CRYER, R. ET AL, *An Introduction to International Criminal Law and Procedure,* Cambridge (2014);
- CRYER, R., HENDERSON, C. (eds.) *Law on the use of force and armed conflict. Volume III, Foundations of the law of armed conflict*, Cheltenham (2017);
- CUDENNEC, A. (ed.), *Ordre Public et Mer* (2012)
- CUDENNEC, A., *Le droit penal et la mer* (2006)
- CUSACK, C.M., *Fish, Justice, and Society*, Boston (2018)
- DA SILVA, C., WOOD, B. (eds.), *The Arms Trade Treaty*, Cambridge (2021)
- DAM-DE JONG, D., *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations,* Cambridge (2015)
- DAVIS, M., *Bareboat Charters, second edition*, London (2005)
- DAXECKER, U., PRINS, B., *Pirate Lands: Governance and Maritime Piracy,* Oxford (2021)
- DECAUX, E., *Les formes contemporaines de l'esclavage*, Leiden (2009)
- DEGUZMAN, M.M., *Shocking the conscience of humanity. Gravity and the legitimacy of international criminal law*, Oxford (2020);
- DEL CASTILLO, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, Liber Amicorum Judge Hugo Caminos* (2015);
- DEL VECCHIO, G., *General Principles of Law,* Boston (1956),
- DEMIRDJIAN, A., *The Armenian Genocide Legacy,* London (2016);
- DESCARTES, R., *Discours de la méthode* (1637).
- DESOMBRE, E.R., *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea,* Cambridge (2006)
- DISTEFANO, G., *Fundamentals of Public International Law,* Leiden (2019)
- DITTRICH, V. E., ET AL. (eds.), *The Tokyo Tribunal: Perspectives on Law, History and Memory*, Brussels, (2020).
- DJEFFAL, C., *Static And Evolutive Treaty Interpretation. A Functional Reconstruction*, Cambridge (2016).
- DONNEDIEU DE VABRES, H., *Le Proces De Nuremberg Devant Les Principes Modernes Du Droit Pénal International,* Recueil des cours 477 (1947)

- DONNEDIEU DE VABRES, H., *Les principes modernes du droit pénal international,* Oslo (2004)
- DRUMBL, M., 'Quest for Purpose', in *Atrocity, Punishment, and International Law*, Cambridge (2007),
- DUBBER, M.D., *Foundational Texts in Modern Criminal Law*, Oxford (2014),
- DUBBER, M.D., HÖRNLE, T., *Criminal Law. A Comparative Approach,* Oxford (2014),
- DUBBER, M.D., *The Dual Penal State. The Crisis of Criminal Law in Comparative-Historical Perspective*, Oxford (2018),
- DUBLER SC, R., KALYK, M., *Crimes against Humanity in the 21st Century*, Leiden (2018);
- DUFF, R.A., *Punishment, Communication, and Community*, Oxford (2003).
- DUPUY, R.-J., VIGNES, D. (eds.), *A Handbook of the New Law of the Sea*, Dordrecht Boston Lancaster (1991)
- EINARSEN, T., RIKHOF, J., *A Theory of Punishable Participation in Universal Crimes,* Oslo (2018)
- EINARSEN, T., *The Concept of Universal Crimes in International Law,* Oslo (2012)
- ELLIOTT, L., SCHAEDLA, W. H. (eds.), *Handbook of Transnational Environmental Crime*, Cheltenham (2016)
- EWING, A.C., *The Morality of Punishment: With Some Suggestions for a General Theory of Ethics*, Abingdon (2012);
- EXTAVOUR, W.C., *The exclusive economic zone. A study of the evolution and progressive development of the international law of the sea*, Gèneve (1979)
- FALCÓN Y TELLA, M.J., *Law and Literature*, Leiden (2016),
- FARMER, L., *Making the modern criminal law. Criminalization and civil order*, Oxford (2016);
- FARNELLI, G.M., *Contrasto e repressione della violenza marittima nel diritto internazionale contemporaneo,* Napoli (2015);
- FASSIN, D., *Punire. Una passione contemporanea*, Milano (2017);
- FAURE, M., PARTAIN, R., Environmental Crime', in *Environmental Law and Economics: Theory and Practice,* Cambridge (2019)
- FELLMETH, A.X., HORWITZ, M., *Guide to latin in international law*, second edition, Oxford (2021)
- FELTON, M., *Slaughter at sea: the story of Japan's naval war crimes*, Annapolis (2007);
- FERNÁNDEZ DE CASADEVANTE Y ROMANI, C., *Sovereignty and interpretation of international norms,* Heidelberg (2007)
- FIANDACA, G., MUSCO, E., *Diritto Penale, parte generale*, sesta edizione, Bologna (2014);
- FINDLAY M, HENHAM RJ., *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process,* London (2012)
- FINK, M. 'The Right of Visit', in *Maritime Interception and the Law of Naval Operations*, The Hague (2018),
- FINK, M., 'International Agreements on Maritime Interception', in *Maritime Interception and the Law of Naval Operations*, The Hague (2018)

- FLORIO, F., *Nazionalità della nave e legge della bandiera*, Milano (1957)
- FORTEAU M., THOUVENIN, J-M. TREVES, T. (eds.), *Traité De Droit International De La Mer*, Paris (2017)
- FOUCHARD, I., *Crimes Internationaux entre internationalisation du droit pénal et pénalisation du droit international*, Bruxelles (2014)
- FOWLER, M.R., BUNCK., J.M., *Law, Power and the sovereign state. the evolution and application of the concept of sovereignty*, Pennsylvania (1995);
- FOX, H., *The law of state immunity, second edition*, Oxford (2008),
- FRANCALANCI, G., SCOVAZZI, T. (eds.), *Lines in the sea*, Dordrecht (1994)
- FRANCKX, E., GAUTIER, P. (eds.), *The exercise of jurisdiction over vessels : new developments in the fields of pollution, fisheries, crimes at sea and trafficking of weapons of mass destruction*, Brussels (2010);
- FRANKLIN, C., *Law of the Sea: Some Recent Developments, with Particular Reference to the United Nations Conference of 1958*, Washington (1961),
- FRASE, R. S., *Just Sentencing: Principles and Procedures for a Workable System*, *Studies in Penal Theory and Philosophy*, Oxford (2012),
- FRIEDMAN, J.B., FIGG, K.M., *Trade Travel and Exploration in the Middle Ages: An Encyclopedia*, Abingdon (2017),
- FRONZA, E., *Memory and Punishment. Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague (2018);
- FULTON, T.W., The Sovereignty of the Sea. *An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters : with special reference to the Rights of Fishing and the Naval Salute*, Edimburgh London (1911)
- GAIUS, *Gai Institutionum Commentarii Quattuor*
- GAJA, G., Ensuring Respect of Obligations Owed to the International Community (Erga Omnes). *Collected Courses of the Hague Academy of International Law*, 364(2012)
- GAJA, G., The Protection Of General Interests in the International Community, *General Course on Public International Law* 364 (2011),
- GALLAGHER, A., DAVID, F., *The International Law of Migrant Smuggling*, Cambridge (2014)
- GARCÍA LLAVE, R., *Tráfico de drogas por mar y justicia universal*, Madrid (2019);
- GAURIER, D., *Histoire du droit international. De l'Antiquité à la creation de l'ONU*, Rennes (2014)
- GAVOUNELI, M., *Functional Jurisdiction in the Law of the Sea* (2007);
- GEIß, R., PETRIG, A., *Piracy and Armed Robbery at Sea*, Oxford (2011)
- GENTILI, A., *Alberici Gentili De Jure Belli Libri III*, Hanvoviae (1598)
- GETZ, T.R., *The Long Nineteenth Century, 1750-1914: Crucible of Modernity*, London (2018
- GIDEL, G., *Le Droit international public de la mer, Le temps de paix, Tome II, les eaux intérieurs*, Chateauroux (1932);
- GIDEL, G., *Le Droit International Public de la mer. Le temps de paix. Tome I, Introduction – la haute mer*, Chateauroux (1932),

- GILLESPIE, A., *Conservation, Biodiversity and International Law*, Cheltenham (2011)
- GOODMAN, C., *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone*, Oxford (2021),
- GRANT, A.J., TEMPERLEY, H., *Europe in the nineteenth and twentieth centuries (1789-1932)*, London (1932)
- GRAVEN, J., Les crimes contre l'humanité, *Collected Courses of the Hague Academy of International Law* 76(1950)
- GREAR, A., ET AL. (eds.), *Posthuman Legalities: New Materialism and Law Beyond the Human*, Cheltenham (2021);
- GROS, A., La Convention sur la pêche et la conservation des ressources biologiques de la haute mer, in *Collected Courses of the Hague Academy of International Law* 97(1959)
- GROTIUS, H (De Groot, H.), *The Free Sea. Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply. Edited and with an Introduction by David Armitage*, Indianapolis (2004)
- GROTIUS, H., *De iure belli ac pacis libri tres, in quibus ius naturae et gentium, item iuris publici praecipua explicantur cum annotatis auctoris edidit P.C. Molhuysen prefatus est C. Van Vollenhoven*, Lugdunum Batavorum (1919),
- GROTIUS, H., *Hvgonis Grotii De Ivre Belli Ac Pacis Libri Tres, In Quibus Jus Naturæ & Gentium, Item Juris Publici Præcipua Explicantur. Editio Nova Cum Annotatis Auctoris, Ex Postrema Ejus Ante Obitum Cura Multo Nunc Auctior. Accefferunt & Annotata In Epiftolam Pauli Ad Philemonem*, Amstelodami (1663),
- GROTIUS, H., *The Rights of War and Peace Book II, Edited and with an Introduction by Richard Tuck From the edition by Jean Barbeyrac,* Indianapolis (2005)
- GUILFOYLE, D., 'Maritime counter-proliferation of weapons of mass destruction', in *Shipping Interdiction and the Law of the Sea*, Cambridge (2009),
- GUILFOYLE, D., 'Unauthorised broadcasting on the high seas', in *Shipping Interdiction and the Law of the Sea,* Cambridge (2009),
- GUTHRIE, W.K.C., *A History of Greek Philosophy Volume 2. The Presocratic Tradition from Parmenides to Democritus*, Cambridge (1962),
- GUZMÁN D'ALBORA, J.L., *Elementi di filosofia giuridico-penale* (edited by Fornasari, G., Macillo, A.), Napoli (2015),
- HAGERTY C. L. RAMSEUR J. L., *Deepwater horizon oil spill : selected issues for congress*, Washington (2010)
- HARRISON, J., *Making the law of the sea : a study in the development of international law*, Cambridge (2011),
- HASLAM, E., *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim*, London (2020);
- HEIDAR, T., 'Introduction How Does the Law of the Sea Adapt to New Knowledge and Changing Circumstances?', in *New Knowledge and Changing Circumstances in the Law of the Sea*, Leiden (2020),

- HEINECCIUS, G., *Gottl. Heineccii, Ic. Et Antecess Praelectiones Academicae In Hvgonis Grotii De Jure Belli Ac Pacis Libros III,* Berolini (1744),
- HENCKAERTS, J.-M., DOSWALD-BECK, L., *Customary International Humanitarian Law*, Vol. 1 (2005);
- HIGGINS, A.P., Le Régime juridiques des navires de commerce, *Recueil des Cours*, 30(V)(1929);
- HIGGINS, R., FLORY, M. (eds.), *Terrorism and international law*, London New York (1997).
- HILLIER, T., DINGWALL, G., *Criminal Justice and the Pursuit of Truth*, Cambridge (2021).
- HOBBES, T., *Hobbes's Leviathan reprinted from the edition of 1651, with an essay by the late W. G. Pogson Smith*, Part I, Chapter 15, Oxford (1969),
- HONDERICH, T., *Punishment: The Supposed Justifications*. Harmondsworth (1971);
- HORNE, C. *Great Events of the Great War*, New York (1923)
- HOSKINS, Z., *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction*, New York (2019)
- HOURY, C., *La piraterie maritime au regard du droit international : incertitudes et évolutions contemporaines*, Paris (2014);
- HUET, A., KOERING-JOULIN R., *Droit penal international (*2005)
- HURD, J.C., *The Theory Of Our National Existence, As Shown By The Action Of The Government Of The United States Since 1861*, Boston (1881),
- ICRC, *Guidelines on the protection of the natural environment in armed conflict. Rules and recommendations relating to the protection of the natural environment under international humanitarian law, with commentary* (2020)
- IWASAWA, Y., Domestic Application of International Law, *Recueil des cours Collected Courses* 378(2015)
- JEßBERGER, F., MELONI, C., CRIPPA, M. (Eds.)., *Domesticating International Criminal Law: Reflections on the Italian and German Experiences* (1st ed.), London (2023)
- JOHNSTON, D.M., *The Theory and History of Ocean Boundary-making*, Montreal (1988)
- JOINET, L., *Lutter contre l'impunité: dix questions pour comprendre et pour agir* (2002)
- JONES, E., *Feminist Theory and International Law: Posthuman Perspectives*, London (2023)
- JOSEPH, S., CASTAN, M., *The International Covenant On Civil And Political Rights. Cases, Materials, and Commentary, Third Edition*, Oxford (2013),
- KALECK, W., ET AL. (eds.), *International Prosecution of Human Rights Crimes,* Berlin (2007);
- KANT, I., *Groundwork of the Metaphysics of Morals, translated and edited by Mary Gregor, with an introduction by Christine M. Korsgaard,* Cambridge (1997),
- KANT, I., *The Philosophy Of Law. An Exposition Of The Fundamental Principles Of Jurisprudence As The Science Of Right. Translated From The German By W. Hastie, B.D.*, Edinburgh (1887),
- KARIM, M.S., 'The International Law of Maritime Terrorism', in *Maritime Terrorism and the Role of Judicial Institutions in the International Legal Order,* Leiden (2016)

- KASOULIDES, G.C., *Port state control and jurisdiction: evolution of the port state regime*, Dordrecht (1993),
- KAUFMAN, W.R.P., *Honor and Revenge: A Theory of Punishment*, Dordrecht (2013);
- KING, E. ET AL. (eds.), *Victim Advocacy before the International Criminal Court*, Cham (2022).
- KITTICHAISAREE, K., *The International Tribunal for the Law of the Sea,* Oxford (2021),
- KLEIN, N., *Maritime Security and the Law of the Sea*, Oxford (2011),
- KLEUS, G., THIERING, M., *Features of Common Sense Geography: Implicit Knowledge Structures in Ancient Geographical Texts,* Zürich (2014)
- KOCHU THOMMEN, T., *Legal status of government Merchant ships in international law,* The Hague (1962),
- KOH, T., *Building a new legal order for the oceans*, Singapore (2020)
- KOLB, R., GAGGIOLI, G. (eds.), *Research Handbook on human rights and humanitarian law*, Cheltenham (2013)
- KOSKENNIEMI, M., *Fragmentation of International Law: Difficulties Arising from the diversification and Expansion of International Law; Report of the Study Group of the International Law Commission*, Helsinki (2007)
- KRASKA, J., PEDROZO, R., 'Chapter Twenty-Two Commentary for the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', in *International Maritime Security Law*, Leiden (2013)
- KRZAN, B. (ed.), *Prosecuting International Crimes: A Multidisciplinary Approach,* Leiden, (2016)
- KWIATKOWSKA, B., *The 200 Mile Exclusive Economic Zone in the Law of the Sea*, Dordrecht (1989),
- KYMLICKA, W., CLAES L., MATRAVERS, M. (eds.), *Criminal Law and Cultural Diversity*, Oxford (2014);
- LACEY, N., *State Punishment: Political Principles and Community Values*, London (2002);
- LAGONI, R., VIGNES, D. (eds.), *Maritime Delimitation,* Leiden (2006)
- LANGEWIESCHE, W., *The outlaw sea: A world of freedom, chaos, and crime*, New York (2004),
- LAWRENCE, T., *Handbook of Public International Law*, Cambridge (1885),
- LEFEBVRE D'OVIDIO, A., PESCATORE, G., TULLIO, L., *Manuale di diritto della navigazione tredicesima edizione*, Milano (2013),
- LEFKOVITZ, D., 'International Criminal Law: Crimes Against Humanity and Universal Jurisdiction', in *Philosophy and International Law: A Critical Introduction,* Cambridge (2020)
- LEHR, P. (ed.), *Violence at sea: piracy in the age of global terrorism*, New York (2007)
- LEMKIN, R., *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress. Second edition by the lawbook Exchange, Ltd.* (2014)
- LEONE, U., PATRIGNANI, A. (eds.), *Human rights and crime prevention*, Malta (1993)

- LEOTTA, C. D., *Il genocidio nel diritto penale internazionale. Dagli scritti di Raphael Lemkin allo Statuto di Roma,* Torino (2013)
- LÉVY, J-P., *La Conférence des Nations Unies sur le Droit de la Mer. Histoire d'une négociation singulière*, Paris (1983),
- LEWIS, M., *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Oxford (2014);
- LKANA Y., KLÖPPER H., LAZERSON M., *The university in the 21st century teaching the new enlightenment at the dawn of the digital age,* Budapest (2016)
- MAESTRO CORTIZAS, A.M., *La nacionalidad de los buques y los pabellones de conveniencia*, Cizur Menor (2022);
- MALLIA, P., *Migrant Smuggling by Sea: Combating a CurrentThreat to Maritime Security through the Creation of a Cooperative Framework*, Leiden (2010)
- MALLOY, C., *De Jure Maritimo Et Navali: Or A Treatise Of Affairs Maritime And Of Commerce In Three Books, The Chird Edition Enlarged*, London (1682),
- MALSCH, M., DUKER, M.J.A. *Incapacitation: Trends and New Perspectives*. Farnham (2016)
- MANCUSO, R., *Istituzioni di diritto della navigazione, seconda edizione*, Torino (2008),
- MANN, F.A., The doctrine of international jurisdiction revisited after twenty years, *Recueil des cours, Collected Courses*, 186 (1984);
- MANN, F.A., The Doctrine of Jurisdiction in International Law, *Collected Courses of the Hague Academy of International Law* 111(1964)
- MANNOZZI, G., 'Il "castigo": dimensione terminologica e meta-significati giuridici. Una lettura a partire dalle radici protoindoeuropee della lingua del diritto', in *Il castigo. Riflessioni interdisciplinari per un dibattito contemporaneo su giustizia, diritto di punire e pena, Quaderno di storia del penale e della giustizia* 3(2021),
- MANSELL, J.N.K., *Flag State Responsibility Historical Development and Contemporary Issues*, Berlin (2009),
- MARAUHN, T., DE VRIES, B. (Eds.), *Legal restraints on the use of military force : collected essays by Michael Bothe*, Leiden (2020)
- MARTEN, B., *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Cham (2014);
- MARTIN, A.N., *Global Criminal Law. Postnational Criminal Justice in the Twenty-First Century*, Cham (2022);
- MATRAVERS, M,, *Justice and Punishment: The Rationale of Coercion*, Oxford (2000).
- MATSUNAMI, N., *Immunity of state ships as a contribution towards unification of the laws on the subject*, London (1924);
- MAURICE, F.D., *Moral And Metaphysical Philosophy, Vol.* II, London (1890)
- MAY, L., *Aggression and Crimes against Peace*, Cambridge (2008)
- MCDORMAN, T.L. ET AL., *International Ocean Law materials and commentaries*, Durham (2005)

- MCDOUGAL, M.S., BURKE, W.T., *The public order of the oceans. a contemporary international law of the sea*, New Haven (1987),
- MCDOUGALL, C., 'An Act of Aggression By Any Other Name', in McDougall, C. (ed.) *The Crime of Aggression under the Rome Statute of the International Criminal Court,* Cambridge (2021)
- MCLAUGHLIN, R., *United Nations Naval Peace Operations in the Territorial Sea*, Leiden (2009)
- MCMILLAN, N., *Imagining the International: Crime, Justice, and the Promise of Community*, Redwood City (2020)
- MEJIA, Q.M., KOJIMA, C., SAWYER, M. (eds.), *Piracy at Sea*, Cham (2013);
- MERCOURIS, P., *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (2015);
- METAXAS, B.N., *Flags of convenience*, Aldershot (1985);
- METTRAUX, G., *International Crimes and the Ad Hoc Tribunals,* Oxford (2006),
- MEYERS, H., *The Nationality Of Ships*, The Hague (1967),
- MILANOVIC, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011);
- MILL, J.S., *Inaugural Address Delivered to the University of St. Andrews, Feb. 1st 1867,* London (1867),
- MITSILEGAS, V., GIUFFRIDA, F., The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol, *Transnational Crime 1.1* (2017)
- MOLENAAR, E.J., *Coastal state jurisdiction over vessel-source pollution*, The Hague (1998),
- MONACO, L., *Prospettive dell'idea dello 'scopo' nella teoria della pena*, Napoli (1984);
- MORGAN R., EVANS, M., *Combating Torture in Europe* (2001)
- MURPHY, D.D., *The structure of regulatory competition: corporations and public policies in a global economy*, Oxford (2004)
- MURPHY, S.D., *International law relating to islands*, The Hague (2017).
- NADELHOFFER, T., *The Future of Punishment*, New York (2013);
- NAESS, E.D., *The Great PanLibHon controversy. The fight over the flags of shipping*, Epping (1972).
- NÆVESTAD, T., *Safety in maritime transport: Is flag state important in an international sector?*, Oslo (2016)
- NAGENDRA, S., *Maritime Flag and International Law. Master memorial lecture,* 1977, Leyden (1978);
- NAGIN, D., CULLEN, F.T., JONSON, C.L. (eds.), *Deterrence Choice and Crime: Contemporary Perspectives*. New York (2018)
- NEMNICH, P.A., *Comtoir lexicon in neun sprachen für handelsleute rechtgelehrte und sonstige geschäfftsmanner*, Hamburg (1803),
- NERI, K., *L'emploi de la force en mer* (2013)
- NGANTCHA, F., *The Right of innocent passage and the evolution of the international law of the sea. The current regime of 'free' navigation in coastal waters of third states*, London (1990),

- NORCHI, C.H., PROUTIÈRE-MAULION. G. (eds*), Piracy in comparative perspective: problems, strategies, law* (2012)
- NORRIE, A., *Punishment, responsibility, and justice. A relational critique*, Oxford (2000);
- O' SULLIVAN, A., *Universal jurisdiction in international criminal law: the debate and the battle for hegemony* (2017)
- O'CONNELL, D.P.O., *The International Law of the Sea: Volume I* (1st Edition), Oxford (1982)
- O'KEEFE, R., *International Criminal Law,* Oxford (2015)
- OBOKATA, T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach,* Leiden (2006)
- ODA, S., 'XIII [1969]. Future Régime of the Deep Ocean Floor', in Oda, S (ed.), *Fifty Years of the Law of the Sea, with a special section on the international court of justice. Selected writings of Shigeru Oda, Judge of the International Court of Justice*, The Hague London New York (2003)
- ODA, S., *International Control of Sea Resources, reprint with a new introduction*, Dordrecht (1989)
- O'KEEFE, R., Universal jurisdiction: clarifying the basic concept, *Journal of International Criminal Justice*, 2(3)(2004)
- OKEKE, E.C., *Jurisdictional Immunities of States and International Organizations*, Oxford (2018),
- OPPENHEIM, L., *International Law: a treatise, eight edition, edited by H. Lauterpacht, Q.C., LL.D, F.B.A., vol. 1 – Peace*, London New York, Toronto (1955),
- OPPENHEIM, L., *International Law: A Treatise*, London (1904),
- OPPENHEIM, L., *International law: a treatise, vol. 1 – peace*, sixth edition, London (1947),
- OPPENHEIM, L., *International Law: a treatise. Vol. 1 -peace*, London (1937)
- OPPENHEIM, L., *International Law: Treatise*, London (1905),
- ORAKHELASHVILI, A., *Akehursts introduction to modern international law, ninth edition*, Abingdon (2022),
- ORAKHELASHVILI, A., *Peremptory Norms in International Law*, Oxford (2006),
- ORESME, N., *Questiones Super Physicam,* Books I-VII, Leiden (2013),
- ORTOLAN, T., *Regles Internationales et Diplomatie de la Mer*, 4th edition Paris (1864), vol. II
- ORTOLAN, T., *Règles internationales et diplomatie de la mer, trosième édition*, Paris (1856),
- ORTOLLAND, D., PIRAT, J.-P., *Atlas Géopolitique des espaces maritimes. Frontières, énergie, piraterie, pêche et environnement*, Paris (2010),
- ØSTHAGEN, A., *Ocean Geopolitics: marine resources, maritime boundary disputes and the law of the sea*, Cheltenham (2022);
- PAIGE, T. P., 'Chapter 17 Small Arms Trade (Resolution 2117 (2013) and the Arms Trade Treaty)', in Paige, T. P., *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'threat to the peace' under Article 39 of the UN Charter*. Leiden (2019)

- PANCRACIO, J.P., *Droit de la mer*, 1er edition, Paris (2010),
- PAPADAKIS, N., *The international legal regime of artificial islands*, Leyden (1977),
- PAPANICOLOPULU, I., *International Law and the Protection of People at Sea,* Oxford (2018)
- PAPANICOLOPULU, I., SCOVAZZI, T. (eds.), *Conflitti armati e situazioni di emergenza: la risposta del diritto internazionale : relazioni al ciclo di Conferenze tenuto nell'Universita di Milano-Bicocca (marzo-aprile 2006)*, Milano (2007)
- PAPASTAVRIDIS, E., *The Interception of Vessels on the High Seas. Contemporary Challenges to the Legal Order of the Oceans*, Oxford Portland (2013),
- PARISI, F., *Cultura dell'«altro» e diritto penale*, Torino (2010);
- PAVARINI, M., *I nuovi confini della penalità*, Bologna (1996),
- PAVARINI, M., *I nuovi confini della penalità. Introduzione alla sociologia della pena*, Bologna (1996);
- PETRIG, A., *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects,* Leiden (2014);
- POULANTZAS, N.M., *The Right Of Hot Pursuit In International Law*. Second Edition, The Hague (2002)
- POZDNAKOVA, A., 'Part Three Criminal Enforcement Jurisdiction in Ship-Source Pollution Cases', in *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution,* Leiden (2013)
- POZDNAKOVA, A., *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution*, Leiden (2012),
- QUINCE, C., *The Exclusive Economic Zone*, Wilmington (2019)
- QUIRK, J., *The anti-slavery project. From the slave trade to human trafficking,* Philadephia (2011)
- RAIBLE, L., *Human Rights Unbound: A Theory of Extraterritoriality*, Oxford (2020);
- RANDEL, D.M., *The Harvard Concise Dictionary of Music and Musicians*, Harvard (2002)
- RASPAIL, H. (ed.), *les droits de l'homme et la mer, actes du colloque du Mans, 24 et 25 mai 2018*, Paris (2020);
- RAYFUSE, R.G., *Non-flag state enforcement in high seas fisheries*, Leiden (2004);
- READ, C., *BP and the Macondo Spill. The Complete Story*, Chippenham and Eastbourne (2011)
- REBUT, D., *Droit penal international*, Paris (2019),
- RENDICH, F., *Comparative etymological Dictionary of classical Indo-European languages: Indo-European - Sanskrit - Greek – Latin* (2013),.
- REYDAMS, L., *Universal jurisdiction, International and municipal legal perspectives*, Oxford (2003);
- RINGBOM H. (ed.), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea* (2015)
- ROBERTS, A., KOSKENNIEMI, M., *Is International Law International?,* Oxford (2017).

- ROBINSON, P. H., *Distributive Principles of Criminal Law: Who Should be Punished How Much*, Oxford (2008)
- RODRÍGUEZ-PINZÓN, D., MARTIN, C., *The Prohibition Of Torture And Ill-Treatment In The Inter-American Human Rights System, A Handbook For Victims And Their Advocates*, World Organisation Against Torture (OMCT), Geneva (2014)
- ROEMER WF., *The Ethical Basis of International Law*, Clark (2007)
- ROMANIN JACUR, F., BONFANTI, A., SEATZU, F. (eds.), *Natural resources grabbing: an international law perspective*, Leiden (2016);
- RONZITTI, N., 'Le droit humanitaire applicable aux conflits armés en mer', in *Collected Courses of the Hague Academy of International Law* 242 (1993)
- RONZITTI, N., *Diritto Internazionale dei Conflitti Armati*, seconda edizione, Torino (2001);
- ROSE, C., *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems*, Oxford (2015)
- ROSE, C., *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems*, Oxford (2015),
- ROSE, C., KUBICIEL, M., LANDWEHR, O. (eds.), *The United Nations Convention Against Corruption: A Commentary*, Oxford (2019).
- ROSE, G., *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre*, Abingdon (2014)
- ROSELLO, M., *IUU Fishing As A Flag State Accountability Paradigm : Between Effectiveness And Legitimacy*, Leiden (2021)
- ROSENNE, S., *The Perplexities of Modern International Law*, Leiden (2003)
- ROSS, A., *Myftagogus Poeticus, Or The Mvses Interpreter Explaining The HiftoricalM yfteries and Myftical Hiftories of the Ancient Greek and Latin Poets*, London (1672),
- ROTHWELL D. R. ET AL. (eds.) *The Oxford Handbook of The Law of The Sea*, Oxford (2015)
- ROTHWELL, D.R. STEPHENS, T., *The International Law of the Sea*, Oxford (2010),
- ROTHWELL, D.R., *Islands and international law*, Oxford (2022),
- ROTHWELL, D.R., STEPHENS, T., *The International law of the sea*, Oxford (2016);
- ROUCOUNAS, E., *Effectiveness of International law for the users of the sea*, CEBID, vols. VIII/IX (2004/5)
- ROUCUNAS, E., 'Facteurs privés et droit international public', *Recueil des cours* 299 (2002
- ROZWADOWSKI, H.M., *Fathoming The Ocean. The Discovery and Exploration of the Deep Sea,* Harvard (2008)
- RUSSELL, W., *Russell on Crime, Treatise on Felonies and Misdemeanors*, ninth edition, London (1936),
- RYNGAERT, C., *Jurisdiction in International Law* (2nd Edition) (2015)
- SADAT, L.N. (ed.), *Forging a Convention for Crimes against Humanity,* Cambridge (2011).
- SANDER, B., *Doing Justice to History: Confronting the Past in International Criminal Courts*, Oxford (2021);
- SANDS, P. ET AL., *Principles of International Environmental Law, fourth edition,* Cambridge (2018)

- SANDS, P., *East West Street* (2016)
- SARPI, P., *Dominio del Mare Adriatico della Serenissima Repubblica di Venezia. Introduzione di Tullio Scovazzi*, Torino (2001)
- SÀSSOLI, M., NAGLER, P.S. (eds.), *International humanitarian law : rules, controversies, and solutions to problems arising in warfare,* Cheltenham (2019);
- SAUL, B., AKANDE, D.(eds.), The Oxford guide to international humanitarian law, Oxford (2020);
- SAUL, B., *Defining Terrorism in International Law*, Oxford (2010)
- SAYAPIN, S., *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State,* The Hague (2014)
- SCARPA, S., *Trafficking in Human Beings: Modern Slavery*, Oxford (2008)
- SCHABAS, W. A., *The Trial of the Kaiser*, Oxford (2018)
- SCHABAS, W., 'Crimes against humanity', in *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone,* Cambridge (2006)
- SCHABAS, W., Genocide in International Law: The Crime of Crimes, Cambridge (2009)
- SCHABAS, W., *International Criminal Law* (2012)
- SCHABAS, W., '*Mens Rea*, *Actus Reus*, And The Role Of The State', in *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals,* Oxford (2012)
- SCHABAS, W., SAX, H. (eds.), *Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty*, Leiden (2006)
- SCHABAS, W., *Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth*, Dordrecht (2004);
- SCHARF, M. 'The Truman Proclamation on the Continental Shelf', in *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments,* Cambridge (2013)
- SCHARF, M., NEWTON, M., STERIO, M., (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*, Cambridge (2015)
- SCHIFF, B.N., *Building the International Criminal Court,* Cambridge (2008),
- SCHMIDT, J.H. ET AL., *Handbook of Criminal Justice Administration*, Boca Raton (2000),
- SCHMITT C., ET AL., *Il Nomos Della Terra Nel Diritto Internazionale Dello "Jus Publicum Europaeum",* Milan (1991)
- SCHONFIELD, C., LEE, S., KWON, M., *The limits of maritime Jurisdiction* (2014)
- SCHWARZENBERGER, G., *The Fundamental Principles of International Law (Volume 87)*, Collected Courses of the Hague Academy of International Law (1955)
- SCOVAZZI, T., *Elementi di diritto internazionale del mare, terza edizione,* Milano (2002)
- SCOVAZZI, T., The Evolution of International Law of the Sea: New Issues, New Challenges, *Collected Courses of The Hague Academy of International Law - Recueil des cours* 286 (2000)
- SELLARS, K., *'Crimes against Peace' and International Law,* Cambridge (2013)
- SENECA, L.A. (PATER), *Controversiarum*, LIB. I 2, 3-7, 8 in L. *Annaei Senecae Patris scripta qvae manservnt, edidit H. J. Müller*, Vindobonae (1887)

- SENECA, L.A., *Ad Lucilium Epistulae Morales: With an English Translation by Richard M. Gummere*. London (1917)
- SHANY, Y., *The extraterritorial application of international human rights law*, Recueil des Courses, vol. 409 (2020)
- SHARMA, O.P., 'The Territorial Sea, International Straits, and Archipelagos' in *The International Law of the Sea: India and the UN Convention of 1982,* Oxford (2010)
- SHAW, M.N., *International law, ninth edition*, Cambridge (2021),
- SHAW, M.N., *International law, seventh edition*, Cambridge (2014),
- SKOTNICKI A. *Conversion and the Rehabilitation of the Penal System: A Theological Rereading of Criminal Justice*. New York (2019).
- SKOTNICKI A., *Criminal Justice and the Catholic Church*, Lanham (2008),
- SMEULERS, A., GRÜNFELD, F., 'IV Torture', in *Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*, Leiden (2011)
- SOBRINO HEREDIA, J. M. (ed.), *Sûreté maritime et violence en mer / Maritime security and violence at sea* (2011)
- SOHN, L. B. ET AL., '6 Maritime Delimitation', in *Cases and Materials on the Law of the Sea, Second Edition*, Leiden (2014)
- SOHN, L.B. ET AL., *Law of the Sea in a nutshell*, 2nd edition, Saint Paul (2010);
- SOLIS, G.D., *The law of armed conflict : international humanitarian law in war*, Cambridge (2016);
- STAHN, C., IVERSON, J., EASTERDAY, J. (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices,* Oxford (2017);
- STAHN, C., VAN DEN HERIK, C. (eds.), *Future perspectives on international criminal justice* (2010)
- STAHN, C., 'Remedial Expression: Expressive Punishment and Repair of Harm', *Justice as Message: Expressivist Foundations of International Criminal Justice,* Oxford (2020).
- STEWART, J., *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York (2011)
- STRATI A., *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea*, The Hague (1995),
- STROBEL, K., *Organized Crime and International Criminal Law. History, Lex Lata and Developments De Lege Ferenda,* Leiden (2021),
- SVETONIUS, *De vita Caesarum libri VIII, Vita Gai*,
- SYMMONS, C. R. (ed.), *Selected Contemporary Issues in the Law of the Sea*, Leiden (2011);
- SYMMONS, C.R., *Historic Waters and Historic Rights in the Law of the Sea, A modern reappraisal, 2nd edition,* Leiden (2019)
- TANAKA, I., *A dual approach to ocean governance. The cases of zonal and integrated management in international law of the sea*, Farnham (2008),
- TANAKA, Y., *International Law of the sea*, Cambridge (2019),
- TANAKA, Y., *The International Law of The Sea,* Cambridge (2012)
- TERENTIUS, P.A., *Heauton Timorumenos*

- TEXTOR, J.R., *Ioannis Ravisii Textoris Nivernensis Officina, uel potius Naturae historia, in qua copiosissime est dispositum, quicquid habent autores in omnibus disciplinis omnes, quod & ad rerum & uerborum cognitionem ullo modo facere potest*, Basileae (1538),
- TONRY, M.H., *Why Punish? How Much?: A Reader on Punishment*, New York (2010); .
- TRINDADE, A.A.C., 'The Legal Personality of the Individual as Subject of International Law', in *International Law for Humankind*, Leiden (2020),
- TSILONIS V., 'The Crime of Genocide and the International Criminal Court's Jurisdiction', in Tsilonis, V., *The Jurisdiction of the International Criminal Court*, Cham (2019)
- TSIMPLIS, M., 'Chapter 7: Implementation and enforcement of environmental regulations', in *Environmental Norms in Maritime Law*, Cheltenham (2021)
- VALLON, F., *La Mer et son droit, entre liberté et consensualisme, l'impossible gestion de la piraterie et du terrorisme* (2011)
- VAN BYNKERSHOEK, C., *Questionum Juris Publici*, Liber I caput XVII
- VAN DER HAVE, N., *The Prevention of Gross Human Rights Violations Under International Human Rights Law* (2018);
- VAN DER WILT, H., PAULUSSEN, C. (eds.), *Legal responses to transnational and international crimes: towards an integrative approach* (2017)
- VASINO, G., *Bandiere ombra e armatori fantasma*, Milano (1976).
- VERRIJN STUART, H., SIMONS, M., *The Prosecutor and the Judge. Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, Amsterdam (2009),
- VON BERNSTORFF, J., *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge (2010)
- VUKAS, B., *The law of the sea, selected writings*, Leiden (2004);
- WALTERS, D., BAILEY, N., *Lives in Peril: Profit or Safety in the Global Maritime Industry?*, Basingstoke (2013);
- WATT, E., COLES, R., *Ships registration: law and practice, third edition*, Abingdon (2019);
- WEATHERALL, T., *Jus Cogens. International Law and Social Contract*, Cambridge (2015),
- WEGELEIN, F.H.T., *Marine Scientific Research: the operation and status of research vessels and other platforms in international law*, Leiden (2005),
- WERKMEISTER, A., 'International Criminal Law as a Means to Fight the 'Hostes Humani Generis'? On the Dangers of the Concept of Enemy Criminal Law', in Fenwick, M., Wrbka, S. (eds.), *Legal Certainty in a Contemporary Context*, Singapore (2016);
- WERLE, G., *Principles of International Criminal Law*, Oxford (2005);
- WHEATON H., DANA R. H., *Elements of international law* (8th ed.), London, Boston (1866),
- WHITE, M. D. (ed.), *Retributivism: Essays on Theory and Policy*, Oxford (2011)
- WHITE, R., *Crimes Against Nature: Environmental criminology and ecological justice*, Cullompton (2008)
- WINTERDYK J., JONES J. (eds) *The Palgrave International Handbook of Human Trafficking* (2020);
- WOOLSTON, H., *Prostitution in the United States* (1921)

- WORKMAN, A., GRIFFIN, P.M., KADDOUR, R., *Culture, Diversity, and Criminal Justice: Towards Culturally Safe Criminal Justice Systems*, Abingdon (2023).
- ZAGARIS, B., 'International Environmental Crimes', in *International White Collar Crime: Cases and Materials*, Cambridge (2015)
- ZIERLER, D., *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think about the Environment*, Athens (2011)

2. Commentaries

- 'Article 18', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993),
- 'Article 220', in NORDQUIST, M.H., ET AL. (eds.), *United Nations Convention on the law of the sea 1982: a commentary*, volume IV, Dordrecht (2002),
- UN, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, done at Vienna on 20 December 1988*, New York (1988),
- TAMS, C.J., BERSTER, L., SCHIFFBAUER, B., 'Introduction', in Tams, C.J., Berster, L., Schiffbauer, B. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, München Oxford (2014), para. 4 p. 2; TAMS, C., 'Article I'
- 'Article 33', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993),
- 'Article 60', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993),
- 'Part VI. Continental Shelf. Introduction', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993)
- AMBOS, K., 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)', in Werle, G., Vormbaum, M., (eds.), *The African Criminal Court*, International Criminal Justice Series 10, The Hague (2017)
- AMBOS, K., 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)', in Werle, G., Wormbaum, M. (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol*, The Hague (2017)
- ARNOLD, R., WEHRENBERG, S., '4. Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment', in Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Munich, Oxford, Baden Baden (2016)
- DONAT-CATTIN, D., 'Article 68' in Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Munich, Oxford, Baden Baden (2016)
- Article 2', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds.), *United Nations Convention on the law of the sea 1982. A commentary*, volume II, Dordrecht (1993)
- Article 56', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary*, volume II, articles 1 to 85, Dordrecht (1993)
- Article 60', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993),

- Article 73', in Nandan, S.N., Rosenne, S., Grandy, N.R. (eds), *United Nations Convention on the Law of the sea 1982: a commentary, volume II, articles 1 to 85*, Dordrecht (1993),
- BARNES, R., 'Article 17', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary,* Munchen (2017),
- BARNES, R., 'Article 2', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary,* Munchen (2017)
- BARNES, R., 'Article 25', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- BARTENSTEIN, 'Article 211 Pollution from vessels', in Proelß, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- BARTENSTEIN, 'Article 216 Enforcement with respect to pollution by dumping', in Proelß, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- BARTENSTEIN, K., 'Article 219', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- BARTENSTEIN, K., 'Article 221. Measures to avoid pollution arising from maritime casualties', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- BASSIOUNI, C., *The Legislative History of the International Criminal Court*, voll. 1-3 (2005);
- BURKE, W.T, 'Article 56. Rights, Jurisdiction and duties of the coastal state in the exclusive economic zone', in Nandan, S.N., Rosenne, S. (eds.), *United Nations f the Law of the Sea: a Commentary. Volume II, Articles 1 to 85, Annexes I and II*, Dordrecht Boston London (1993)
- BURKE, W.T., 'Article 55. Specific legal régime of the exclusive economic zone', in Nandan, S.N., Rosenne, S. (eds.), *United Nations f the Law of the Sea: a Commentary. Volume II, Articles 1 to 85, Annexes I and II*, Dordrecht Boston London (1993)
- FERNANDEZ, J., PACREAU, X., MAZE, L. (eds.), *Statut de Rome de la Cour pénale international: Commentaire article par article, Tome I* (2012)
- GUILFOYLE, D., 'Article 100 Duty to cooperate in the repression of piracy', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- GUILFOYLE, D., 'Article 105 Seizure of a pirate ship or aircraft', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017)
- GUILFOYLE, D., 'Article 109 Unauthorized broadcasting from the high seas', in Proelβ . (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- GUILFOYLE, D., 'Article 110 Right of visit', in Proelβ . (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017)
- GUILFOYLE, D., 'Article 111 Right of hot pursuit' in Proelβ A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- GUILFOYLE, D., 'Article 87 Freedom of the high seas', in Proelβ A. (ed.), *United Nations Convention on the Law of the Sea: a commentary,* München (2017),
- GUILFOYLE, D., 'Article 87 Freedom of the high seas', Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),

- GUILFOYLE, D., 'Article 89 Invalidity of claims of sovereignty over the high seas' in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017),
- GUILFOYLE, D., 'Article 89 Invalidity of claims of sovereignty over the high seas' in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),
- GUILFOYLE, D., 'Article 91 Nationality of Ships', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- GUILFOYLE, D., 'Article 92 Status of ships', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- GUILFOYLE, D., 'Article 99 Prohibition of the transport of slaves', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- HAMAMOTO, S., 'Article 220 Enforcement by coastal States', in Proelß, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- HARRISON, J., 'Article 73', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),
- HARRISON, J., MORGERA, E., 'Article 61. Conservation of the living resources.', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017), Section III. Elements
- HARRISON, J., MORGERA, E., 'Article 62. Utilization of the living resources', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017)
- JEßBERGER, F., 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)', in Werle, G., Wormbaum, M. (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol*, The Hague (2017)
- KHAN, D.K., 'Article 33', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017),
- KHAN, D-E., 'Article 33', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017),
- KÖNIG, 'Article 218 Enforcement by port States', in Proelß A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- KÖNIG, D., 'Article 218', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- KREß, C., BARRIGA, S. (eds.), *The Crime of Aggression: A Commentary*, Cambridge (2017)
- LUCCHINI, L., VOELCKEL, M., *Droit de la Mer, Tome 2, volume 2, Navigation et pêche*, Paris (1996);
- MAGGIO, A.R., 'Article 77' in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),
- MAGGIO, A.R., 'Rights of the coastal State over the continental shelf', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),

- NANDAN, S.N., ROSENNE, S. (eds.), *United Nations f the Law of the Sea: a Commentary. Volume II, Articles 1 to 85, Annexes I and II*, Dordrecht Boston London (1993), Part II. Territorial Sea and Contiguous Zone, Introduction
- NORDQUIST, M.H., NANDAN, S.N., KRASKA, J. (eds.), *UNCLOS 1982 Commentary, Supplementary Documents*, Leiden (2012)
- NORDQUIST, M.H., ROSENNE, S., SOHN, L.B. (eds.), *United Nations Convention on the Law of the Sea 1982: a commentary,* volume V, Dordrecht (1989),
- O'KEEFE, R., 'the general understandings', in O'Keefe, R., Tams, C.J. (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford (2013),
- PILLOUD, C., DE PREUX, J., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva (1987)
- PROELSS, A., (ed.) "High Seas." *United Nations Convention on the Law of the Sea: A Commentary*. Ed. (2017);
- PROELSS, A., 'Article 55', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary,* Munchen (2017),
- PROELSS, A., 'Article 56', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),
- PROELSS, A., 'Article 58', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017)
- PROELSS, A., 'Article 59', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017),
- PROELSS, A., 'Article 60', in Proelss, A. et al. (eds.), *United Nations Convention on the law of the sea. A commentary*, Munchen (2017)
- ROSE, C., KUBICIEL, M., LANDWEHR, O. (eds.) *The United Nations Convention Against Corruption: A Commentary*, Oxford (2019)
- SCHABAS, W., 'article 6. Genocide', in Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Munich, Oxford, Baden Baden (2016)
- SCHABAS, W., SAX, H,. *A Commentary on the United Nations Convention on the Rights of the Child,* Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty (2006).
- SCHABAS, W., *The International Criminal Court: A Commentary on the Rome Statute, second edition* (2016);
- SCHABAS, W.A., PECORELLA, G., 'Article 12 Preconditions to the exercise of jurisdiction', in Triffterer, O., Ambos, K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary. Third Edition,* London (2016)
- SCOVAZZI, T., 'Article 135 Legal status of the superjacent waters and air space', in Proelβ A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- SCOVAZZI, T., 'Article 149. Archaeological and historical objects', in Proelβ, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),

- SCOVAZZI, T., 'Article 303', in Proelss, A., et al. (eds.), *United Nations Convention on the Law of the Sea: a commentary*, München (2017),
- TAYLOR, P., 'Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment', in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights,* Cambridge (2020)
- TRIFFTERER, O., AMBOS, K. *The Rome Statute of the International Criminal Court: a commentary, Third Edition* (2016);
- TRÜMPLER, K., 'Article 8', in Proelss, A. (ed.), *United Nations Convention on the law of the sea. A commentary,* Munchen (2017),
- VILLIGER, M. E. 'Article 64: Emergence Of A New Peremptory Norm Of General International Law (Jus Cogens)'. In Villiger, M. E., *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009);
- VÖNEKY, S., BECK, F., 'Article 145 Protection of the marine environment', in Proelβ . (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- VÖNEKY, S., BECK, F., 'Article 146 Protection of human life', in Proelβ, . (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- VÖNEKY, S., HÖFELMEYER, A., 'Article 136 Common heritage of mankind', in Proelβ A. (ed.), *United Nations Convention on the Law of the Sea : a commentary*, München (2017),
- WACHT, F., 'Article 210 Pollution by dumping', in Proelß, A. (ed.), *United Nations Convention on the Law of the Sea : a commentary,* München (2017),
- WILD, S. E. (ed.), *Webster's New World Law Dictionary*, Hoboken (2006),
- ZIMMERMANN, A., FREIBURG, E., 'Article 8bis' in Triffterer, O., Ambos, K. *The Rome Statute of the International Criminal Court: a commentary, Third Edition* (2016)
- ZIMMERMANN, B., ET AL., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Leiden (1987)

3. Contributions in edited books and encyclopedias

-

- 'From the Binghamton Press, Binghampton, N.Y., September 13, 1944', quoted in US Congress, Committee of Foreign Affairs, *World Freedom of Press and Radio: Editorials Submitted to the Committee on Foreign Affairs, House of Representatives of the United States, Seventy-eighth Congress, Second Session, Relative to Senate Concurrent Resolution 50, Senate Concurrent Resolution 52, Senate Concurrent Resolution 53, House Concurrent Resolution 97, Favoring World Freedom of Information and of Communications*, Washington (1944),
- AHL NEWMAN, G., 'Punishment Philosophies and Practices around the World', in Natarajan, M. (ed.), *International Crime and Justice,* Cambridge (2010)
- AKANDE, D., 'Active personality principle', in Cassese, A. (ed.), *The Oxford Companion to international criminal justice*, Oxford (2010),
- AKIN, W.M., 'Nuremberg, Justice and the Beast of Impunity', in Reginbogin, H. R., Safferling, C. (eds.), *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference / Internationale Konferenz zum 60. Jahrestag*, Berlin (2006),
- ALI, K., '6 A Case Study of Piracy and Armed Robbery in the Gulf of Guinea', in Ali, K., *Maritime Security Cooperation in the Gulf of Guinea*, Leiden (2015),
- ALLWOOD, J.S. ET AL. (eds.), *Controversies and Interdisciplinarity: Beyond Disciplinary Fragmentation for a New Knowledge Model*, Amsterdam (2020).
- AMBOS, K., 'Gravity and Complementarity *stricto sensu*', in Ambos, K., *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court,* Berlin Heidelberg (2010)
- AMBOS, K., 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Ambos, K., Large, J., Wierda, M. (eds.), *Building a Future on Peace and Justice,* Berlin (2009),
- AMBOS, K., Gravity and Complementarity Stricto Sensu', in Ambos, K., *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court. An Inductive, Situation-based Approach*, Berlin (2010),
- AMBOS,K., 'Chapter 3: Ius puniendi and individual criminal responsibility in international criminal law', in Mulgrew, R., Abels, D. (eds.), *Research Handbook on the International Penal System*, Cheltenham (2016)
- AMERI, M., 'La police de la mer', in Forteau, M., Thouvenin, J.M. (eds.), *Traité de Droit Internationale de la mer*, Paris (2017),
- ANDERSON, A. W., Jurisdiction over stateless vessels on the high seas: an appraisal under domestic and international law, *Journal of Maritime Law and Commerce* 13(3)(1982),

- ANDERSON, C. B. D. H., 'Chapter 106 Joyce A.C. Gutteridge, The 1958 Geneva Convention on the Continental Shelf, 1959', in Barrett, J., Gauci, J. (eds.), *British Contributions to International Law, 1915–2015*, Leiden (2020)
- ANDERSON, D., 'Freedoms of the High Seas in the Modern Law of the Sea', in Freestone, D., Barnes, R., Ong, D. (eds), *The Law of the Sea: Progress and Prospects,* Oxford (2006),
- ANDREONE, G., 'The exclusive Economic Zone', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015),
- ANDREOPOULOS, G., 'Genocide, War Crimes, and Crimes against Humanity', in Natarajan, M. (ed.), *International Crime and Justice,* Cambridge (2010)
- AQUILINA, K., '2. Territorial sea and the contiguous zone', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016),
- ARONOWITZ, A., 'Understanding Trafficking in Human Beings: A Human Rights, Public Health, and Criminal Justice Issue', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010)
- ATTARD, D., MALLIA, P., 'the high seas', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea,* Oxford (2014),
- AUST, A., 'Jurisdiction', in *Handbook of International Law*. Cambridge (2005),
- AUST, H., 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission', in Dire Tladi (ed.), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (forthcoming 2021)
- BARNES, R., FREESTONE, D., ONG, D.M., 'Chapter 1. The law of the sea: progress and prospects', in Barnes, R., Freestone, D., Ong, D.M (eds.), *The law of the sea: progress and prospects*, Oxford (2006),
- BARNES, R., ROSELLO, M., 'Fisheries and maritime security: understanding and enhancing the connection', in Evans, M.D., Galani, S. (eds.), *Maritime Security and the Law of the Sea: Help or Hindrance?* (2020)
- BARNES, R.A., 'Flag States', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015)
- BARRIGA, S., '43. The Crime of Aggression', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2014)
- BARTON, G.G., Foreign Armed Forces: Qualified Jurisdictional Immunity, *British Year Book of International Law* 31(1954),
- BARTON, J.R. Flags Of Convenience': Geoeconomics And Regulatory Minimisation, *Tijdschrift voor Economische en Sociale Geografie* 90(2)(1999),
- BASSIOUNI, M.C., 'The sources and content of international criminal law: a theoretical framework', in Bassiouni, M.C. (ed.), *International Criminal Law*, second edition (1998), vol. 1

- BASSIOUNI, M.C., FERENCZ, B. B. 'The Crime Against Peace and Aggression: From Its Origins to the ICC', in Bassiouni M.C. (ed.), *International Criminal Law, Volume 1: Sources, Subjects and Contents, Third Edition*, Leiden (2008)
- BECCARIA, C., 'Public peace', in Bellamy, R. (Ed.), Davies, R. (Trans.), *Beccaria: 'On Crimes and Punishments' and Other Writings,* Cambridge (1995),
- BECCARIA, C.,'Public peace', in Bellamy, R. (Ed.), Davies, R. (Trans.), *Beccaria: 'On Crimes and Punishments' and Other Writings,* Cambridge (1995)
- BECKER-WEINBERG, V., 'Chapter 10 Human Trafficking & IUUF: Legal and Gender Implications' in Papanicolopulu, I. (ed.), *Gender and the Law of the Sea*, Leiden (2019)
- BECKMAN, R., 'Chapter 15. Jurisdiction over Pirates and Maritime Terrorists', in Schonfield, C., Lee, S., Kwon, M. (eds.), *The Limits of Maritime Jurisdiction*, Leiden Boston (2014)
- BENTON, L., 'Legalities of the Sea in Gentili's Hispanica Advocatio', in Kingsbury, B., Straumann, B. (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford (2010),
- BESSON, S., 'Sovereignty', *Max Planck Encyclopedia of Public International Law* (2011).
- BETTINK, H.W.W, Open registries, the genuine link and the 1986 convention on registration conditions for ships, *Netherlands Yearbook of International Law* 18(1987)
- BILSKY, L., 'The right to truth in international criminal law', in Heller, K.J. et al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford (2020),
- BOAS, G., BISCHOFF, J., REID, N. 'Genocide', in Boas, G., Bischoff, J., Reid, N. (eds.), *International Criminal Law Practitioner Library,* Cambridge (2009)
- BOENKHOUT VAN SOLINGE, T., 'The Illegal exploitation of natural resources', in Paoli, L. (ed.), *The Oxford Handbook of Organized Crime*, Oxford (2014)
- BOISSON, P., 'Law of maritime safety', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016)
- BOISTER, N., 'Chapter 7. The UN Convention against Transnational Organised Crime 2000', in Hauck, P., Peterke, S. (eds.), *International Law and Transnational Organised Crime*, Oxford (2016),
- BOISTER, N., 'Chapter 7. The UN Convention against Transnational Organised Crime 2000', in Hauck, P., Peterke, S. (eds.) *International Law and Transnational Organised Crime,* Oxford (2016)
- BOU, V., 'Chapter Thirty-Two. Crimes Against Humanity In Contemporary International Law', in Constantinides, A., Zaikos, N. (eds.), *The Diversity of International Law*, Leiden (2010)
- BOYLE, A., 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change', in Freestone, D., Barnes, R., Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* Oxford (2006),

- BREAU, S.C., 'Chapter 8. Ships owned or operated by a state', in Hafner, G., Kohen, M., Breau, S. (eds.), *State practice regarding state immunities/La pratique des Etats concernant les Immunités des Etats*, Leiden (2006),
- BROWNLIE, I., The Human Environment: Problems Of Standard-Setting And Enforcement, *Natural Resources Journal* 12(2)(1972),
- BRUHA, T., 'The General Assembly's Definition of the Act of Aggression', in Kreß, C., Barriga, S. (eds.), *The Crime of Aggression: A Commentary*, Cambridge (2017)
- BRUWER, C., 'Blue frontiers: In pursuit of smugglers at sea', in Gallien, M., Weigend, F. (eds.), *The Routledge Handbook Of Smuggling*, Abingdon (2022),
- CALLEY, D., 'transitional states and the flag of convenience fishing industry', in Michalowski, S. (ed.), *Corporate accountability in the context of transitional justice*, Abingdon (2013)
- CAMINOS, H., 'Hot Pursuit', *Max Planck Encyclopedia of Public International Law* (2013).
- CARLSON, K., 'History, Trials, and Collective Memory: Constructing "Truth"', in *Model(ing) Justice: Perfecting the Promise of International Criminal Law*, Cambridge (2018)
- CARON, D., 'ships: nationality and status', in Bernhardt, R. (ed.), *Encyclopedia of public international law*, vol. 11, Amsterdam (1989),
- CASSESE, A., '13. Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in Cassese, A., Gaeta, P., Zappalà, S. (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, Oxford (2008),
- CASSESE, A., 'A tentative appraisal of the old and the new humanitarian law of armed conflict', in Cassese, A. (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli (1979)
- CASSESE, A., 'Soliloquy', in Cassese, A., Gaeta, P., and Zappalà, S. (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (2008)
- CASSESE, A., 'Volume I, s.1 The Path to Rome and Beyond, 1 From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford (2002),
- CASSESE, A., The Prohibition of indiscriminate means of warfare, in Akkerman, R. J., Van Krieken, P. J., Pannenborg, C. O. (eds.), *Declarations on principles-A Quest for Universal Peace, Liber Amicorum Discipulorumque Prof. Dr. Bert V. A. Röling*, Leyden (1977)
- CHARBONNEAU, A., 'Les droits sociaux fondamentaux des gens de mer', in Raspail, H. (ed.), *les droits de l'homme et la mer, actes du colloque du Mans, 24 et 25 mai 2018*, Paris (2020),
- CHEHTMAN, A., RIVERA-LÓPEZ, E., "Inside" and "Outside": Assessing the Russian Blockade Against Ukraine, in Krieger, H., Kalmanovitz, P., Lieblich, E., Evdokimos Pantazopoulos, S. (eds) *Yearbook of International Humanitarian Law* 25(2022),
- CHURCHILL, R., 'Coastal waters', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, The law of the sea, Oxford (2016),

- CHURCHILL, R., 'Under-Utilized Coastal State Jurisdiction: Causes and Consequences', in Ringbom, H. (ed.), *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea*, Leiden (2015)
- CHURCHILL, R.R., 'The 1982 United Nations Convention on the Law of the Sea', in Rothwell, D.R. et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford (2015),
- CLARK O., 'From Piracy to Palermo: The Changing Challenges of Maritime Crime', in Schildknecht J., Dickey R., Fink M., Ferris L. (eds.) *Operational Law in International Straits and Current Maritime Security Challenges. Operational Maritime Law, vol 1*, Cham (2018)
- CLARK, R. S., 'The Crime of Aggression and the International Criminal Court', in Doria, J., Gasser, H-P., Bassiouni, M. C. (eds), *The Legal Regime of the International Criminal Court*, Leiden (2009)
- CONDERMAN, P.J., Status of Armed Forces on Foreign Territory Agreements (SOFA), *Max Planck Encyclopedias of International Law* [MPIL], february 2013
- CONDORELLI, L., 'Chapitre 19. Présentation de la IIème partie', ASCENSIO, H., DECAUX, E., PELLET, A. (eds.), *Droit International Pénal,* Paris (2000)
- COUPER, A.D., '1. Historical perspectives on seafares and the law', in Fitzpatrick, D., Anderson, M. (eds.), *Seafarers' rights,* Oxford (2005),
- CRONIN-FURMAN, K., TAUB, A., 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in Schabas, W.A., McDermott, Y., Hayes, N. (eds.), *The Ashgate Research Companion to International Criminal Law. Critical Perspectives*, Abingdon (2016)
- CRONIN-FURMAN, K., TAUB, A., 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in Mcdermott, Y., Schabas, W. (eds.), *The Ashgate Research Companion to International Criminal Law. Critical Perspectives*, London (2013)
- CRYER, R., '13. International law, crime and torture', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*, Cheltenham (2020),
- CRYER, R., 'Introduction', in Cryer, R. *et al*, *An Introduction to International Criminal Law and Procedure,* Cambridge (2014)
- CRYER, R., 'Jurisdiction', in Cryer, R. et al. (eds), *An Introduction to International Criminal Law and Procedure, third edition*, Cambridge (2014)
- CRYER, R., 'The Doctrinal Foundations of International Criminalization', in Bassiouni, M. C. (ed.), *International Criminal Law, Volume 1: Sources, Subjects and Content*s, Leiden (2008),
- DADRIAN, V. N., 'Armenians in Ottoman Turkey and the Armenian Genocide', in Shelton, D.L. (ed.), *Encyclopedia of Genocide and Crimes Against Humanity,* Farmington Hills (2005)

- DAHLGREN, C., 'Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals', in Andersson, S. (ed.), *On Nuclear Weapons: Denuclearization, Demilitarization and Disarmament: Selected Writings of Richard Falk*, Cambridge (2019),
- DAM-DE JONG, D., STEWART, J., 'Illicit Exploitation of Natural Resources', in C. Jalloh, C., Clarke, K., Nmehielle, V. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge (2019)
- DAVENPORT, T., 'The Archipelagic regime', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015),
- DAVIES, M., 'Maritime Law, the Epitome of Transnational Legal Authority', in Handl, G., Zekoll, J., Zumbansen, P. (eds.). *Beyond Territoriality*, Leiden (2012),
- DE CONING, E., Why Are Some Flag States Unable or Unwilling to Address IUU Fishing?, *International Community Law Review* 22 (2020),
- DE LUCIA, V., 'Ocean commons and an 'ethological' nomos of the sea, in De Lucia, V., Oude Elferink, A.G., Nguyen, L.N. (eds.), *International law and marine areas beyond national jurisdiction. reflections on justice, space, knowledge and power,* Leiden (2022),
- DE LUCIA, V., 'Ocean commons and an 'ethological' nomos of the sea', in De Lucia, V., Oude Elferink, A.G., Nguyen, L.N. (eds.), *International law and marine areas beyond national jurisdiction. reflections on justice, space, knowledge and power*, Leiden (2022),
- DE ZAYAS, A., 'Peace', in W. Schabas (Ed.), *The Cambridge Companion to International Criminal Law*, Cambridge (2016)
- DEGUZMAN, M., '4. Crimes Against Humanity', in Brown, B.S. (ed.), *Research handbook on international criminal law,* Cheltenham (2011),
- DEGUZMAN, M., '8. Crimes against Humanity', in Schabas, W., Bernaz, N. (eds.), *Routledge handbook of international criminal law,* Abingdon (2011),
- DESOMBRE, E. R., '16 Environmental politics and global shipping trade: club goods as a solution to common-pool resource problems', in Gallagher, K.P. (ed.), *Handbook on Trade and the Environment*, Cheltenham (2008)
- DI FILIPPO, M., 'The Definition(s) of Terrorism in International Law', in Saul, B. (eds.) *Research Handbook on International Law and Terrorism*, Cheltenham (2014)
- DIMITRIOU, E., Flags of Convenience and international law, *Thesaurus Acroasium*, 7 (1977)
- DINSTEIN, Y., 'The Crime of Aggression under Customary International Law', in Sadat, L. (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge (2018),
- DONALDSON, J.W., 'Chapter 5. Oil and Water: Assessing the Link between Maritime Boundary Delimitation and Hydrocarbon Resources', in Schofield, C., Lee, S., Kwon, M.-S. (eds.), *The limits of maritime jurisdiction*, Leiden (2014),
- DRUMBL, M., 'Waging war against the world: The need to move from war crimes to environmental crimes', in Austin, J., Bruch, C., (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives, Cambridge* (2000)

- DUBBER, M.D., 'Preventive Justice. The Quest for Principle', in Ashworth, A., Zedner, L., Tomlin, P. (eds.), *Prevention and the Limits of the Criminal Law*, Oxford (2013)
- DUBBER, M.D., 'Preventive Justice. The Quest for Principle', in Ashworth, A., Zedner, L., Tomlin, P. (eds.), *Prevention and the Limits of the Criminal Law*, Oxford (2013),
- DUFF, R.A., 'Purgative Punishment and the Importance of Perspective', in McBride, M., Kurki, V.A.J. (eds.*), Without Trimmings*, Oxford (2022)
- DUFFY, H., '"Terrorism' in international law', in *The 'War On Terror' And The Framework Of International Law, Second Edition,* Cambridge (2015),
- DUPUY, P.-M., 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in Cannizzaro, E. (ed.), *The Law of Treaties Beyond the Vienna Convention,* Oxford (2011),
- DUPUY, R., '5. the sea under national competence', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 1, Dordrecht (1991),
- EVANS, M.D., 'Maritime Boundary Delimitation: whatever Next?', in Barrett, J., Barnes, R. (eds.), *Law of the Sea. UNCLOS as a living treaty*, London (2016),
- FARNELLI, G.M., A Controversial Dialogue between International and Domestic Courts on Functional Immunity, *The Law and Practice of International Courts and Tribunals* 14 (2015)
- FEDOROVA, M., VAN KEMPEN, P.H., 'A History of Maritime Piracy', in Boister, N., Gless, S., Jeßberger, F. (eds), *Histories of Transnational Criminal*, Oxford (2021),
- FERRELL, J.K., Controlling Flags Of Convenience: One Measure To Stop Overfishing Of Collapsing Fish Stocks, *Environmental Law*, 35(2)(2005),
- FINK, M. 'The Right of Visit', in *Maritime Interception and the Law of Naval Operations*, The Hague (2018),
- FINK, M., 'Chapter 5 The UN Collective Security System and Maritime Interception Operations', in *Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations*, The Hague (2018)
- FITZMAURICE, A., 'Property, Trade and Empire', in Nijman, J.E., Lesaffer, R. (eds.), *The Cambridge Companion to Hugo Grotius*, Cambridge (2021),
- FLECK, D., Are foreign military personnel exempt from international criminal jurisdiction under status of forces agreements, *Journal of International Criminal Justice* 1(3)(2003)
- FLEISCHER, C.A., 'Fisheries and biological resources', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 2, Dordrecht (1991),
- FORD, J.K., WILCOX, C., Shedding light on the dark side of maritime trade – a new approach to identify countries as flags of convenience, *Marine Policy* 99(2019)
- FREESTONE, D. 'Chapter 1. The Impact Of Human Uses On The Marine Environment Beyond National Jurisdiction', in Warner, R. (ed.), *Protecting the Oceans Beyond National Jurisdiction*. Leiden (2009),

- FREESTONE, D., 'Governance of Areas beyond National Jurisdiction: An Unfinished Agenda?', in Barrett, J., Barnes, R. (eds.), *UN Convention on the Law of the Sea: A Living Treaty?* (2016)
- FRY, E., 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity', in van Sliedregt, E., Vasiliev, S. (eds.), *Pluralism in International Criminal Law,* Oxford (2014)
- GAETA, P., 'Chapter 7. Genocide', in Schabas, W., Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Abingdon (2011)
- GALANI, S., 'Pirate Hostage-Taking and Counter-Piracy Measures. The Lack of a Victim's Perspective in the Fight against Modern Piracy', in Galani, S. (ed.), *Hostages and Human Rights: Towards a Victim-Centred Approach* (2021)
- GALANI, S., EVANS, M.D., 'The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?', in Galani, S., Evans, M.D. (eds.), *The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: help or hindrance?* Cheltenham (2020)
- GALLANT, K.S., 'The Territorial Principle', in *International Criminal Jurisdiction: Whose Law Must We Obey*, Oxford (2022)
- GAVOUNELI, M., 'Chapter 8. From Uniformity to Fragmentation? the Ability of the Un Convention on the Law of the Sea to Accommodate New Uses and Challenges', in Strati, A., Gavouneli, M., Skourtos, N. (Eds.)*Unresolved Issues and New Challenges to the Law of the Sea*, Leiden (2006),
- GEIß, R., TAMS, C.J., 'Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?', in Ringbom, H. (ed.), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea,* Leiden (2015),
- GEORGE, M., 'Maritime security', in Keyuan, Z. (ed.), *Routledge Handbook of the South China Sea*, Abingdon (2021),
- GILMORE, B., 'Hovering Acts', in *Max Planck Encyclopedia of Public International* Law [MPEPIL], December 2008
- GIRVIN, S., 'Nationality requirements: implications for shipping enterprises', in Girvin, S., Ulfbeck, V. (eds.), *Maritime Organisation, Management and Liability. A Legal Analysis of New Challenges in the Maritime Industry*, Oxford (2021),
- GREGORY, C.N., Jurisdiction over Foreign Ships in Territorial Waters, *Michigan Law Review* 2(5)(1904),
- GUILFOYLE, D., '6. The Legal Challenges In Fighting Piracy', in van Ginkel, B., van der Putten, F. (eds.), *The International Response to Somali Piracy*. Leiden (2010),
- GUILFOYLE, D., 'The high seas', in Rothwell, D.R., et al. (eds), *The International Law of the Sea*, Oxford (2010),
- GUILFOYLE, D., MCLAUGHLIN, R., 'The Crime of Piracy' in Jalloh, C., Clarke, K., Nmehielle, V. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges,* Cambridge (2019)

- HAFNER, G., 'Does the Freedom of the Seas Still Exist?', in Crawford J., et al., (eds.), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (2017);
- HARRISON, J., *Making the law of the sea : a study in the development of international law*, Cambridge (2011)
- HÄRTER, K., 'Norms, Procedures and Practices of Transnational Criminal Law in 18th and Early 19th-Century Europe', in Boister, N., Gless, S., Jeßberger, F., (eds.), *Histories of Transnational Criminal Law*, Oxford (2021),
- HAUCK, P., '21 Transnational Organised Crime and International Criminal Law', in Hauck, P., Peterke, S. (eds.) *International Law and Transnational Organised Crime*, Oxford (2016)
- HEINTSCHEL VON HEINEGG, W., '10. The law of armed conflicts at sea', in Fleck, D. (ed.), *The Handbook of International Humanitarian Law*, third edition, Oxford (2013),
- HENCKAERTS, J-M., CONSTANTIN, D., 'Ch. 19 Protection Of The Natural Environment', in Clapham, A., Gaeta, P. (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford (2014)
- HERTOGEN, A., Letting Lotus Bloom, *The European Journal of International Law* 26(4)(2016),
- HESSE, P.J., 'Historie et sources des Droits maritimes', in Hesse, P.J. et al. (eds.), *Droit Maritimes. Tome I. Mer, Navire et Marins*, Lyon (1995)
- HICKEY, J. E., 'Law-making and the law of the sea. The BP Deepwater Horizon oil spill in the Gulf of Mexico', in Liivoja, R., Petman, J. (eds.), *International Law-making: Essays in Honour of Jan Klabbers*, London (2013)
- HIGGINS, N., 'In defence of culture: should defences based on culture apply at the ICC?', in *Cultural Defences at the International Criminal Court*, London (2018),
- HIGGINS, R., 'Terrorism and international law', in Higgins, Flory (eds.), *Terrorism and international law*, London New York (1997)
- HONG, N., 'China', in Lee, S. (ed.), *Encyclopedia of Ocean Law and Policy in Asia-Pacific*, Leiden (2022),
- HURLBURT, K., SEYLE, D.C., '2. Piracy takes a heavy human toll', in Miller, D.A. (ed.), *Piracy on the high seas*, Farmington Hills (2014),
- INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, Doswald-Beck, L. (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Part IV Methods And Means Of Warfare At Sea, Section II Methods of warfare Blockade, Cambridge (1995)
- JALLOH, C.C., 'The distinction between 'international' and 'transnational' crimes in the African Criminal Court', in Van der Wilt, H., Paulussen, C. (eds.), *Legal responses to transnational and international crimes: towards an integrative approach* (2017);
- JESSEN, H., 'United States' Bilateral Shipboarding Agreements—Upholding Law of the Sea Principles while Updating State Practice', in Ringbom, H. (ed.), *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea*, Leiden (2015),

- KATEKA, J.L., 'Combating Piracy and Armed Robbery Off the Somali Coast and the Gulf of Guinea', in Del Castillo, L. et al. (eds.) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Liber Amicorum Judge Hugo Caminos*, Leiden (2015)
- KAYE, S., 'Chapter 1. A zonal Approach to Maritime Regulation and Enforcement', in Warner, R., Kaye, S. (eds.), *Routledge Handbook of Maritime Regulation and Enforcement*, Abingdon (2016),
- KAYE, S., 'Chapter 14. Maritime Security in the post-9/11 World: A New Creeping Jurisdiction in the Law of the Sea?', in Schonfield, C., Lee, S., Kwon, M. (eds.), *The limits of maritime Jurisdiction,* Leiden (2014),
- KELBESSA, W., 'Environmental Injustice and Disposal of Hazardous Waste in Africa' in: Brinkmann, R. (ed.), *The Palgrave Handbook of Global Sustainability*, Cham (2023),
- KHALIQ, U., 'Jurisdiction, Ships and Human Rights Treaties', in Ringbom, H. (ed.), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea*, Leiden (2015)
- KHAN, D.-E., 'II Themes, 9 Territory and Boundaries', in Fassbender, B., Peters, A. (eds.), *The Oxford Handbook of the History of International Law*, Oxford (2012)
- KIM, H.J., 'Section 6. La haute mer', in Forteau, M., Thouvenin, J.M. (eds.), *Traité de Droit Internationale de la mer*, Paris (2017),
- KIM, S., KIM, J., Flags of convenience in the context of the OECD BEPS package, *Journal of Maritime Law and Commerce*, 49(2)(2018),
- KINDRED, H.M. ET AL., in Chircop, A., McDorman, T.L., Rolston, S.J. (eds.), *The future of ocean regime-building. Essays in tribute to Douglas M. Johnston*, Leiden (2009),
- KLEEMOLA-JUNTUNEN, P., 'The Right of Innocent Passage: The Challenge of the Proliferation Security Initiative and the Implications for the Territorial Waters of the Åland Islands', in Andreone, G. (eds.), *The Future of the Law of the Sea*, Cham (2017),
- KLEIN, N., 'Terrorism and Proliferation of Weapons of Mass Destruction', in *Maritime Security and the Law of the Sea*, Oxford (2009)
- KNUST N., LINGENFELTER K., 'Individual Criminal Responsibility Beyond the State: Human Trafficking as Both a Transnational and an International Crime', in Winterdyk J., Jones J. (eds.) *The Palgrave International Handbook of Human Trafficking*, Cham (2020)
- KOJIMA, C., 'Climate Change and Protection of the Marine Environment: Food Security, Evolutionary Interpretation, and the Novel Application of Dispute Settlement Mechanisms under the United Nations Convention on the Law of the Sea', in Craik, N., Jefferies, C., Seck, S., Stephens , T. (eds.), *Global Environmental Change and Innovation in International Law*, Cambridge (2018)
- KOOPS, A. G., 'Defining International Crimes', in Knoops, A.G., *An Introduction to the Law of International Criminal Tribunals*. Leiden (2014)

- KRASKA, J., 'Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?', in Schmitt, M.N. et al. (eds.), *Yearbook of International Humanitarian Law Volume 13,* The Hague (2010)
- KREB, C., '27. The ICC's First Encounter with the Crime of Genocide. The Case against Al Bashir', in Stahn, C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford (2015)
- KRIEGER, H., PETERS, A., 'Due Diligence and Structural Change in the International Legal Order', in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order*, Oxford (2020),
- KUROSAKI, M., 'The Fight against Impunity for Core International Crimes: Reflections on the Contribution of Networked Experts to a Regime of Aggravated State Responsibility', in Cullen, H., Harrington, J., Renshaw, C. (eds.), *Experts, Networks and International Law,* Cambridge (2017),
- KURUC, M., 'Monitoring, Control and Surveillance Tools to Detect IUU Fishing and Related Activities', in Vidas, D. (ed.), *Law, technology and science for oceans in globalisation: IUU fishing, oil pollution, bioprospecting, outer continental shelf*, Leiden (2010)
- LATTANZI, F., PISTOIA, E. (eds.), *The Armenian Massacres of 1915–1916 a Hundred Years Later: Open Questions and Tentative Answers in International Law,* Cham (2018)
- LEANZA, U., CARACCIOLO, I., 'The Exclusive Economic Zone', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014),
- LEGGETT, T., 'Transnational Firearms Trafficking Guns for Crime and Conflict', in Natarajan, M. (Ed.), *International and Transnational Crime and Justice,* Cambridge (2019)
- LEVIE, H., Submarine Warfare: With Emphasis on the 1936 London Protocol, in Schmitt, M.N., Green, L. C. (eds.), *Levie on the Law of War, Newport* (1998)
- LEWIS, S. G. *ET AL.*, 'Human Rights and the Sustainability of Fisheries', in Levin, P. S., Poe, M. R. (eds.) *Conservation for the Anthropocene Ocean: Interdisciplinary Science in Support of Nature and People* (2017);
- LORENZON, F., CAMPÀS VELASCO, A., 'Chapter 2: shipbuilding, sale, finance and registration', in Baatz, Y. (ed.), *Maritime Law* fifth edition, Abingdon (2021)
- MADSEN, F.G., 'The Historical Evolution of the International Cooperation against Transnational Organised Crime: An Overview', in Hauck, P., Peterke, S. (eds.) *International Law and Transnational Organised Crime* (2016);
- MALYNES, G., quoted in Barton, W., *Dissertation on the Freedom of Navigation and Maritime Commerce, and Such Rights of States, Relative Thereto, as Are Founded on the Law of Nations: Adapted More Particulary to the United States; and Interspersed with Moral and Political Reflections, and Historical Facts,* Philadelphia (1802)
- MARCHESI, A., 'Metz Yeghern and the Origin of International Norms on the Punishment of Crimes', in Lattanzi, F., Pistoia, E. (eds.), *The Armenian Massacres of 1915–1916 a Hundred Years Later*, Studies in the History of Law and Justice 15, Cham (2018)

- MARTIN, J., Transnational law of the sea, *Chicago Journal of International Law*, 21(2)(2021)
- MBIAH, E.K., 'Coastal, flag and port state jurisdictions: powers and other considerations under UNCLOS', in Mukherjee, P.K., Mejia, M.Q.J., Xu, J. (eds.), *Maritime Law in motion*, Cham (2020)
- MCCARTHY, B.. '10. Crime, Imprisonment, and Social Control', in *Concise Encyclopedia of Comparative Sociology*. Leiden (2014),
- MCCONNELL, M.L., 'The law applicable on the continental shelf and in the exclusive economic zone', in Brown, K.B., Snyder, D.V. (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, Dordrecht (2012)
- MCDORMAN, T., '4. Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions', in Ringbom, H. (ed.), *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea*, Leiden (2015)
- MCDORMAN, T.L., 'CHAPTER THIRTEEN Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments', in Caron, D.D., Scheiber, H.N. (eds.), *The Oceans in the Nuclear Age*, Leiden (2014),
- MCDOUGALL, C., 'The Court's Jurisdiction Over the Crime of Aggression', in *The Crime of Aggression under the Rome Statute of the International Criminal Court,* Cambridge (2021),
- MCDOUGALL, C., 'The Crime of Aggression under the Rome Statute of the International Criminal Court: An Introduction', in *The Crime of Aggression under the Rome Statute of the International Criminal Court,* Cambridge (2021),
- MCLAUGHLIN, R., '"Terrorism' as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2011', in Schmitt, M.N., Arimatsu, L. (eds.), Yearbook of International Humanitarian Law 14(2011),
- MÉGRET, F. 'The Case for a General International Crime against the Environment', in Jodoin, S., Cordonier Segger, M. (eds.), *Sustainable Development, International Criminal Justice, and Treaty Implementation,* Cambridge (2013)
- MENEFEE S.P., 'A Century of Piracy Treaties: An Overview for the Future', in: Mukherjee P., Mejia, Jr. M., Xu J. (eds.) *Maritime Law in Motion. WMU Studies in Maritime Affairs, vol 8*, Cham (2020)
- MENSAH T.A., 'Piracy at Sea – a New Approach to an Old Menace', in Hestermeyer H., Matz-Lück N., Seibert-Fohr A., Vöneky S. (eds) *Law of the Sea in Dialogue. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht)*, vol 221, Berlin, Heidelberg (2011)
- MENSAH, T.A., 'Flags of convenience: problems and promises', in Mejia, M.Q. (ed.), *Selected issues in maritime law and policy. Liber amicorum Proshanto K. Mukherjee*, New York (2013),
- MERON, T. 'The Principle Of Legality In International Criminal Law', in *The Making of International Criminal Justice: The View from the Bench: Selected Speeches*, Oxford (2011)

- METTRAUX, G. 'The Definition of Crimes Against Humanity and the Question of a "Policy" Element', in Sadat, L., (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge (2011)
- MICKELSON, K. 'The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State', in Natarajan, U., Dehm, J. (eds.*), Locating Nature: Making and Unmaking International Law,* Cambridge (2022),
- MICKLITZ, H., 'Rethinking the public/private divide,' in Maduro, M., Tuori, K., Sankari, S. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge (2014),
- MOLENAAR, E. J., 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in Freestone, D., Barnes, R., Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* Oxford (2006),
- MOLENAAR, E. J., 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in Freestone, D., Barnes, R., Ong, D. (eds), *The Law of the Sea: Progress and Prospects,* Oxford (2006),
- MOLENAAR, E.J., 'New Maritime Zones and the Law of the Sea' in Ringbom, H. (ed.), *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea,* Leiden (2015),
- MOLENAAR, E.J., 'Port State Jurisdiction', *Max Planck Encyclopedias of International Law [MPIL],* January 2021;
- MOLENAAR, E.J., '13. Port and coastal states', in Rothwell, D.R., et al. (eds.), *The Oxford handbook of the law of the sea*, Oxford (2015),
- MOMTAZ D., La Convention des Nations Unies sur les conditions de l'immatriculation des navires, *Annuaire français de droit international* 32(1986)
- MOMTAZ, D., '7. The High Seas', in Dupuy, R., Vignes, D. (eds.), *A handbook on the new law of the sea*, vol. 1, Dordrecht (1991),
- MUKHERJEE, R., 'Ship Nationality, Flag States and the Eradication of Substandard Ships: A Critical Analysis', in Mukherjee, P.K., Mejia, M.Q., Xu, J. (eds.), *Maritime Law in Motion. WMU Studies in Maritime Affairs*, vol 8, Cham (2020)
- MUTAQIN, Z.Z., 'Modern-Day Slavery at Sea: Human Trafficking in Thai Fishing Industry', in Lee, E.Y.J. (ed.), *ASEAN International Law,* Singapore (2022)
- NEGRET, C., Pretending to be liberian and panamanian; flags of convenience and the weakening of the nation state on the high seas, *Journal of Maritime Law and Commerce*, 47(1)(2016),
- NELSON, D., 'Maritime Jurisdiction', *Max Planck Encyclopedia of Public International Law* (2010),
- NERI K., 'Security Council's Contribution to the Evolution of the Law of the Sea: Avant Garde or Self-Limitation?', in, Ribeiro M., Loureiro Bastos F., Henriksen T. (eds.) *Global Challenges and the Law of the Sea*, Cham (2020)
- NEWMAN, G., 'Punishment Philosophies and Practices around the World', in Natarajan, M. (ed.), *International Crime and Justice,* Cambridge (2010),

- NIJMAN, J. E., 'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium', in Koskenniemi, M., García-Salmones, M., Amorosa, P. (eds.), *International Law and Religion: Historical and Contemporary Perspectives*, Oxford (2017)
- NISTOR, A., MERRYLEES, A., HOLÁ, B., 'Spellbound at the ICC: the intersection of spirituality and international criminal law', in Fraser, J., McGonigle Leyh, B. (eds.), *Intersections of Law and Culture at the International Criminal Court*. Cheltenham (2020),
- NOYES, J.E., '5. The territorial Sea and Contiguous Zone', in Rothwell D. R. et al. (eds.) *The Oxford Handbook of The Law of The Sea*, Oxford (2015),
- O'CONNELL, M., 'Jus Cogens: International Law's Higher Ethical Norms', in Childress, I. III (ed.), *The Role of Ethics in International Law*, Cambridge (2011),
- OECD study on flags of convenience. *Journal of Maritime Law and Commerce*, 4(2)(1973)
- OEGROSENO, A.H., 'Archipelagic states: from concept to law', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law, volume II, The law of the sea*, Oxford (2016),
- OETTE, L., 'Universal and extraterritorial jurisdiction for torture', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*. Cheltenham (2020),
- OLLINO, A., 'Chapter 9 Feminism, Nature and the Post-Human: toward a Critical Analysis of the International Law of the Sea Governing Marine Living Resources Management', in Papanicolopulu, I. (ed.), *Gender and the Law of the Sea,* Leiden (2019),
- OMBRES OP, R., 'Justice and mercy: Canon law and the sacrament of penance.', in F. Cranmer, M. Hill QC, C. Kenny, Sandberg, R., (eds.), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe,* Oxford (2016),
- ONG, D., 'International Law of the Sea', in Bowman, M., Kritsiotis, D. (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties,* Cambridge (2018)
- ORAKHELASHVILI, A., 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide', in Ruys, T., Angelet, N., Ferro, L. (eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge (2019),
- ORAL, N., 'The Law of the Sea', in Espósito, C., Parlett, K., (eds.), *The Cambridge Companion to the International Court of Justice*, Cambridge (2023),
- ORREGO VICUÑA, F., 'The International Law of High Seas Fisheries: from Freedom of fishing to sustainable use', in Schram Stokke, O. (ed.), *Governing High Seas Fisheries. Then interplay of global and regional regimes*, Oxford (2001),
- ORREGO VICUÑA, F., *The Changing International Law of High Seas Fisheries*, Cambridge (2003)
- OUDE ELFERINK, A., Artificial Islands, Installations and Structures, *Max Planck Encyclopedias of International Law*, September 2013
- OUDE ELFERINK, A.G., 'The genuine link concept: time for a *Post Mortem*', in Dekker, I.F., Post, H.H.G. (eds.), *On the foundations and sources of international law*, The Hague (2003)

- OVERY, R.,'The Nuremberg trials: International law in the making', in Sands, P. (Ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice,* Cambridge (2003),
- OXMAN, B.H., Jurisdiction of states, *Max Planck Encyclopedias of International Law* [MPIL], november 2007
- PAIK, J., 'The Tribunal's Jurisprudence and Its Contribution to the Rule of Law', in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*, Leiden (2018),
- PAINE, J., 'Chapter 7 The Judicial Dimension of Regime Interaction beyond Systemic Integration', in Trevisanut, S., Giannopoulos, N., Holst, R. (eds.), *Regime Interaction in Ocean Governance*, Leiden (2020)
- PALMA-ROBLES, M.A., 'Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance', in Warner, R., Kaye, S. (eds.*)*, *Routledge Handbook of Maritime Regulation and Enforcement*, Abingdon (2016),
- PAPANICOLOPULU, I., '9 Due Diligence in the Law of the Sea' in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order*, Oxford (2020),
- PAPANICOLOPULU, I., 'Due Diligence in the Law of the Sea', in Krieger, H., Peters, A., Kreuzer, L., (eds) *Due Diligence in the International Legal Order* (2020);
- PAPANICOLOPULU, I., 'People, the Sea, and International Law', in *International Law and the Protection of People at Sea*, Oxford (2018)
- PAPANICOLOPULU, I., 'Some Thoughts on the Extension of Existing Boundaries for the Delimitation of New Maritime Zones', in Rainer Lagoni, R.,Vignes, D. (eds.), *Maritime Delimitation*, Leiden (2006)
- PAPANICOLOPULU, I., 'Due Diligence in the Law of the Sea', in Krieger, H., Peters, A., and Kreuzer, L. (eds.), *Due Diligence in the International Legal Order,* Oxford (2020),
- PAPASTAVRIDIS, E., 'The illicit trafficking of drugs', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea,* Oxford (2014),
- PAPASTAVRIDIS, E., 'Crimes at Sea: A Law of the Sea Perspective', in Papastavridis, E., Trapp, K. (eds.), *La Criminalité en Mer/Crimes at Sea*, Leiden (2014)
- PAPPA, M., UNSCR 1325 and Maritime Security, *Max Planck Yearbook of United Nations Law Online*, *24*(1)(2021),
- PARMENTIER, S., WEITEKAMP, E., 'Punishing perpetrators or seeking truth for victims: Serbian opinions on dealing with war crimes', in Dawn, R., Meernik, J.D., and Thordis Ingadottir, T. (eds.), *The Realities of International Criminal Justice*, Leiden (2013),
- PETRIG, A., '37. Piracy', in Rothwell, D.R. et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford (2015)
- PETROSSIAN, G.A., LETTIERI, J., CLARKE, R.V.G., 'Addressing the Security Issues Related to Illegal Commercial Fishing', in Gill, M. (eds.), *The Handbook of Security*, Cham (2022),

- PINESCHI, L., 'Inter-Legality and the Protection of Marine Ecosystems', Klabbers, J., Palombella, G. (eds.), *The Challenge of Inter-Legality*, ASIL Studies in International Legal Theory, Cambridge (2019)
- PIOTROWICZ, R., REDPATH-CROSS, J., 'Human trafficking and smuggling', in Opeskin, B., R. Perruchoud, R., Redpath-Cross J., (eds.), *Foundations of International Migration Law*, Cambridge (2012)
- PLAKOKEFALOS, I., 'Environmental Protection of the Deep Seabed', in Schechinger, J., Nollkaemper, A., Plakokefalos, I. (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge (2017),
- POCAR F., 'Human Trafficking: A Crime Against Humanity', in Savona E.U., Stefanizzi S. (eds.) *Measuring Human Trafficking*, New York (2007)
- PORTEOUS, T., '26. Torture today', in Evans, M. D., Modvig, J., (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*, Cheltenham (2020)
- PRIEMEL, K.C., 'Historical reasoning and judicial historiography', in Heller, K.J. et al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford (2020),
- PROELSS, A., HOFMANN, T., '20. Law of the sea and transnational organised crime', in Hauck, P., Peterke, S. (eds.) *International Law and Transnational Organised Crime*, Oxford (2016)
- QUENEUDEC, J-P., 'Pour un véritable ordre public de la mer', in Cudennec, A. (ed.), *Ordre public et mer. Actes du colloque de Brest, 12 et 13 mai 2011*, Paris (2011),
- RAGNI, C., 'Achille Lauro Affair' (1985), in Wolfrum, R. (ed.), *Max Planck Encyclopedia of International Law* (2009);
- RAHMAN, M.M., KHAN, B.U., 'Chapter 4 The Contested Definitions of 'International Crimes'', in Uddin Khan, B., Bhuiyan, M. J. H. (eds.), *Human Rights and International Criminal Law*, Leiden (2022),
- RALSTON, J.H., FINNIN, S., 'Investigating International Crimes: A Review of International Law Enforcement Strategies Expediency v Effectivenes', in Blumenthal, D.A., McCormack, T.L.H. (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Leiden (2008)
- READY, N.P., 'Nationality, Registration and ownership of ships', in Attard, D. J., Et Al., *The IMLI Manual on the International Maritime Law, vol. II: Shipping law*, Oxford (2016),
- READY, N.P., 'Nationality, Registration, Ownership of ships', in Attard, D.J., et al. (eds.), *The IMLI manual on international maritime law*, volume II, shipping law, Oxford (2016),
- ROACH, J. A., 'Chapter Seven. General Problematic Issues On Exercise Of Jurisdiction Over Modern Instances Of Piracy', in Symmons, C.R. (ed.), *Selected Contemporary Issues in the Law of the Sea*. Leiden (2011),
- ROBERTI DI SARSINA, J., 'The Content of the Obligations to Investigate and Prosecute International Human Rights Law Violations'. In: *Transitional Justice and a State's Response to Mass Atrocity*, The Hague (2019),

- RÖLING, B.V.A., 'Aspects of the criminal responsibility for the violations of the law of war', in Cassese, A. (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli (1979)
- RONZITTI, N., 'The crisis of the traditional law regulating international armed conflicts at sea and the need for its revision', in Ronzitti, N. (ed.), *The law of naval warfare. A collection of agreements and documents with commentaries*, Dordrecht (1988),
- ROSELLO, M., 'Chapter 3 Illegal, Unreported and Unregulated (IUU) Fishing as a Maritime Security Concern', in Otto, L. (ed.), *Global Challenges in Maritime Security*, Cham (2020)
- ROTH, M.P., 'Historical Overview of Transnational Crime', in Reichel, P., Albanese, J. (eds.), *Handbook of Transnational Crime and Justice Second Edition* (2014);
- ROUGHTON, D., TREHARNE, C.,' The Continental Shelf', in Attard, D.J., Fitzmaurice, M., Martìnez Gutiérrez, N.A. (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford (2014)
- ROYER, C., 'The International Criminal Court as a Bulwark Against Evil', in *Evil as a Crime Against Humanity: Confronting Mass Atrocities in a Plural World*, Cham (2023),
- RUIZ-CERUTTI, S., 'The UNCLOS and the Settlement of Disputes: The *ARA Libertad* Case', in del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015),
- RYNGAERT, C., 'The Concept of Jurisdiction in International Law', in Orakhelashvili, A. (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham (2015),
- RYNGAERT, C., Territory in the Law of Jurisdiction: Imagining Alternatives, in Kuijer, M., Werner, W. (eds) *Netherlands Yearbook of International Law* 47(2016),
- SANCHEZ-MORENO ELLART, C., 'Law of the sea, Rhodian', in Bagnall, R.S. et al. (eds.), *The Encyclopedia of Ancient History*, Malden (2013)
- SANDER, B., 'Justifying International Criminal Punishment: A Critical Perspective', in Bergsmo, M., Buis, E.J. (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, Brussels (2019),
- SANDER, O., WOOD, M., 'Chapter II. Extraterritorial jurisdiction and the limits of customary international law', in Parrish, A., Ryngaert, C. (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham (2023)
- SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R., *Oceans, Seas and Marine Living Resources*. In *Principles of International Environmental Law*, Cambridge (2018),
- SANGER, A., 'Chapter 14 The Contemporary Law of Blockade and the Gaza Freedom Flotilla', in Schmitt, M.N. et al. (eds.), *Yearbook of International Humanitarian Law Volume 13*, The Hague (2010)
- SANTULLI, F., 'La sentenza come genere testuale: narrazione, argomentazione, performatività', in Santulli, F., Garzone, G. (eds.), *Il linguaggio giuridico: prospettive interdisciplinari*, Torino (2008),

- SASSÒLI, M., BOUVIER, A., QUINTIN, A., 'Chapter 10. The Law of Naval Warfare', in *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* Geneva (2011)
- SAUL, B., 'Civilizing the Exception: Universally Defining Terrorism', in Masferrer, A. (ed.), *Post-9/11 And The State Of Permanent Legal Emergency: Security And Human Rights In Countering Terrorism,* Dordrecht Heidelberg New York London (2012)
- SAYAPIN, S., 'The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights'. in Jalloh, C., K. Clarke, K., Nmehielle, V. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges,* Cambridge (2019)
- SCHABAS, W., 'Is Terrorism a Crime Against Humanity?', in Langholtz, H., Kondoch, B., Wells, A. (eds.), *International Peacekeeping: The Yearbook of International Peace Operations* 8(2002)
- SCHARF, M., 'The Truman Proclamation on the Continental Shelf', in *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments,* Cambridge (2013)
- SCHLOENHARDT, A., 'Chapter Three Convention Against Transnational Organised Crime', in *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region*, Leiden (2009);
- SCOVAZZI, T., '15 ITLOS and Jurisdiction over Ships', in Ringbom, H. (ed.), *Jurisdiction over Ships,* Leiden, (2015),
- SCOVAZZI, T., '4 The Origin of the Theory of Sovereignty of the Sea', in Del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015)
- SCOVAZZI, T., 'Chapter 8 The Frontier in the Historical Development of the International Law of the Sea', in Barnes, R., Long, R. (eds.), *Frontiers in International Environmental Law: Oceans and Climate Challenges*, Leiden (2021)
- SCOVAZZI, T., 'Libertà e dominio del mare', in Sarpi, P., *Dominio del Mare Adriatico della Serenissima Repubblica di Venezia. Introduzione di Tullio Scovazzi*, Torino (2001)
- SEDDIGHZADEH, H., 'Developing A Universal Standard Of Care For Victims Of Trafficking Under The Guiding Principles Of Non-State Torture', in Winterdyk, J., Jones, J. (ed.), *The Palgrave International Handbook of Human Trafficking,* Cham (2020), pp. 195-205
- SEIDL-HOHENVELDERN, I., 'Flags of convenience', in Vukas, B. (ed.), *Essays on the new law of the sea 2,* Zagreb (1990)
- SHARMA, O.P., 'Inland or Internal Waters', in *The International Law of the Sea: India and the UN Convention of 1982*, Oxford (2012),
- SHARMA, O.P., 'The Contiguous Zone' in Sharma, O.P., *The International Law of the Sea: India and the UN Convention of 1982,* Oxford (2010),
- SIMMA, B., MÜLLER, A, T., '6. Exercise and limits of jurisdiction', in Crawford, J., Koskenniemi, M. (eds.), *The Cambridge Companion to international law*, Cambridge (2012),

- SKODVIN, K.E., '9. Hot Pursuit', in Jensen, Ø. (ed.), *The Development of the Law of the Sea Convention. The Role of International Courts and Tribunals,* Cheltenham (2020),
- SMART, S. M., 'Maritime Interdiction Operations', in Corn, G.S., Van Landingham, R.E., Reeves, S.R. (eds), *U.S. Military Operations: Law, Policy, and Practice*, Oxford (2015)
- SMEULERS, A. GRÜNFELD, F., 'Chapter Five. Genocide', in Smeulers, A. Grünfeld, F. (eds.) *International Crimes and Other Gross Human Rights Violations*, Leiden (2011)
- SNEH, I.,'40 History of Genocide', in Natarajan, M., (ed.), *Introduction to International Criminal Justice*, Boston (2005)
- SOHN, L. B., '14 Maritime Terrorism and Security', in Sohn, L.B. et al (eds.), *Cases and Materials on the Law of the Sea, Second Edition*, Leiden (2014)
- SOUTHWELL, P., BREWER, M.L., DOUGLAS-JONES, B. (eds.), *Human trafficking and modern slavery law and practice, second edition*, London (2021);
- SPIERMANN, O., 'Lotus and the Double Structure of International Legal Argument', in Boisson de Chazournes, L., Sands, P. (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge (1999),
- STAHN, C., 'Chapter 20 How Can We Justify International Criminal Justice?', in Blokker, N. M., Dam-de Jong, D., Prislan, V. (Eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*. Leiden (2021)
- STAHN, C., 'Chapter 20 How Can We Justify International Criminal Justice?', In, Blokker, N. M., Dam-de Jong, D., Prislan, V. (Eds.) *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*, Leiden (2021);
- STAHN, C., 'How Can We Justify International Criminal Justice?', in Blokker, N., Dam-de Jong, D., Prislan, V. (eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development. Liber Amicorum Nico Schrijver,* Leiden (2021),
- STEGMILLER, I., 'Interpretative gravity under the Rome Statute: Identifying common gravity criteria', in Stahn, C.,El Zeidy, M. (eds.), *The International Criminal Court and Complementarity: From Theory to Practice,* Cambridge (2011)
- STEPHENS, T., 'Marine wildlife and ecosystems', in *International Courts and Environmental Protection*, Cambridge Studies in International and Comparative Law, Cambridge (2009)
- STEPHENS, T., ROTHWELL, D. R., The LOSC framework for maritime jurisdiction and enforcement 30 years on. *International Journal of Marine and Coastal Law*, 27(4)(2012),
- STEPHENS, T., ROTHWELL, D.R., 'The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On', in Freestone, D. (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas,* Leiden (2013)
- STOYANOVA, V., 'Criminalisation Of Trafficking In Human Beings', in Planitzer, J., Sax, H. (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*. Cheltenham (2020)
- STRÖM, C., '18. The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles', in *SIPRI Yearbook 2005: Armaments, Disarmament and International Security*, Stockholm (2005)

- SUBEDI, S. P., 'Chapter 12 An Innovative Solution to an Ambitious Project: Dispute Resolution in the 1982 Convention on the Law of the Sea', in Chernor Jalloh, C., Elias, O., *Shielding Humanity*, Leiden, (2015)
- TADROS, V., 'Punishment and Duty', in *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford (2011);
- TANAKA, Y., 'Chapter 4: Jurisdiction of states and the law of the sea', in Orakhelashvili, A. (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham (2015),
- TIROCH, K., 'Black Sea' in *Max Planck Encyclopedia of Public International Law* (2011)
- TOMUSCHAT, C., 'The Security Council and Jus Cogens', in Cannizzaro, E. (ed.), *The Present and Future of Jus Cogens*, Roma (2015)
- TOMUSCHAT, C., THOUVENIN, J.-M., 'L'identification des regles fondamentales - un probleme resolu?', in Tomuschat, C., Thouvenin, J.-M. (eds.), *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Leiden (2006),
- TREVES, T., 'Historical development of the Law of the Sea', in Rothwell, D.R. et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford (2015),
- TRINDADE, A.A.C., 'The Legal Personality of the Individual as Subject of International Law', in *International Law for Humankind*, Leiden (2020),
- URFAN, K., 'Jurisdiction, Ships and Human Rights Treaties', in Ringbom, H. (ed.), *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea,* Leiden (2015)
- VADI, V., 'Chapter 6 Gentili and the Law of the Sea', in *War and Peace*, Leiden (2020),
- VADI, V., 'Gentili and the Law of the Sea', in Vadi, V., *Law and Peace. Alberico Gentili and the Early Modern Law of Nations*, Leiden (2020)
- VAN DER WILT, H., 'Chapter 1: Legal responses to transnational and international crimes: towards an integrative approach?', in Van der Wilt, H., Paulussen, C. (eds.*), Legal Responses to Transnational and International Crimes: Towards an Integrative Approach*, Cheltenham (2017),
- VAN DER WILT, H., 'Legal responses to transnational and international crimes: towards an integrative approach?' in Van der Wilt, H., Paulussen, C. (eds.), *Legal responses to transnational and international crimes: towards an integrative approach* (2017);
- VAN DER WILT, H., '21. States' obligations to investigate and prosecute perpetrators of international crimes: the perspective of the European Court of Human Rights', in Stahn, C., El Zeidy, M.M. (eds.), *The International Criminal Court and complementarity: from theory to practice*, Cambridge (2011),
- VERVLIET, J., 'General Introduction', in Feenstra, E. (ed.), *Hugo Grotius Mare Liberum 1609-2009*, Leiden Boston (2009)
- VIDAS, D., 'Delimitation of the territorial sea, the continental shelf, and the EEZ. A comparative perspective', in Oude Elferink, A.G., Henriksen, T., Veierud Busch, S. (eds.), *Maritime boundary delimitation: the case law. is it consistent and predictable?*, Cambridge (2018), pp. 46-7.

- VIOLI, F., 'The Function of the Triad 'Territory', 'Jurisdiction', and 'Control', in Krieger, H., Peters, A., Kreuzer, L., (eds.), *Due Diligence in the International Legal Order,* Oxford (2020),
- VIRZO, R., 'The 'General Rule of Interpretation' in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea', in Del Vecchio, A., Virzo, R. (eds.) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Cham (2018)
- VOHRAH, L.C., ASKIN, K.D., MUNDIS, D.A., 'Contemporary Law Regulating Armed Conflicts at Sea', in Ando, N., Mcwhinney, E., Wolfrum, R. (eds.), *Liber amicorum Judge Shigeru Oda*, volume 2, The Hague (2002),
- VON BOGDANDY, A., RAU, M., 'Lotus, The', *Max Planck Encyclopedia of Public International Law [MPEPIL]*, June 2006
- VON HEBEL, H., ROBINSON, D., 'Crimes within the jurisdiction of the Court', in Lee, R.S. (ed.), *The International Criminal Court. The making of the Rome Statute: Issues, Negotiations, Results*, The Hague (1999)
- VUKAS, B., VIDAS, D., 'Flags of convenience and high seas fishing: the emergence of a legal framework', in Schram Stokke, O. (ed.), *Governing high seas fisheries: the interplay of global and regional regimes,* Oxford (2001),
- WARMING, R., 'An Introduction to Hand-to-Hand Combat at Sea: General Characteristics and Shipborne Technologies from c. 1210 BCE to 1600 CE', in Rönnby, J. (ed.), *On War on Board: Archaeological and historical perspectives on early modern maritime violence and warfare. 1st ed*, Hudding (2019)
- WERKMEISTER, A., 'International Criminal Law as a Means to Fight the 'Hostes Humani Generis'? On the Dangers of the Concept of Enemy Criminal Law', in Fenwick, M., Wrbka, S. (eds.), *Legal Certainty in a Contemporary Context. Private and Criminal Law Perspectives*, Singapore (2016),
- WHITE, R., 'Transnational Environmental Crime', in Natarajan, M. (ed.), *International Crime and Justice*, Cambridge (2010)
- WILMSHURST, E., '30. The Crime of Aggression: Custom, Treaty and Prospects for International Prosecution', in Buffard, I., et al (eds.), *International Law between Universalism and Fragmentation*. Leiden (2008)
- WOLFRUM, R., '7 The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective', in Del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*. Leiden (2015),
- WOLFRUM, R., '7 The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective' in del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015),
- WOLFRUM, R., '7 The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective' in del Castillo, L. (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden (2015),

- WOLFRUM, R., 'Fighting Terrorism at Sea: Options and Limitations under International Law', in Moore, J.N. et al. (eds.), *Legal Challenges in Maritime Security*, Leiden (2008)
- WOLFRUM, R., 'Freedom Of Navigation: New Challenges', *in* Nordquist, M. H., Koh, T., Moore, J. N. (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden (2009)
- WOODIWISS, M., 'Transnational organised crime: the global reach of an American concept', in Edwards, A., Gill, P. (eds.), *Transnational organised crime: perspectives on global security* (2004);
- XUE, G., 'The South China Sea: competing claims and conflict solutions', in Schonfield, C., Lee, S., Kwon, M-S. (eds.), *The limits of maritime jurisdiction*, Leiden (2014),
- YOUNG, M.A. 'Fragmentation, regime interaction and sovereignty', in Chinkin, C, Baetens, F. (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Cambridge (2015).
- ZAHAR, A., SLUITER, G., 'Genocide Law: an education in sentimentalism', in Zahar, A., Sluiter, G., *International Criminal Law: a critical introduction*, Oxford (2008) (2011)

4. **Articles**

- ABI SAAB, G., 'The Uses of Article 19', *European Journal of International Law* 10 (2) (1999);
- ABI-SAAB, G., The Proper Role of Universal Jurisdiction, *Journal of International Criminal Justice*, 1(3)(2003)
- ACHESON, J.M., Anthropology of Fishing, *Annual Review of Anthropology* 10(1981),
- ADEMUNI-ODEKE, You Are Free to Commit Piracy and Armed Robbery against Ships but Please Do Not Do It in This Place: Geographical Scope of Piracy and Armed Robbery against Ships under UNCLOS and Related International Instruments, *Journal of Maritime Law and Commerce*, 50(4)(2019)
- AKEHURST, M., Jurisdiction in International Law, *British Year Book of International Law* 46(1972-1973),
- ALDERTON, T., WINCHESTER, N., Flag states and safety: 1997-1999, (2002), *Maritime Policy & Management*, 29(2)(2002),
- ALEXANDER, J.P., The philosophy of punishment, *Journal of the American Institute of Criminal Law and Criminology*, 13(2)(1922),
- ALEXANDER, L. M., Geography and the Law of the Sea, *Annals of the Association of American Geographers* 58(1)(1968),
- ALLAIN, J., Slavery and Its Obligations Erga Omnes, *Australian Yearbook of International Law* 36(2018)
- AMBOS, K. The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles. *Criminal Law, Philosophy* 9(2015),
- AMBOS, K., 'The Crime of Aggression after Kampala', *German Yearbook of International Law* 53(2010)
- ANAND, R. R., Non-European Sources of Law of the Sea, *Ocean Yearbook* 17(2003)
- ANDERSON, H., The nationality of ships and flags of convenience: economics, politics, and alternatives. *Tulane Maritime Law Journal*, 21(1)(1996)
- APT, B.L., Do we know how to punish?, *New Criminal Law Review: An International and Interdisciplinary Journal* 19(3)(2016)
- AQUILA, E., Courts have gone overboard in applying the maritime drug law enforcement act, *Fordham Law Review* 86(6)(2018);
- ARAJARVI, N., 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?', *Tilburg Law Review* 16 (2011)
- ATAK, I., SIMEON, J.C., Human Trafficking. *Journal of International Criminal Justice*, 12(5)(2014)
- AUBURN, F.M., The International Seabed Area, *The International and Comparative Law Quarterly* 20(2)(1971),
- AUSTIN, K., Illicit arms brokers: aiding and abetting atrocities, *Brown Journal of World Affairs*, 9(1)(2002)

- AZNAR, M.J., The Contiguous Zone as an Archaeological Maritime Zone, *The International Journal of Marine and Coastal Law* 29 (2014),
- BAKER & MCKENZIE LLP, "Under International Law, what Conventions or customary international law best address modern acts of piracy?", *War Crimes Memoranda* 41(2011).
- BANZAI, H., The Proliferation Security Initiative and International Law of the Sea: A Japanese Lawyer's Perspective, *Journal of East Asia and International Law* 3(1)(2010)
- BARDIN, A., 'Coastal State's Jurisdiction over Foreign Vessels', *Pace International Law Review*, 14(1) (2002)
- BARNES, R., 'Consolidating Governance Principles for Areas beyond National Jurisdiction', *The International Journal of Marine and Coastal Law* 27 (2012)
- BARTLETT, M., Game of Drones: Unmanned Maritime Vehicles and the Law of the Sea, *Auckland University Law Review* 24 (2018);
- BARTON, G.G., Foreign Armed Forces: Qualified Jurisdictional Immunity, *British Year Book of International Law* 31(1954)
- BASSIOUNI, M., International crimes: jus cogens and obligatio erga omnes, *Law and Contemporary Problems* 59(4),
- BASSIOUNI, M., Universal jurisdiction for international crimes: historical perspectives and contemporary practice, *Virginia Journal of International Law* 42(1)(2001),
- BASSIOUNI, M.C., Enslavement as an International Crime, *International Law And Politics* 23 (1991),
- BAXTER, R. R., The Territorial Sea. *American Society of International Law Proceedings* 50(Fifth Session)(1956),
- BEAVERS, E., War crimes, inc.: The ATS case against the U.S. weapons industry for aiding and abetting atrocities in Yemen. *Florida Journal of International Law*, 31(2)(2020),
- BECHKY, P., Lemkin's Situation: Toward a Rhetorical Understanding of "Genocide", *Brooklyn Law Review* 77(2)(2012)
- BEDAU, H., Genocide in Vietnam, *Boston University Law Review* 53(3)(1973)
- BENEDICT, R. D., The Historical Position of the Rhodian Law, *The Yale Law Journal*, *18*(4) (1909)
- BENEDICT, R. D., The Historical Position of the Rhodian Law, *The Yale Law Journal*, *18*(4) (1909)
- BENHAM, A., FAUST, P., Twilight of Flag State Control, *Ocean Yearbook* 17(2003)
- BENNETT, A., 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act', 37 *Yale J. Int'l L.* (2012)
- BERAT, L., Defending the Right to Healthy Environment: Toward Crime of Geocide in International Law, *Boston University International Law Journal*, 11(2)(1993)
- BERMAN, M.N., Punishment and Justification, *Ethics* 118(2)(2008),
- BERTOLOTTI, C., 'Libya: the businesses of human trafficking and the smuggling of oil, drug and weapons. A structural threat to Europe', *Osservatorio Strategico* (19)(5)(2017)
- BESCHLE, D.L., Why do people support capital punishment?: the death penalty as community ritual. *Connecticut Law Review* 33(3)(2001),

- BEVILACQUA, G., Law of the Sea: Illicit Drug Trafficking on the High Seas: A Matter of Jurisdiction and Cooperation between Flag and Coastal States, *The Italian Yearbook of International Law Online* 29(1)(2020),
- BEYER, J. ET AL., Environmental effects of the Deepwater Horizon oil spill: A review, *Marine Pollution Bulletin* 110 (2016),
- BISHOP, W., The 1958 Geneva convention on fishing and conservation of the, living resources of the high seas, *Columbia Law Review*, 62(7)(1962)
- BLANCHETTE-SEGUIN, V., Preserving territorial status quo: Grotian law of nature, baselines and rising sea level, *New York University Journal of International Law and Politics*, 50 (2017),
- BOISTER, N., 'Transnational Criminal Law?', *EJIL* 14(5) (2003)
- BONAFE, B. I., Coordinating concurrent legal orders in the prosecution of international crimes. *Global Constitutionalism*, 2(2)(2013);
- BOYLE, A., Further development of the law of the sea convention: mechanisms for change, *International and Comparative Law Quarterly* 54(3)(2005),
- BRAGA DA SILVA, R., 'Synergies between Core and Transnational Crimes: An Analysis from the Perspective of the Rome Statute'. *Melbourne Journal of International Law* 21(1)(2020)
- BRAMMERTZ, S., Reflections on Genocide, *Studies in Transnational Legal Policy*, 40(1)(2009)
- BROLAN, C., An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from Refugee Protection Perspective, *International Journal of Refugee Law* 14(4)(2002)
- BRONSTHER, J., The corrective justice theory of punishment, *Virginia Law Review* 107(2)(2021),
- BROWNLEE, K., Retributive, Restorative and Ritualistic Justice, *Oxford Journal of Legal Studies* 30(2)(2010),
- BUCHAN, R., The International Law Of Naval Blockade And Israel's Interception Of The Mavi Marmara, *Netherlands International Law Review* 18 (2011)
- BUEGER, C., EDMUNDS, T., Beyond seablindness: a new agenda for maritime security studies, *International Affairs* 93(6)(2017),
- BUFALINI, A., 'The principle of legality and the role of customary international law in the interpretation of the ICC statute', 14(2) *Law & Prac. Int'l Cts. & Tribunals* 233 (2015)
- BURCHARD, C. Torture in the Jurisprudence of the Ad Hoc Tribunals, *Journal of International Criminal Justice*, 6(2)(2008)
- CABRAL, R.B., ET AL. Rapid and lasting gains from solving illegal fishing. *Nature Ecology & Evolution* 2(2018)
- CARNERO ROJO, E., Crónica de una muerte anunciada: la jurisdicción de los tribunales españoles sobre crímenes internacionales antes y después de la Ley Orgánica 1/2014 relativa a la justicia universal, *Anuario Iberoamericano de Derecho Internacional Penal* 3(2015),

- CARPENTER, W.M., Terrorism and Piracy: Converging Maritime Threats in East and South Asia, *American Journal of Chinese Studies* 11(2)(2004)
- CARRABINE, E., Just Images: Aesthetics, Ethics and Visual Criminology, *The British Journal of Criminology*, 52(3)(2012),
- CASSESE, A., 'On Some Problematical Aspects ofthe Crime of Aggression', *Leiden Journal of International Law*, 20 (2007),
- CASSESE, A., 'The Nexus Requirement for War Crimes', *Journal of International Criminal Justice* 10(5)(2012)
- CASSESE, A., 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', *European Journal of International Law* 13(4)(2002)
- CASSESE, A., Reflections on International Criminal Justice, *The Modern Law Review* 61(1)(1998),
- CHANG, Y.-C., Clarifying Maritime Criminal Cases Jurisdiction and its International Implications—Current Legal Developments in China, *Crime, Law and Social Change* 77(2022),
- CHERKASSKY, L., Genocide: Punishing a Moral Wrong, *International Criminal Law Review* 9(2009),
- CHINCHILLA, A., Out of reach: the mdlea's impermissible extraterritorial reach on maritime drug-traffickers, *University of Miami Inter-American Law Review* 53(1)(2021).
- CHRISTENSEN, M. J., Crafting and promoting international crimes: controversy among professionals of core-crimes and anti-corruption. *Leiden Journal of International Law* 30(2)(2017)
- CHUANG, J. A., Exploitation creep and the unmaking of human trafficking law. *American Journal of International Law*, 108(4)(2014),
- CHURCHILL, R., Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-territoriality?, *The International Journal of Marine and Coastal Law* 31(2016);
- CHURCHILL, R., The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?, *The International Journal of Marine and Coastal Law*, 22(3)(2007),
- CLARKE, C. P., Drugs & Thugs: Funding Terrorism through Narcotics Trafficking, *Journal of Strategic Security*, *9*(3)(2016),
- CLIBERTO, G., Libya's pull-backs of boat migrants: can Italy be held accountable for violations of international law, *Italian Law Journal* 4(2)(2018),
- COCCO, G., Dal pirata *hostis humani generis* alla pirateria contemporanea. Verso un diritto penale universale?, *Rivista italiana di diritto e procedura penale* (2012)
- COCO, A., The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9, and 11 by the International Law Commission, *Journal of International Criminal Justice* 16(4)(2018)

- COGLIATI-BANTZ, V.P., 'Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law', *Nordic Journal of International Law* 79 (2010)
- COLOMBOS, C.J.,' Territorial waters', *Transactions of the Grotius Society* 9(1923)
- COPPEN, T., The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty, *Goettingen Journal of International* Law 7(2)(2016),
- COREY, A., JOIREMAN, S. F., Retributive Justice: The Gacaca Courts in Rwanda, *African Affairs*, *103*(410)(2014),
- CORLISS, C., Human Trafficking as "Modern Slavery": The Trouble with Trafficking as Enslavement in International Law, *South Carolina Law Review*, 71(3)(2020
- CRAWFORD, J. R., Responsibility to the international community as whole, *Indiana Journal of Global Legal Studies* 8(2)(2001),
- CRAWFORD, J., International Law and Foreign Sovereigns: Distinguishing Immune Transactions, *British Yearbook of International Law* 54 (1)(1983),
- CROOK, M., SHORT, D., Marx, Lemkin and the genocide–ecocide nexus, *The International Journal of Human Rights*, 18(3)(2014)
- CURTIS, D.E., RESNIK, D.E., Images of Justice, *The Yale Law Journal* 96(8)(1987),
- DADRIAN, V.N., The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice, *The Yale Journal Of International Law* 23(1998)
- DAMAŠKA, M., What Is the Point of International Criminal Justice?, *Chicago-Kent Law Review* 83(1)(2007)
- D'ASPREMONT, J., Towards an International Law of Brigandage: Interpretive Engineering for the Regulation of Natural Resources Exploitation, *Asian Journal of International Law* 3(1)(2013)
- DE CONING, E., STOLSVIK, G., Combating Organised at Sea: What Role for the United Nations Office on Drugs and Crime. *International Journal of Marine and Coastal Law*, 28(1)(2013),
- DE VABRES, D., The system of universal jurisdiction: historical origins and contemporary forms, *Journal of International Criminal Justice*, 9(4)(2011),
- DEAN, A.H., The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, *The American Journal of International Law* 54(4)(1960),
- DEGAN, V.D., 'Internal waters', in *Netherlands Yearbook of International Law* 17(1986),
- DEGUZMAN, M. M., How serious are international crimes the gravity problem in international criminal law. *Columbia Journal of Transnational Law*, 51(1)(2012),
- DEGUZMAN, M. M., Legitimate Supra-National Adjudication in the New Era: The Requirement of Comparative Benefit, *Case Western Reserve Journal of International Law* 55(2023)
- DEGUZMAN, M., Defining Crimes Against Humanity: Practicality and Value Balancing, *African Journal of International Criminal Justice* 6(1)(2020)
- DEGUZMAN, M., The Road from Rome: The Developing Law of Crimes against Humanity, *Human Rights Quarterly* 22 (2000),

- DeGuzman, M.M., Gravity and the Legitimacy of the International Criminal Court, *Fordham International Law Journal*, 32(5)(2009)
- Demeyere, B. et al., The updated icrc commentary on the second geneva convention: demystifying the law of armed conflict at sea, *International Review of the Red Cross* 98(2)(2016),
- Demeyere, B., Henckaerts, J-M., Hiemstra, H., Nohle, E., The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea, *International Law Studies* 94(2018).
- Derluyn, I., et al., Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers, *BMC International Health and Human Rights* 28 (2015)
- Descendre, R., Quand la mer est territoire : Paolo Sarpi et le 'Dominio del mare Adriatico', *Studi Veneziani* (2008)
- Dickinson, A. Status of Forces under the UN Convention on State Immunity, *International & Comparative Law Quarterly, 55*(2)(2006),
- Dimock, S., The Malum prohibitum - Malum in se Distinction and the Wrongfulness Constraint on Criminalization. *Dialogue-Canadian Philosophical Review*, *55*(1)(2016),
- Dinstein, Y., 'International criminal law', *Israel Law Review* 20(2-3)(1985)
- Donnedieu de Vabres, H. H., Essai d'un Systeme Rationnel de Distribution des Competences en Droit Penal International. *Revue de Droit International Prive*, 19(1924),
- Dromgoole, S., 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *The International Journal Of Marine And Coastal Law* 18(1)(2003)
- Drumbl, M., The Visualities and Aesthetics of Prosecuting Aged Defendants, *International Criminal Law Review* 22(2022),
- Dubber, M., Theories of crime and punishment in German criminal law, *American Journal of Comparative Law*, 53(3)(2005)
- Dubner, B., Vargas, L. M., 'On the Law of Pirate Fishing and Its Connection to Human Rights Violations and to Environmental Degradation A Multi-National Disaster', *Journal of Maritime Law and Commerce*, 48(2)(2017)
- Dubner, B., Arias, M. Under international law, must ship on the high seas fly the flag of state in order to avoid being stateless vessel: is flag painted on either side of the ship sufficient to identify it, *University of San Francisco Maritime Law Journal* 29(2)(2016),
- Dugard, J., 'Convention On The Suppression And Punishment Of The Crime Of Apartheid, introductory note', *United Nations Audiovisual Library of International Law* (2008)
- Dupré, C., 'Human Dignity in Europe: A Foundational Constitutional Principle', *European Public Law* 19(2)(2013)
- Eidinow, E., The Ancient Greek Pharmakos Rituals. A Study in Mistrust, *Numen* 69 (2022),
- El Zeidy, M. M., The Gravity Threshold Under The Statute Of The International Criminal Court, *Criminal Law Forum* (19)(2008),

- ELFERINK, A. O., The arctic sunrise incident: multi-faceted law of the sea case with human rights dimension, *International Journal of Marine and Coastal Law* 29(2)(2014),
- ESCAMILLA-CASTILLO, M., The purposes of legal punishment, *Ratio Juris*, 23(4)(2010)
- FABRIS, D., 'Crimes Committed at Sea and Criminal Jurisdiction: Current Issues of International Law of the Sea Awaiting the 'Enrica Lexie' Decision', *Amsterdam Law Forum*, 5 (2017)
- FALK, R. A., Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals. *Bulletin of Peace Proposals*, 4(1)(1973)
- FARNELLI, G.M., A Controversial Dialogue between International and Domestic Courts on Functional Immunity, *The Law and Practice of International Courts and Tribunals* 14 (2015)
- FELL, L.C., Maritime Contiguous Zones, *Michigan Law Review* 62(5)(1964),
- FERENCZ, D. M., 'The Crime of Aggression: Some Personal Reflections on Kampala', *Leiden Journal of International Law*, 23(4)(2010),
- FERNANDEZ, R., ESTAPA, J., Towards single and comprehensive notion of civilian population in crimes against humanity, *International Criminal Law Review* 17(1)(2017),
- FINK, M., Naval Blockade and the Russia–Ukraine Conflict, *Netherlands International Law Review* 69(2022),
- FISH, M.J., An Eye for an Eye: Proportionality as a Moral Principle of Punishment, *Oxford Journal of Legal Studies* 28(1)(2008)
- FITZMAURICE, G., Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics, *The International and Comparative Law Quarterly* 8(1)(1959)
- FLECK, D., Are foreign military personnel exempt from international criminal jurisdiction under status of forces agreements, *Journal of International Criminal Justice* 1(3)(2003)
- FLETCHER-TOMENIUS, P., FORREST, C., The protection of the underwater cultural heritage and the challenge of UNCLOS, *Art Antiquity and Law*, 5(2)(2000),
- FLEURY GRAFF, T., Territoire et droit international, *Civitas Europa* 35(2015),
- FOCARELLI, C., 'Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects', *Nordic Journal of International Law* 77(4) (2008)
- FOLEY, R., LAHR, M.M., The role of "the aquatic" in human evolution: Constraining the aquatic ape hypothesis, *Evolutive Anthropology* 23(2014)
- FORREST, C., The protection of the underwater cultural heritage and the challenge of UNCLOS, *Art Antiquity and Law*, 5(2)(2000),
- FOUCHE, H., MEYER, J., Investigating sea piracy: crime scene challenges, *WMU Journal of Maritime Affairs* 11(2012)
- FRASE, R.S., Punishment Purposes, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform *Stanford Law Review* 58(1)(2005),
- FRASER, H.S., The Research In International Law—Third Phase, *American Bar Association Journal* 21(11)(1935),

- FROMMER, A. M., The British hovering acts: contribution to the study of the contiguous zone, *Revue Belge de Droit International Belgian Review of International Law*, 16(2)(1981)
- FUKUTI, Y., The Arms Trade Treaty: Pursuit for the Effective Control of Arms Transfer, *Journal of Conflict and Security Law*, 20(2)(2015)
- GAETA, P., When is the Involvement of State Officials Requirement for the Crime of Torture, *Journal of International Criminal Justice*, 6(2)(2008)
- GAHLEN, S.F., Less than meets the eye: the right of innocent passage and coastal state sovereignty in territorial waters, *Annuaire de Droit maritime et océanique* 33(2015),
- GARCÍA RUIZ, A., SOUTH, N., BRISMAN, A., Eco-Crimes and Ecocide at Sea: Toward a New Blue Criminology, *International Journal of Offender Therapy and Comparative Criminology* 66(4)(2022)
- GARROD, M., The emergence of universal jurisdiction in response to somali piracy: an empirically informed critique of international law's paradigmatic universal jurisdiction crime. *Chinese Journal of International Law*, 18(3)(2019)
- GERRITS, A. W., Disinformation in International Relations: How Important Is It?, *Security and Human Rights 29*(1-4)(2018),
- GIBBONS, P., Proving the Point: North Korea and the Ratification of the Proliferation Security Initiative, *Loyola Maritime Law Journal* 7 (2009),
- GILLETT, M., 'The Anatomy of an International Crime: Aggression at the International Criminal Court', *International Criminal Law Review* 13 (2013)
- GILMORE, W. C., 'Drug trafficking by sea: The 1988 United Nations convention against illicit traffic in narcotic drugs and psychotropic substances', *Marine Policy* 15(3) (1991)
- GILMORE, W., WARBRICK, C., MCGOLDRICK, D., 'I. Drug Trafficking at Sea: the Case of R. v. Charrington and Others', *International and Comparative Law Quarterly* 49 (2000)
- GIOVANNINI, A., La lex de piratis persequendis, *Museum Helveticum* 35(1)(1978),
- GIUFFRÉ, M., A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights, *Questions of International Law* (2022)
- GLASER, S.M., ROBERTS, P.M., HURLBURT, K.J., Foreign Illegal, Unreported, and Unregulated Fishing in Somali Waters Perpetuates Conflict, *Frontiers in Marine Science* 6(704)(2019)
- GOODMAN, N., 'Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone', *The International Journal of Marine and Coastal Law* 33 (2018)
- GORDON, E., Grotius And The Freedom Of The Seas In The Seventeenth Century, *Willamette Journal of International Law and Dispute Resolution* 16(2)(2008),
- GORDON, L.J., Does Public Health Still Include Environmental Health and Protection?, *Journal of Public Health Policy* 13(4)(1992),
- GRAF VITZTHUM VON ECKSTÄDT, N. W., From the Rhodian Sea Law to UNCLOS III, *Ocean Yearbook Online*, *17*(1)(2003)
- GRANCHER, R., SERRUYS, M-W., CHANGES on the Coast. Towards a Terraqueous Environmental History, *Journal for the History of Environment and Society* 6(2021),

- GRAY, A., The Christian view of the use of punishment, *Howard Journal*, 2(4)(1929),
- GRAY, M., The International Crime of Ecocide, *California Western International Law Journal*, 26(2)(1996);
- GREEN, J., The Oil Platforms Case: An Error In Judgment?, *Journal of Conflict & Security Law* 9(3)(2004)
- GRZEBYK, P., Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law, *Polish Yearbook of International law* 41(2021)
- GUILFOYLE, D., The Mavi Marmara Incident And Blockade In Armed Conflict, *The British Yearbook of International Law* 81(1)(2011)
- GUILFOYLE, D., The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?. *Melbourne University Law Review*, 29(3)(2005),
- GUIZZARDI RIGHETTI, G., 'Finding Hope for International Corporate Liability in a Post-Kiobel and Jesner World: from the Malabo Protocol to the ICSID Jurisprudence', *Journal of International Law of Peace and Armed Conflict / Humanitäres Völkerrecht* 3 (1-2)(2020);
- GUTTERIDGE, J.A.C., The Regime of the Continental Shelf, *Transactions of the Grotius Society, 1958, Vol. 44, Problems of Public and Private International Law, Transactions for the Year 1958-59* (1958),
- HAINES, S., War at sea: Nineteenth-century laws for twenty-first century wars?, *International Review of the Red Cross*, 98 (2)(2016)
- HALBERSTAM, M., Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law* 82(2)(1988)
- HALLING, M., Push the Envelope –Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity, *Leiden Journal of International Law*, 23 (2010)
- HAMPTON, J., The Moral Education Theory of Punishment, *Philosophy & Public Affairs* 13(3)(1984),
- HANDERSON, S., The Arms Trade Treaty: Responsibility to Protect in Action?, *Global Responsibility To Protect* 9 (2017)
- HANNA, M.J., Controlling "Pirate" Broadcasting, Comments, *San Diego Law Review* 15(1978)
- HARRINGTON, C.A., Heightened Security: The Need to Incorporate Article 3BIS(1)(A) and 8BIS(5)(E) of the 2005 Draft Sua Protocol into Part VII of the United Nations Convention on the Law of the Sea, *Pacific Rim Law and Policy Journal* 16(1)(2007)
- HARRIS, W. R., KING, H. T., FERENCZ, B. B., 'Nuremberg and Genocide: Historical Perspectives', *Studies in Transnational Legal Policy* 40 (1) (2009).
- HART, H.L.A., The Presidential Address: Prolegomenon to the Principles of Punishment, *Proceedings of the Aristotelian Society, 1959 - 1960, New Series* 60 (1959-60),
- Harvard Draft Convention on Jurisdiction with Respect to Crime, *The American Journal of International Law* 29(1935),

- HAYASHI, M., Jurisdiction over Foreign Commercial Ships in Ports: Gap in the Law of the Sea Codification, *Ocean Yearbook* (2004),
- HEARN, W. A., Special Aspects of Jurisdiction at Sea, *International Law Studies Series. US Naval War College* 61 (1980)
- HEINSCH, R. 'The Crime of Aggression after Kampala: Success or Burden for the Future', *Goettingen Journal of International Law* 2 (2) (2010),
- HEINTSCHEL VON HEINEGG, W., The United Nations Convention on the Law of the Sea and Maritime Security Operations, *German Yearbook of International Law*, 48(2005)
- HELLER, K.G., What Is an International Crime? (A Revisionist History), *Harvard International Law Journal* 58(2)(2017)
- HERITIER, P., From text to image: the sacred foundation of western institutional order: legal-semiotic perspectives, *International Journal for the Semiotics of Law*, 26(1)(2013),
- HERMANN, D. H., The evil christ crucified: the ritual function of punishment, *Wayne Law Review* 19(5)(1973)
- HERNÁNDEZ, J., Drug Trafficking, and the Globalization of Supply, *Perspectives on Terrorism* 7(4)(2013),
- HESSELMANN, F., Punishing crimes of the mind: Sanctions for scientific misconduct as a case for the cultural theory of punishment, *Theoretical Criminology*, *23*(4)(2019),
- HIÉRAMENTE, M., The Myth of 'International Crimes': Dialectics and International Criminal Law, *Goettingen Journal of International Law* 3(2)(2011)
- HODGES, D. G., High Seas and High Risks: Proliferation in Post-9/11 World, *Ocean and Coastal Law Journal*, 19(2)(2014)
- HODGKINSON, S.L., 'International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates', *Case W. Res. J. Int'l L.* 44 (2011);
- HONG, N., NG, A.K.Y., The international legal instruments in addressing piracy and maritime terrorism: A critical review, *Research in Transportation Economics* 27(2010)
- HONNIBALL, A. N., 'The Exclusive Jurisdiction of Flag States: a Limitation on Pro-active Port States?', *International Journal of Marine and Coastal Law* 31 (2016);
- HÖRNLE, T., A Framework Theory of Punishment, *MPI-CSL Working Paper* 1 (2021)
- HORWITZ, S., The Tokyo Trial, *International Conciliation* 28(1950)
- HOUGH, P., Defending Nature: The Evolution of the International Legal Restriction of Military Ecocide, *THE GLOBAL COMMUNITY Yearbook of International Law & Jurisprudence* 1(2014)
- HOWARD, J.W., Punishment As Moral Fortification, *Law and Philosophy* 36(1)(2017)
- ILA, The Exclusive Economic Zone, *International Law Association Reports of Conferences* 60 (1982),
- JALLOH, C.C., The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?, *Case Western Reserve Journal of International Law* 52 (2020)
- JESSUP, P.C., The United Nations Conference on the Law of the Sea, *Columbia Law Review* 59(2) (1959)

- JEUTNER, V., 'Rebutting Four Arguments in Favour of Resolving ius cogens Norm Conflicts by Means of Proportionality Tests', *Nordic Journal of International Law* 89(3-4) (2020)
- JODOIN, S., Terrorism as a War Crime, *International Criminal Law Review* 7(2007)
- JOHNSON, D. D., The preparation of the 1958 Geneva conference on the law of the sea, *International and Comparative Law Quarterly* 8(1)(1959),
- JOHNSON, D.N.H., Law of the Sea, *The International and Comparative Law Quarterly* 10(3)(1961)
- JONES, H., A Roman law concerning piracy. *The Journal of Roman Studies, 16*(2)(1926),
- JØRGENSEN, N.H.B., Children associated with terrorist groups in the context of the legal framework for child soldiers, *QIL, Zoom-in* 60(2019),
- JOYNER, C.C., The 1988 IMO Convention on the Safety of Maritime Navigation: Towards Legal Remedy for Terrorism at Sea, *German Yearbook of International Law*, 31(1988)
- JOYNER, D.H., The Proliferation Security Initiative Security Initiative: Nonproliferation, Counterproliferation, and International Law, *The Yale Journal Of International Law* 30(2005),
- KALDIS, B., Law, aesthetic symbolism and utopia: kantian reading. *International Journal for the Semiotics of Law* 16(3)(2003),
- KALPOUZOS I., International Criminal Law and the Violence against Migrants. *German Law Journal 21* (2020)
- KALPOUZOS, I., MANN, I., Banal Crimes against Humanity: The Case of Asylum Seekers in Greece. *Melbourne Journal of International Law* 16(1)(2015)
- KANEHARA, A., Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas, *Japanese Yearbook of International Law* 51(2008),
- KAVANAGH, J., The Law of Contemporary Sea Piracy, *Australian International Law Journal* (1999)
- KAYE, S., The Proliferation Security Initiative in the Maritime Domain, *Israel Yearbook on Human Rights*, 35(2005),
- KEYOUAN, Z., JING, J., The Question of Pirate Trials in States Without a Crime of Piracy, *Chinese Journal of International Law* 19(2020),
- KHAN, A., Afghanistan And The Drug Trade, *Strategic Studies*, *25*(3)(2005)
- KILLEAN, R., DOWDS, E., KRAMER, A., Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes against Humanity, *Leiden Journal of International Law*, 30(3)(2017)
- KIM, S., 'Maritime Terrorism and the SUA Convention Regime', in *Global Maritime Safety & Security Issues and East Asia,* Leiden (2019)
- KIRSCH, S., Two Kinds of Wrong: On the Context Element of Crimes against Humanity, *Leiden Journal of International* Law, 22 (2009),
- KLEIN, N., Maritime autonomous vehicles and international laws on boat migration: Lessons from the use of drones in the Mediterranean, *Marine Policy* 127(2021);

- KLEIN, N., Responding to Law of the Sea Violations. *Australian International Law Journal*, 27(2020)
- KLEIN, N., 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* 35(2)(2007)
- KLUWEN, T., Universal Jurisdiction in Absentia Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity?, *Goettingen Journal of International Law* 8 (2017)
- KOH, T.T.B., The Territorial Sea, Contiguous Zone, Straits And Archipelagoes Under The 1982 Convention On The Law Of The Sea, *Malaya Law Review* 29(2)(1987)
- KOJIMA, C., 'Modern Slavery and the Law of the Sea: Proposal for a Functional Approach', *Korean Journal of International and Comparative Law* 9 (2021),
- KONTOROVICH, E., "A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists, *Faculty Working Papers* 37(2010)
- KONTOROVICH, E., Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes, *Minnesota Law Review* 544(2009).
- KOSKENNIEMI, M., Between Impunity and Show Trials, *Max Planck Yearbook of United Nations Law* 6 (2002),
- KRAMEK, J. E., Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?, *The University of Miami Inter-American Law Review* 31(1)(2000),
- KRAMER, A., The First Wave of International War Crimes Trials: Istanbul and Leipzig, *European Review*, *14*(4)(2006),
- KRANZBÜHLER, O. 'Nuremberg eighteen years afterwards', *DePaul Law Review* 14(2) (1965)
- KREß, C., 'The Law of Naval Warfare and International Criminal Law: Germany's Federal Prosecutor on The Gaza Flotilla Incident', *Israel Yearbook On Human Rights 49*, Leiden (2019),
- KREß, C., The Crime of Genocide under International Law, *International Criminal Law Review* 6(4)(2006)
- KREß, C., Universal Jurisdiction over International Crimes and the Institut de droit international, *Journal of International Criminal Justice* 4(3)(2006);
- KREB, C., The International Court of Justice and the Elements of the Crime of Genocide, *The European Journal of International Law* 18(4)(2007)
- KUBIAK, K., Terrorism at Sea: New Threat to International Security, *Polish Quarterly of International Affairs*, 11(3)(2002)
- KUSCHNIK, B., Humaneness, Humankind and Crimes against Humanity. *Goettingen Journal of International Law*, 2(2) (2010)
- KWIATKOWSKA, B., Creeping jurisdiction beyond 200 miles in the light of the 1982 law of the sea convention and state practice. *Ocean Development and International Law* 22(2)(1991),

- LACEY, N., PICKARD, H., To blame or to forgive: reconciling punishment and forgiveness in criminal justice, *Oxford Journal of Legal Studies* 35(4)(2015),
- LALLEMANT-MOE, H.R., Le régime juridique des îles flottantes, entre fantasme et réalité en Polynésie française, *Énergie-environnement-infrastructures* 7(2017)
- LAMBERT, C., Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?, *Leiden Journal of International Law* 30(2017);
- LAMBERT, D., MARTINS, L., OGBORN, M., Currents, visions and voyages: historical geographies of the sea, *Journal of Historical Geography* 32 (2006),
- LANDO, M., Judicial uncertainties concerning territorial sea delimitation under article 15 of The United Nations Convention On The Law Of The Sea, *International and Comparative Law Quarterly*, 66(3)(2017),
- LANDO, M., State Jurisdiction and Immunity of Warships in the ARA Libertad Case, *Japanese Yearbook of International Law* 58 (2015),
- LANGER, M., EASON, M., The quiet expansion of universal jurisdiction, *European Journal of International Law*, 30(3)(2019),
- LANGER, M., Universal jurisdiction is not disappearing. *Journal of International Criminal Justice*, 13(2)(2015);
- LARIAN, A. M. An Old Problem Reborn: So What Is Piracy after All, *University of San Francisco Maritime Law Journal*, 26(1)(2013)
- LAURITSEN, J.L., Advances and Challenges in Empirical Studies of Victimization, *Journal of Quantitative Criminology* 26(4)(2010),
- LAURSEN, A., The Judgment by the International Court of Justice in the Oil Platforms Case, *Nordic Journal of International Law* 73(1)(2004),
- LAVORGNA, A., ET AL., CITES, wild plants, and opportunities for crime, *European Journal on Criminal Policy and Research* 24 (2018)
- LEE, A.Y.K., Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends, *Oxford Journal of Legal Studies* 37(1)(2017),
- LENZERINI, F., Suppressing Slavery Under Customary International Law, *The Italian Yearbook of International Law Online,* 10(1)(2000)
- LEWIS, A., 'Conflating conscience and legality in international law: Implications for the future', *Adel. L. Rev.* 40(2) (2019)
- LEWIS, A., Flag verification on the high seas: understanding requirements for masters and commanders, *International Journal of Marine and Coastal Law*, 30(2)(2015)
- LI, K.X., WONHAM, J., Registration of Vessels, *The International Journal of Marine and Coastal Law*, 14(1)(1999),
- LI, K.X., WONHAM, J., Who is safe and who is at risk: a study of 20-year-record on accident total loss in different flags, *Maritime Policy & Management*, 26(2)(1999)
- LIDDICK, D., The dimensions of a transnational crime problem: the case of IUU fishing, *Trends in Organized Crime* 17(2014)
- LIM, C., MITCHELL, R., Neutral Rights And Collective Countermeasures For Erga Omnes Violations, *International & Comparative Law Quarterly, 72*(2)(2023);

- LINDERFALK, U., 'International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes', *Nordic Journal of International Law* 80(1) (2011);
- LINDERFALK, U., 'The legal consequences of jus cogens and the individuation of norms', *Leiden Journal of International Law*, vol. 33 (2020);
- LINDERFALK, U., 'The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law', *Nordic Journal of International Law* 82(3) (2013)
- LINDERFALK, U., 'What Is So Special About Jus Cogens? – On the Difference between the Ordinary and the Peremptory International Law', *International Community Law Review*, 14(1) (2012)
- LISS, R., Crimes against the sovereign order: rethinking international criminal justice, *American Journal of International Law*, 113(4)(2019),
- LIXINSKI, L., MCADAM, J., TUPOU, P., Ocean cultures, the Anthropocene and international law: cultural heritage and mobility law as imaginative gateways. *Melbourne Journal of International Law*, 23(1)(2022),
- LOFSTROM, M., RAPHAEL, S., Crime, the Criminal Justice System, and Socioeconomic Inequality. *The Journal of Economic Perspectives*, 30(2)(2016),
- LOGAN, S. E., The proliferation security initiative: navigating the legal challenges, *Journal of Transnational Law & Policy* 14(2)(2005),
- LONGOBARDO, M., 'Some Developments in the Prosecution of International Crimes Committed in Palestine: Any Real News', *Polish Y.B. Int'l L.* 35 (2015);
- LONGOBARDO, M., Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes, *QIL, Zoom-in* 33 (2016),
- LOTT, A., The (In)applicability of the Right of Innocent Passage in the Gulf of Finland – Russia's Return to a Mare Clausum?, available at https://munin.uit.no/bitstream/handle/10037/23853/article.pdf?sequence=4 (originally published in Estonian as LOTT, A., 'Rahumeelse läbisõidu õigus Venemaa Föderatsiooni Soome lahe vetest', *Juridica* 25(7)(2017)
- LOWE, A.V., The Development of the Concept of the Contiguous Zone, *British Yearbook of International Law*, Volume 52(1)(1981),
- LUBAN, D., A Theory of Crimes Against Humanity, *The Yale Journal Of International Law* 89(2004)
- LUSTGARTEN, L., The Arms Trade Treaty: Achievements, Failings, Future, *International and Comparative Law Quarterly* 64 (2015)
- LYNCH, M., Failed States and Ungoverned Spaces. *Annals of the American Academy of Political and Social Science*, 668(2016),
- LYTLE, E., 'Η θάλασσα κοινή: Fishermen, the Sea, and the Limits of Ancient Greek Regulatory Reach, *Classical Antiquity*, 31(1)(2012)
- MACFARLANE, D., 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*, 7(1)(2017),

- MACHADO, S., Towards an Aesthetic Epistemology of International Law, *Nordic Journal of International Law* 91 (2022)
- MACLEOD, C., Towards a Philosophical Account of Crimes Against Humanity, *The European Journal of International Law* 21(2)(2010)
- MALHOTRA, S., The International Crime That Could Have Been but Never Was: An English School Perspective on the Ecocide Law, *Amsterdam Law Forum*, 9(3)(2017), pp. 49-70;
- MALLORY, C., A second coming of extraterritorial jurisdiction at the European Court of Human Rights?, *QIL, Zoom-in* 82 (2021)
- MANCHUCK, G., 'The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to Replace an Outdated, Inconvenient Doctrine', *Tul. Mar. L.J.* 32 (2007-2008);
- MANCINI, M., A brand new definition for the crime of aggression: the Kampala outcome, *Nordic Journal of International Law*, 81(2)(2012),
- MARINIELLO, T., The 'Nuremberg Clause' and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence, *Nordic Journal of International Law* 82 (2013),
- MARTIN, J., 'A Transnational Law of the Sea', *Chicago Journal of International Law* 21(2)(6) (2021);
- MATAS, D., Prosecuting Crimes Against Humanity: The Lessons of World War I, *Fordham International Law Journal* 13(1)(3)(1989)
- MATLIN, D.F., Re-evaluating the Status of Flags of Convenience Under International Law, *Vanderbilt Journal of Transnational Law* 23(5)(1991)
- MCCALL-SMITH, K., Treaty Bodies: Choreographing the Customary Prohibition against Torture, *International Community Law Review* 21 (2019)
- MCCONNELL, M. L., Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, *Journal of Maritime Law and Commerce*, 18(3)(1987
- MCCREIGHT, M., Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on Comparative Perspective, *European Law Journal*, 12(1)(2006)
- MCDONALD, D.S., The SUA 2005 Protocol: A Critical Reflection, *The International Journal of Marine and Coastal Law* 28 (2013)
- MCDOUGAL, M. S., BURKE, W. T., Claims to authority over the territorial sea, *Philippine International Law Journal* 1(1)(1962),
- MCGREGOR, L., Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings. *Human Rights Quarterly*, 36(1) (2014
- MCLACHLAN, C. (2005). The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention, *The International and Comparative Law Quarterly*, *54*(2)(2005),
- MCLAUGHLIN, R., Article 110 of the law of the sea convention 1982 and jurisdiction over vessels without nationality, *George Washington International Law Review* 51(3)(2019),
- MCMURRAY, C. A., Wildlife Trafficking: U.S. Efforts to Tackle Global Crisis, *Natural Resources & Environment* 23(3)(2009)

- MÉGRET, F., The Anti-deterrence Hypothesis. What if International Criminal Justice Encouraged Crime?, *Journal of International Criminal Justice* 19 (2021),
- MELA, Tempo, Memoria e Diritto Penale, *Diritto Penale Contemporaneo* 4(2018).
- MELLOR, J., Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism, *American University International Law Review*, 18(2)(2002),
- MELONI, C., The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity, *QIL, Zoom-in* 33 (2016),
- MENDELSON, M.H., Fragmentation of the law of the sea, *Marine Policy* 12(3)(1988)
- METZ, T., Censure theory and intuitions about punishment, *Law and Philosophy* 19(2000),
- MILES, C., 'The MV "Norstar" Case (Panama v. Italy)', *American Journal of International Law*, 114(1) (2020);
- MIRON, A., The archipelagic status reconsidered in light of the South China Sea and Duzgit Integrity Awards, *Indonesian Journal of International Law*, 15(3)(2018),
- MOFFET, L., Elaborating justice for victims at the international criminal court. *Journal of International Criminal Justice, 13(2(2015)*
- MOLENAAR, E., Port state jurisdiction: toward comprehensive, mandatory and global coverage, *Ocean Development and International Law*, 38(1-2)(2007)
- MORENO-LAX, V., The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model.", *German Law Journal* 21(3)(2020),
- MORRIS, H., A Paternalistic Theory of Punishment, *American Philosophical Quarterly* 18(4)(1981)
- MORSE, C. G. J., Polygamists and the crime of bigamy, *The International and Comparative Law Quarterly*, *25*(1)(1976)
- MOWBRAY, A., 'European Court of Human Rights: May 2010–April 2011', *European Public Law* 17(4) (2011)
- MUJUZI, J.D., The Prosecution in Seychelles of piracy committed on the high seas and the right to a fair trial, *Criminal Law Forum* 31(2020),
- MULLER, J., 'The Hamburg Piracy Trial - A Contribution to the International Aim of Combating Piracy', *German Y.B. Int'l L.* 56 (2013);
- MURPHY, R., Gravity Issues And The International Criminal Court, *Criminal Law Forum* (2006)
- MURPHY, S.D., Crimes Against Humanity And Other Topics: The Sixty-Ninth Session Of The International Law Commission, *The American Journal Of International Law* 111(4)(2017)
- MURRAY, A. R., Does International Criminal Law Still Require Crime of Crimes: Comparative Review of Genocide and Crimes against Humanity, *Goettingen Journal of International Law* 3(2)(2011)
- MUSSI, F., 'What Possibilities for Exercising Criminal Jurisdiction over Migrant Smugglers in International Waters?". Note to: Corte di Cassazione (sez. I penale), 3 luglio 2018, n. 29832', *Italian Yearbook Of International Law* 28 (2019)

- MUTAQIN, Z. Z., Modern-day slavery at sea: human trafficking in the Thai fishing industry, *Journal of East Asia and International Law*, 11(1)(2018),
- MYKHNENKO, V., Causes and Consequences of the War in Eastern Ukraine: An Economic Geography Perspective, *Europe-Asia Studies*, 72(3)(2020)
- NEWMAN, A., Abortions on the High Seas: Can the Coastal State Invoke Its Criminal Jurisdiction to Stop Them, *Ocean Yearbook* 17(2003),
- NICHOLSON, J., 'Strengthening the effectiveness of international criminal law through the principle of legality', *Int'l Crim. L. Rev.* 17(4) (2017)
- NIJMAN, V., SHEPHERD, C.R., Trade in non-native, CITES-listed, wildlife in Asia, as exemplified by the trade in freshwater turtles and tortoises (Chelonidae) in Thailand, *Contributions to Zoology*, 76(3)(2007)
- NORRIS, A.J., The "Other" Law Of The Sea, *Naval War College Review* 64(3)(2011),
- NOWAK, M., Can Private Actors Torture?, *Journal of International Criminal Justice* 19(2)(2021),
- NUSSBAUM WICHERT, R., NUSSBAUM, M.C., Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission, *Journal of Human Development and Capabilities*, 18(3)(2017),
- OBOKATA, T., Human Rights Framework to Address Trafficking of Human Beings, *Netherlands Quarterly of Human Rights*, 24(3)(2006
- ODA, S., The 1958 Geneva Convention on the Fisheries: Its Immaturities, *Die Friedens-Warte*, 55(1959)
- ODA, S., The concept of the contiguous zone, *International and Comparative Law Quarterly*, 11(1)(1962),
- OLIVI, G., The role of national courts in prosecuting international crimes: new perspectives, *Sri Lanka Journal of International Law*, 18(1)(2006),
- ORAKHELASHVILI, A., Between Impunity And Accountability For Serious International Crimes: Legal And Policy Approaches, *Netherlands International Law Review* 55(2008);
- ORAKHELASHVILI, A., Legal Stability and Claims of Change: The International Court's Treatment of Jus ad Bellum and Jus in Bello, *Nordic Journal of International Law*, 75(3-4)(2010)
- ORREGO VICUÑA, F., National Laws on Seabed Exploitation: Problems of International Law, *Lawyer of the Americas* 13(2)(1981),
- OSOFSKY, H. M., Multidimensional governance and the BP Deepwater Horizon Oil spill. *Florida Law Review*, 63(5)(2011),
- OWENS, D., Wrong by convention. *Ethics*, *127*(3)(2017),
- OXMAN, B.H., The Regime of Warships Under the United Nations Convention on the Law of the Sea, *Virginia Journal Of International Law* 24(4)(1984)
- OZCAYR, Z., The use of port state control in maritime industry and application of the Paris MoU, *Ocean and Coastal Law Journal,* 14(2)(2009),
- PAGLIARO, A., Funzioni della pena criminale, *Cassazione Penale* 5(2016),

- PALMA-ROBLES, M. A., Tightening the Net: The Legal Link between Illegal, Unreported and Unregulated Fishing and Transnational Crime under International Law, *Ocean Yearbook Online*, *29*(1)(2015)
- PAOLI, L., GREENFIELD, V. A., Starting from the End: A Plea for Focusing on the Consequences of Crime, *European Journal of Crime, Criminal Law and Criminal Justice*, *23*(2)(2015)
- PAPANICOLOPULU, I., 'The Law of the Sea Convention: No Place for Persons', *International Journal of Marine and Coastal Law*, 27(4) (2012);
- PAPANICOLOPULU, I., Hirsi Jamaa v. Italy. *The American Journal of International Law*, 107(2)(2013)
- PAPANICOLOPULU, I., Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative, *Diritto, Immigrazione e Cittadinanza* 3(2017)
- PAPANICOLOPULU, I., The land dominates the sea (dominates the land dominates the sea), *QIL Zoom-in* 47 (2018),
- PAPASTAVRIDIS, E., 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities anf the Rule of Law on the high seas', *The journal of marine and coastal law*, 25 (2010)
- PAPASTAVRIDIS, E., EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea, *QIL, Zoom-in* 30 (2016),
- PAPASTAVRIDIS, E., Interception of human beings on the high seas: contemporary analysis under international law, *Syracuse Journal of International Law and Commerce* 36(2) (2008),
- PAPASTAVRIDIS, E., The right of visit on the high seas in theoretical perspective: mare liberum versus mare clausum revisisted. *Leiden Journal of International Law*, 24(1)(2011),
- PAULUS, A., 'Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal', *Nordic Journal of International Law* 74(3-4) (2005);
- PAYER, A., The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross-Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries, *International Criminal Law Review* 23(2023),
- PEDROZO, R., Military Activities in the Exclusive Economic Zone*: East Asia Focus. International Law Studies Series. US Naval War College*, 90(2014)
- PEDROZO, R., Military Activities in the Exclusive Economic Zone: East Asia Focus, *International Law Studies* 90 (2014),
- PELLET, A., 'Can a State Commit a Crime? Definitely, Yes!', *European Journal of International Law*, 10 (2) (1999)
- PEMBERTON, A., LETSCHERT, R.M., DE BROUWER, A., HAVEMAN, R.H., Coherence in International Criminal Justice: A Victimological Perspective. *International Criminal Law Review* 15(2)(2015)
- PERRY, T. C., Burring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea, *Ocean Development and International Law* 37(1)(2006)

- PERRY, T., The PSI as a Shared Good: How the Proliferation Security Initiative Both Challenges and Reinforces a Prevailingly *Mare Liberum* Regime, *Ocean Development & International Law* 49(4)(2018)
- PETRIG, A., STEMMLER, M., Article 16 UNESCO Convention and the protection of underwater cultural heritage, *International and Comparative Law Quarterly* 69(2)(2020),
- PETROSSIAN, G.A. ET AL., Flags for sale: An empirical assessment of flag of convenience desirability to foreign vessels, *Marine Policy* 116 (2020),
- PETROVEC, .Poverty and Reaction to Crime –Freedom without Responsibility. *European Journal of Crime, Criminal Law and Criminal Justice*, 8(4)(2000)
- PHILLIPSON, C., Cornelius van Bynkershoek, *Journal of the Society of Comparative Legislation* 9(1)(1908)
- PINTO, R., Flags of convenience, *Journal de Droit International* 87(2)(1959),
- PIOTROWICZ, R., The Legal Nature of Trafficking in Human Beings, *Intercultural Human Rights Law Review* 4 (2009
- PLACHTA, M., International Report Filed with the ICC Accuses European Union of Crimes Against Humanity in the Libya Situation, *International Enforcement Law Reporter* 35(6)(2019)
- POPALZAI, G., THOBANI, H., The Complexities of the Gravity Threshold in the International Criminal Court: A Practical Necessity or an Insidious Pitfall?, *Max Planck Yearbook of United Nations Law Online* 20(1)(2017),
- POULANTZAS, N. M., The Right of Hot Pursuit Especially under the Geneva Convention on the High Seas, *Revue Hellenique de Droit International* 14 (1961)
- POWELL, E., Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience, *Annual Survey of International & Comparative Law*, 19(2013),
- QUÉNIVET, N., Does and Should International Law Prohibit the Prosecution of Children for War Crimes?, *European Journal of International Law* 28(2)(2017),
- RAIBLE, L., Between facts and principles: jurisdiction in international human rights law, *An International Journal of Legal and Political Thought* 13(1)(2022),
- REEVES, J.S., 'The Codification of the Law of Territorial Waters', *The American Journal of International Law* 24(3)(1930),
- RESTA, E., Le parole, il diritto e il processo, *Studi Italiani di Linguistica Teorica e Applicata* XLV(2)(2016),
- REULAND, R.C.F., Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, *Vanderbilt Journal of Transnational Law* 5(5)(1989),
- RICARD, P., Pêche / Exploitation durable des ressources halieutiques, *Répertoire de Droit Internationale* (2021)
- RIJKEN, C., A human rights based approach to trafficking in human beings, *Security and Human Rights*, *20*(3)(2009)

- ROBERSON, L.A., WATSON, R.A. KLEIN, C.J., Over 90 endangered fish and invertebrates are caught in industrial fisheries. *Nature Communication* 11(4764)(2020
- ROBERTSON, H.B., 'The "New" Law of the Sea and The Law of Armed Conflict at Sea', *Newport Paper* 3(1992),
- RODLEY, N. S., 'The Prohibition of Torture: Absolute Means Absolute', *Denver Journal of International Law and Policy*, 34(1) (2006)
- RODOGNO, R., Shame, Guilt, and Punishment, *Law and Philosophy* 28(5)(2009),
- ROHT-ARRIAZA, N., State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law. *California Law Review*, 78(2)(1990),
- ROIGER-SIMEK, K., 1958 The Geneva Conventions on the Law of the Sea of 1958, *Austrian Review of International and European Law*, 23(2018)
- ROMBACH, J., Cornelius van Bynkershoek, *International Review of the Red Cross, 13*(152)(1973),
- RONZITTI, N., Is The Gulf of Taranto an Historic Bay?, *Syracuse Journal of International Law and Commerce*,11(2)(4)(1984),
- RONZITTI, N., WMD Terrorism, *Japanese Yearbook of International Law*, 52(2009)
- ROOPNARINE, P., HERTOG, R. Exploitation, secondary extinction and the altered trophic structure of Jamaican coral reefs, *Nature Precedings* (2010);
- ROSCINI, M., Gravity In The Statute Of The International Criminal Court And Cyber Conduct That Constitutes, Instigates Or Facilitates International Crimes, *Criminal Law Forum* 30 (2019)
- ROSELLO, M., Illegal, Unreported and Unregulated Fishing Control in the Exclusive Economic Zone: a Brief Appraisal of Regulatory Deficits and Accountability Strategies, *Croatian International Relations Review* 22(75)(2016)
- ROTH, B.R., Just Short of Torture. Abusive Treatment and the Limits of International Criminal Justice, *Journal of International Criminal Justice* 6 (2008)
- ROTHE, D. L., COLLINS, V., The International Criminal Court: A Pipe Dream to End Impunity?, *International Criminal Law Review*, *13*(1)(2013)
- RUBIN, A.P., The Law of Piracy, *Denver Journal of International Law & Policy* 15(2)(1987)
- RYNGAERT, C., 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law', *International Criminal Law Review* 9 (2009)
- RYNGAERT, C., RINGBOM, H., Introduction: Port state Jurisdiction: Challenges and Potential, *The International Journal of Marine and Coastal Law* 31 (2016)
- SACK, R.D., Human Territoriality: A Theory, *Annals of the Association of American Geographers*, *73*(1)(1983),
- SAINZ-PARDO, P., Is international criminal law living discipline?, *International Journal of Human Rights*, 3(4)(1999);
- SANDER, B., The Method Is The Message: Law, Narrative Authority And Historical Contestation In International Criminal Courts, *Melbourne Journal of International Law* 19 (2018),

- SANDS, P., International Law Transformed? From Pinochet to Congo…? *Leiden Journal of International Law*, 16(2003)
- SANTILLI, P. C., What did Descartes do to virtue?, *Journal of Value Inquiry*, 26(3)(1992)
- SATKAUSKAS, R., Piracy at sea and the limits of international law, *Aegean Review of the Law of the Sea* (2011),
- SCANLON, Z., Taking action against fishing vessels without nationality: have recent international developments clarified the law, *International Journal of Marine and Coastal Law* 32(1)(2017)
- SCHABAS, W., Prevention of Crimes Against Humanity, *Journal of International CriminalJustice* 16 (2018)
- SCHABAS, W., The Crime of Torture and the International Criminal Tribunals, *Case Western Reserve Journal of International Law* 37(2)(2006)
- SCHARF, M. P., 'The Grotian Moment Concept', *ILSA Quarterly*, 19(3) (2011)
- SCHARF, M., TAYLOR, M., A Contemporary Approach to the Oldest International Crime, *Utrecht Journal of International and European Law*, 33(84)(2017)
- SCHATZ, V. J., The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes, *International Community Law Review*, 22(3-4)(2020)
- SCHATZ, V.J., Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State, *Gottingen Journal of International Law* 7(2)(2016)
- SCHEFFER, D., The Complex Crime of Aggression under the Rome Statute, *Leiden Journal of International Law*, 23 (2010)
- SCHIFFMAN, H. S., Scientific research whaling in international law: objectives and objections. *ILSA Journal of International & Comparative Law*, 8(2)(2002),
- SCHMITTHOFF, C.M., WOOLDRIDGE, F., The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading, *The Denver Journal of International Law & Policy*, 2(2)(1972),
- SCHMOECKEL, M., Nemesis: a historical glimpse into the Christian reasons for punishment, *Tijdschrift voor Rechtsgeschiedenis* 81 (2013),
- SCHNEIDER, P., When Protest Goes to Sea: Theorizing Maritime Violence by Applying Social Movement Theory to Terrorism and Piracy in the Cases of Nigeria and Somalia, *Ocean Development and International Law* 51(4)(2020)
- SCHWARZENBERGER, G., 15 The Problem of an International Criminal Law, *Current Legal Problems* 3(1)(1950)
- SCHWÖBEL-PATEL, C., Spectacle in international criminal law: the fundraising image of victimhood, *London Review of International Law* 4(2)(2016
- SCOVAZZI, T., Convention on the protection of underwater cultural heritage, *Environmental Policy and Law*, 32(3-4)(2002)
- SEIBERT-FOHR, A., 'The fight against Impunity under the International Covenant on Civil and Political Rights', *Max Planck Yearbook of United Nations Law* 6 (2002)

- SHAMSEY, J., 80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide. Journal of Transnational Law & Policy 11(2)(2002)
- SHARP, W. G. S., Proliferation Security Initiative: The Legacy of Operacion Socotora, *Transnational Law & Contemporary Problems* 16(3)(2007),
- SHEARER, I. A. Problems of Jurisdiction and Law Enforcement against Delinquent Vessels, *The International and Comparative Law Quarterly*, *35*(2)(1986)
- SHELTON, D., Human rights, health and environmental protection: linkages in law and practice, *Human Rights & International Legal Discourse* 1(1)(2007),
- SILLER, N., 'Modern Slavery'. Does International Law Distinguish between Slavery, Enslavement and Trafficking?, *Journal of International Criminal Justice* 14 (2016)
- SIMMLER, M., The importance of placing blame: criminal law and the stabilization of norms, *Criminal Law Forum*, 31(2)(2020),
- SODIK, D., IUU fishing and Indonesia's legal framework for vessel registration and fishing vessel licensing, *Ocean Development and International Law*, 40(3)(2009),
- SONG, Y-H., The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment, *Ocean Development and International Law*, 38(1-2)(2007)
- SOONS, A.H.A., Law Enforcement in the Ocean – An Overview, *WMU Journal of Maritime Affairs* 3(1)(2004),
- SORENSEN, C. E., Drug trafficking on the high seas: move toward universal jurisdiction under international law, *Emory International Law Review* 4(1)(1990),
- SOYER, B., LELOUDAS, G., MILLER, D., Tackling IUU Fishing: Developing a Holistic Legal Response. *Transnational Environmental Law,* 7(1)(2018)
- SPEARIT, Legal punishment as civil ritual: making cultural sense of harsh punishment, *Mississippi Law Journal* 82(1)(2013),
- SPERDUTI, G., Dualism and Monism: Confrontation to Be Overcome. *Italian Yearbook of International Law,* 3(1977), pp. 31-49;
- STAIANO, F., 'Universal Jurisdiction Over Transnational Maritime Crimes Beyond Piracy', *Rivista di Diritto Internazionale* 3 (2019);
- STANISLAWSKI, B. H., ET AL., Para-States, Quasi-States, and Black Spots: Perhaps Not States, but Not 'Ungoverned Territories,' Either, *International Studies Review 10(2)(2008)*,
- STARKE, J.J., Monism and Dualism in the Theory of International Law. *British Year Book of International Law,* 17(1936), pp. 66-81;
- STEDJAN, S., Introductory Note To The Arms Trade Treaty, *International Law Materials* 52(2013),
- STEPHEN, L., 'Round Mont Blanc. By Leslie Stephen. A Paper read before the Alpine Club, December 12, 1871', *The Alpine Journal: A Record Of Mountain Adventure And Scientific Observation. By Members Of The Alpine Club. Vol. V. May 1870 To May 1872*, London (1872)

- STEPHEN, T., ROTHWELL, D., The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On, *The International Journal of Marine and Coastal Law* 27 (2012),
- STERIO, M., Transnational piracy: to pay or to prosecute? Introductory Remarks by Milena Sterio. *Proceedings of the Annual Meeting (American Society of International Law)* 105(2011).
- STIGALL, D.E., 'Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law', *Notre Dame Journal of International & Comparative Law* 3(1) (2013);
- STIGEN, J., 'The Right or Non-Right of States to Prosecute Core International Crimes under the Title of "Universal Jurisdiction"', *Baltic Yearbook of International Law Online*, 10(1) (2010)
- STOLK, S., A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials, *The European Journal of International Law* 29(3)(2018),
- SUMAILA, U. R., BAWUMIA, M., 'Fisheries, ecosystem justice and piracy: A case study of Somalia', *Fisheries Research* (2014)
- SUMNER, G.V., The 'Piracy Law' from Delphi and the Law of the Cnidos Inscription, *Greek, Roman and Byzantine Studies* 19(3)(1978).
- SURTEES, R., 'Trapped at Sea. Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers', *Groningen Journal of International Law*, 1(2) (2013)
- SYMONIDES, J., Origin and legal essence of the contiguous zone, *Ocean Development & International Law*, 20(2)(1989),
- SZIGETI, P., The Illusion of Territorial Jurisdiction, *Texas International Law Journal* 52 (2017),
- SZUNIEWICZ, M. 'Problems and Challenges of the ECHR's Extraterritorial Application to Law-Enforcement Operations at Sea', *International Community Law Review*, 17(4-5) (2015)
- TACHE, S.W., 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link', *The International Lawyer* 16(2) (1982);
- TAKEI, Y., Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion, *The International Journal of Marine and Coastal Law* 28 (2013)
- TALLGREEN, I., Come and See? The Power of Images and International Criminal Justice, *International Criminal Law Review* 17 (2017),
- TALLGREN, I., The sensibility and sense of international criminal law, *European Journal of International Criminal Law* 13(3)(2002),
- TANAKA, Y., '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* 22 (2020)

- TANAKA, Y., 'Zonal and integrated management approaches to ocean governance: reflections on a dual approach in international law of the sea', *International Journal of Marine and Coastal Law* 19 (4)(2004)
- TARWACKA, A., Piracy in Roman Law and the Beginnings of International Criminal Law, *Polish Review Of International And European Law* 1(1-2)(2012),
- TASIOULAS, J., Punishment and Repentance, *Philosophy 81*(2)(2006)
- TECLAFF, L. A., Beyond Restoration The Case of Ecocide, *Natural Resources Journal* 34(4)(1994)
- TEINER, D., Cartel-Related Violence in Mexico as Narco-Terrorism or Criminal Insurgency: A Literature Review. *Perspectives on Terrorism*, *14*(4)(2020),
- Territory, Jurisdiction, and Jurisdictional Immunities, *Digest of United States Practice in International Law* (1980),
- The 1958 Geneva Convention on the Continental Shelf. International Law Studies Series, *US Naval War College*, 53(1959-60)
- TONRY, M., Purposes and Functions of Sentencing, *Crime and Justice* 34(1)(2006),
- TRAUGHBER, C. M., 'Terror-Crime Nexus? Terrorism and Arms, Drug, and Human Trafficking in Georgia.' *Connections* 6(1)(2007),
- TREVES, T., 'Human Rights And The Law Of The Sea', *Berkeley Journal Of International Law*, 28(1) (2010);
- TREVES, T., Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, *The European Journal of International Law* 20(2)(2009)
- TREVES, T., UNCLOS at Thirty: Open Challenges, *Ocean Yearbook* 27(2013),
- TSABORA, J., Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones during Armed Conflict, Natural Resources Journal 54(1)(2014)
- TUERK, H., Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *Center for Oceans Law and Policy* 12(2008),
- TUERK, H., The resurgence of piracy: phenomenon of modern times, *University of Miami International and Comparative Law Review*, 17(1)(2009),
- VAANGAL, K., Legal Status of Offshore (Deep-Water) Oil Rigs: Coastal State Jurisdiction and Countering Oil Spills Threats, *Lex Portus* 7(5)(2021),
- VAN DEN HERIK, C., DAM-DE JONG, D., Revitalizing The Antique War Crime Of Pillage: The Potential And Pitfalls Of Using International Criminal Law To Address Illegal Resource Exploitation During Armed Conflict, *Criminal Law Forum* 15(2011)
- VAN DEN HERIK, L., VAN SLIEDREGT, E., Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note, *Leiden Journal of International Law*, 23 (2010)
- VAN DEN WYNGAERT, C., Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, *Case Western Reserve Journal of International Law* 44(2011),
- VAN DER WILT, H., 'Expanding Criminal Responsibility in Transnational and International Organised Crime', *Groningen Journal of International Law* 4(1)(2016);

- VAN DER WILT, H., Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts, *Chinese Journal of International Law* 13(2)(2014),
- VAN FOSSEN, A., Flags of Convenience and Global Capitalism, *International Critical Thought* 6(3)(2016),
- VAN HESPEN, I., 'Developing the Concept of Maritime Piracy: A Comparative Legal Analysis of International Law and Domestic Criminal Legislation', *The International Journal of Marine and Coastal Law* 31 (2016).
- VAN SLIEDREGT, E., International outlaws, *Leiden Journal of International Law* 33(3)(2020),
- VANHÉE, L., BORIT, M., SANTOS, J., Autonomous Fishing Vessels Roving the Seas: What Multiagent Systems Have Got to Do with It, *AAMAS* (2018).
- VARMER, O., Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf, *Stanford Environmental Law Journal* 33(2)(2014),
- VEAL, R., TSIMPLIS, M., SERDY, A., The Legal Status and Operation of Unmanned Maritime Vehicles, *Ocean Development & International Law* 50 (2019)
- VENTRELLA, M., 'The impact of Operation Sophia on the exercise of criminal Jurisdiction against migrant smugglers and human traffickers', *QIL Zoom-in* 30 (2016);
- VERDIER, P.H., VERSTEEG, M.,. International Law in Domestic Legal Systems: An Empirical Perspective. *Proceedings of the Annual Meeting (American Society of International Law)*, 108(2014)
- VISEUR SELLERS, P., GETGEN KESTENBAUM, J., Missing in Action: The International Crime of the Slave Trade, *Journal of International Criminal Justice* 18 (2020)
- VON HEINEGG, W. H., 'Naval Blockade." *International Law Studies Series. US Naval War College*, 75 (2000)
- VON HEINEGG, W. H., How to Update the San Remo Manual on International Law Applicable to Armed Conflicts at Sea', *Israel Yearbook on Human Rights,* Volume 36 (2006)
- VON HEINEGG, W., The Proliferation Security Initiative: Security vs. Freedom of Navigation?, *International Law Studies, US Naval War College*, 81 (2006),
- VON HEINEGG, W.H., Repressing Piracy and Armed Robbery at Sea - Towards a New International Legal Regime, *Israel Yearbook on Human Rights* 40(2010)
- VONEKY, S., New shield for the environment: peacetime treaties as legal restraints of wartime damage. *Review of European, Comparative & International Environmental Law* 9(1)(2000)
- VOS, R., STOLK, S., Courtroom 600: The (Virtual) Reality of Being There, *International Criminal Law Review* 22 (2022),
- VOS, R., STOLK, S., International Legal Sightseeing as a Phenomenon and a Methodology, *Journal of Law, Art and History* 3 (2022),
- WAGNER, M., The ICC and its Jurisdiction – Myths, Misperceptions and Realities, *Max Planck Yearbook of United Nations Law* 7(2004)
- WALKER, P.B., What is innocent passage?, *International Law Studies* 61(1980)

- WALKER, R. International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century, *Auckland University Law Review* (17)(2011),
- WALKER, W. L., Territorial Waters: The Cannon Shot Rule, *British Year Book of International Law*, 22(1945)
- WARNER, R., Jurisdictional Issues for Navies Involved in Enforcing Multilateral Regimes Beyond National Jurisdiction, *The International Journal of Marine and Coastal Law 14*(3)(1999),
- WATTERS, D.R., The Law of the Sea Treaty and Underwater Cultural Resources, *American Antiquity* 48(4)(1983),
- WATTERSON, C.J., OSBORNE, S., GRANT, S., Open registries as an enabler of maritime sanctions evasion, *Marine Policy* 119 (2020)
- WATTS, M., Petro-Insurgency or Criminal Syndicate? Conflict & Violence in the Niger Delta, *Review of African Political Economy* 114(2007)
- WEBB, P., GARCIANDIA, R., 'State Responsibility For Modern Slavery: Uncovering And Bridging The Gap', *International and Comparative Law Quarterly*, 68(3)(2019),
- WERLE, G., BURGHARDT, B., 'Do Crimes Against Humanity Require the Participation of a State or a'State-like' Organization?', *Journal of International Criminal Justice* 10 (2012),
- WHARTON, S., Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute, *The Canadian Yearbook of International Law* 52(2014),
- WHEELER, C. H., Shifting Priorities: Are Attitudes Changing at the International Criminal Court about Trials in absentia?, *International Criminal Law Review*, 21(1)(2021),
- WHITNEY R. HARRIS, W. R., KING, H. T., FERENCZ, B.J., Nuremberg and Genocide: Historical Perspectives, *Studies in Transnational Legal Policy* 40(1)(2009),
- WIBLE, B., De-jeopardizing justice: domestic prosecutions for international crimes and the need for transnational convergence. *Denver Journal of International Law and Policy*, 31(2)(2002),
- WILKINSON, J., The First Declaration of the Freedom of the Seas: The Rhodian Sea Law, *Ocean Yearbook Online 2*(1)(1980)
- WILLIAMS, G. L., The Juridical Basis of Hot Pursuit, *British Year Book of International Law*, 20(1939)
- WILLIS, F., Economic development, environmental protection, and the right to Health, *Georgetown International Environmental Law Review*, 9(1)(1996),
- WINN, J. I., GOVERN, K. H., Maritime pirates, sea robbers, and terrorists: new approaches to emerging threats, *Homeland Security Review*, 2(2)(2008),
- WOKER, H., ET AL., The law of the sea and current practices of marine scientific research in the Arctic, *Marine Policy* 115(2020)
- WOLSWIJK, H., Locus delicti and criminal jurisdiction. *Netherlands International Law Review* 46(1999), pp. 161-82.

- WONG, M. S., The Activation of the International Criminal Court's Jurisdiction over the Crime of Aggression: International Institutional Law and Dispute Settlement Perspectives, *International Community Law Review* 22(2)(2020),
- WOOD, M., The International Tribunal for the Law of the Sea and General International Law, *The International Journal of Marine and Coastal Law*, *22*(3)(2007),
- WOODLIFFE, J. J., The demise of unauthorised broadcasting from ships in international waters, *International Journal of Estuarine and Coastal Law* 1(4)(1986)
- YANNOPOULOS, G. N., The Economics of "Flagging Out", *Journal of Transport Economics and Policy*, *22*(2)(1988),
- ŻENKIEWICZ, M., WASILEWSKI, T., The Galleon 'San Jose'. Almost Four Decades of Legal Struggles on the National and International Plane. *Comparative Law Review* 25(2019),
- ZIMMERMANN, A., Amending the amendment provisions of the rome statute: the Kampala compromise on the crime of aggression and the law of treaties, *Journal of International Criminal Justice,* 10(1)(2012),
- ZUGLIANI, N., Georgiev, Final appeal judgment, No 13596/2019, ILDC 3009 (IT 2019), 28th March 2019, Italy; Supreme Court of Cassation; 4th Criminal Section, *Oxford Reports on International Law [ORIL], International Law in Domestic Courts* [ILDC], 28 august 2019
- ZWINGE, T., 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So', *Journal of International Business and Law* 10(2)(5) (2011)
- ZYSSET A., International crimes through the lens of global constitutionalism. *Global Constitutionalism* 12(1)(2023)

5. Newspaper articles, press releases and other reports

- 'Modern piracy is a threat to the lives and livelihoods of seafarers', *Gard*, Alert 28 october 2021. https://www.gard.no/web/updates/content/32555323/modern-piracy-is-a-threat-to-the-lives-and-livelihoods-of-seafarers
- 'Rescuers pull 394 migrants from dangerously overcrowded boat off Tunisia', *Reuters*, 2 August 2021 https://www.reuters.com/world/europe/rescuers-pull-394-migrants-dangerously-overcrowded-boat-off-tunisia-2021-08-01/.
- 'Starving Rohingya refugees rescued off Bangladesh after two months at sea', *BBC News*, 16 april 2020 https://www.bbc.com/news/world-asia-52305931.
- AL ARABIYA NEWS, 'Migrant boat tragedy slammed as 'genocide', 20 april 2015https://english.alarabiya.net/News/middle-east/2015/04/20/Migrant-boat-tragedy-slammed-as-genocide-

- ARGOUBY, M., NASR, J., SCHERER, S., 'Berlin attack suspect emerged from jail with 'totally different mentality', *Reuters*, 22 december 2016 https://www.reuters.com/article/us-germany-truck-suspect-idUSKBN14B1XU.
- ASSOCIATED PRESS, China has fully militarized three islands in South China Sea, US admiral says, *The Guardian*, 21 March 2022 https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says.
- ASSOCIATED PRESS, *Seafood from Slaves. An AP investigation helps free slaves in the 21st century* (2016)
- BELFORD, A., MUNAWIR, R., Migrants in 'maritime ping-pong' as Asian nations turn them back, *Reuters*, 16 May 2015 https://www.reuters.com/article/uk-asia-migrants-idUKKBN0O105O20150516.
- BHARWANI, R.L. (dir.), *Jermal*, Indonesia (2009): https://www.imdb.com/title/tt1190073/.
- BROAD, D.J., Scientists Warn That Visitors Are Loving Titanic to Death, *The New York Times*, 9 August 2003 https://www.nytimes.com/2003/08/09/world/scientists-warn-that-visitors-are-loving-titanic-to-death.html.
- BURKE, J., TONDO, L., 'Suspect in Nice terror attack phoned his family hours before rampage', *The Guardian*, 30 october 2020. https://www.theguardian.com/world/2020/oct/30/nice-terror-suspect-phoned-family-hours-before-church-attack-brahim-aouissaoui
- CAPORALE, A., 'Migranti: la conta dei morti nell'Olocausto mediterraneo', *Il Fatto Quotidiano*, 26 august 2014, https://www.ilfattoquotidiano.it/2014/08/26/migranti-la-conta-dei-morti-nellolocausto-mediterraneo/1099199/
- China is resorting to new forms of bullying in the South China Sea', *The Economist*, 5 October 2019 https://www.economist.com/asia/2019/10/03/china-is-resorting-to-new-forms-of-bullying-in-the-south-china-sea.
- CHOU, C.T., Child workers 'abandoned' at sea, *Al-Jazeera* 19 april 2007 https://www.aljazeera.com/economy/2007/4/19/child-workers-abandoned-at-sea.
- CLARK, A., BP oil rig registration raised in Congress over safety concerns, *The Guardian*, 30 May 2010 https://www.theguardian.com/environment/2010/may/30/oil-spill-deepwater-horizon-marshall-islands
- CLOWES, W., 'Piracy Surge Off West Africa Draws Maersk Call for Action', *Bloomberg*, Business, 27 january 2021 https://www.bloomberg.com/news/articles/2021-01-17/record-kidnappings-draw-maersk-call-for-action-in-gulf-of-guinea
- DEGNARAIN, N., Anger As Dead Dolphins Wash Up On Mauritius Beaches A Day After Wakashio Oil Ship Deliberately Sunk, *Forbes*, 26 august 2020 https://www.forbes.com/sites/nishandegnarain/2020/08/26/anger-as-dead-dolphins-wash-up-on-mauritius-beaches-a-day-after-wakashio-oil-ship-deliberately-sunk/?sh=361f6d4526ff

- DOW, S., "Such brutality': tricked into slavery in the Thai fishing industry', The *Guardian*, 21 september 2019 https://www.theguardian.com/world/2019/sep/21/such-brutality-tricked-into-slavery-in-the-thai-fishing-industry
- DOYLE, A., FOUCHE, G., Norway court rules in Oslo's favour in snow crab case with implication for oil, *Reuters* 12 september 2019 https://www.euronews.com/2019/02/14/norway-court-rules-in-oslos-favour-in-snow-crab-case-with-implication-for-oil;
- EUDE, T., Was the Deepwater Horizon Incident Really Unprecedented?, *The Maritime Executive*, 5 May 2020
- France24, Ship captain sentenced to 20 months over Mauritius oil spill: magistrate, 27 December 2021 https://www.france24.com/en/live-news/20211227-ship-captain-sentenced-to-20-months-over-mauritius-oil-spill-magistrate-1
- GAVOUNELI, M., Whose Sea? A Greek International Law Perspective on the Greek-Turkish Disputes, *Institute Montaigne*, 16 October 2020 https://www.institutmontaigne.org/en/analysis/whose-sea-greek-international-law-perspective-greek-turkish-disputes.
- HAROON, S., Legal experts worldwide draw up 'historic' definition of ecocide, *The Guardian,* 22 June 2021 https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide?fbclid=IwAR1iwcQ375g4cjbNreSZQfuhRLvqUZCddQTyVoht7z-7W5fRjXTQ0mC9u-A
- HAYDEN, S., 'Mayor of Palermo accuses EU of 'genocide' against refugees', *The Irish Times*, 23 december 2019. https://www.irishtimes.com/news/world/europe/mayor-of-palermo-accuses-eu-of-genocide-against-refugees-1.4123029
- https://maritime-executive.com/editorials/was-the-deepwater-horizon-incident-really-unprecedented;
- https://www.ap.org/explore/seafood-from-slaves/;
- ILLUECA, A., On Sanctions and Deregistration of Vessels: The Recent Practice of Panama, *Opinio Juris,* 24 july 2019 http://opiniojuris.org/2019/07/24/on-sanctions-and-deregistration-of-vessels-the-recent-practice-of-panama/.
- ITALIAN COAST GUARD, Catturata la nave madre e fermati i membri d'equipaggio per favoreggiamento dell'immigrazione clandestina, *Press Release*, 23 February 2023 https://www.gdf.gov.it/it/gdf-comunica/notizie-ed-eventi/comunicati-stampa/anno-2023/febbraio/catturato-la-nave-madre-e-fermati-i-membri-d2019equipaggio-per-favoreggiamento-dell2019immigrazione-clandestina#documenti-allegati;
- KENNEY, S., Slavery and Torture Bait Fishermen in the Pacific, *Catalyst*, 10 june 2020 https://catalyst.cm/stories-new/2020/6/10/slavery-and-torture-bait-fishermen-in-the-pacific
- KENT, S., OLSON, B., ' Chevron Shuts Platform Off Nigeria After Attack', *The Wall Street Journal* 6 May 2016 https://www.wsj.com/articles/nigeria-attack-shuts-chevron-oil-facility-1462533977

- KHADKA, N.S., Why the Mauritius oil spill is so serious, *BBC News*, 13 august 2020 https://www.bbc.com/news/world-africa-53754751
- LAW INSIDER, Bunkering definition, https://www.lawinsider.com/dictionary/bunkering
- LO CASTRO, R., 'Migranti: parroco che accolse Papa a Lampedusa, 'nel Mediterraneo genocidio'', Adnkronos, 24 april 2021 https://www.adnkronos.com/migranti-parroco-che-accolse-papa-a-lampedusa-nel-mediterraneo-genocidio_13FobFak2SMKPTFqtgiP5E;
- MEADE, R., Over 100 falsely flagged ships are trading in plain sight, *Lloyd's list*, 16 March 2023 https://lloydslist.maritimeintelligence.informa.com/LL1144324/Over-100-falsely-flagged-ships-are-trading-in-plain-sight;
- MIRA, A.M., Migranti. Scoperta e bloccata la nave madre che ha trainato la "barca dei minori", *Avvenire*, 5 June 2021 https://www.avvenire.it/attualita/pagine/scoperta-e-bloccata-dalla-finanza-la-nave-madre-che-ha-trainato-la-barca-dei-minori
- MOORE, S., On immigration, the language of genocide has entered the mainstream, *The Guardian*, 20 April 2015 https://www.theguardian.com/commentisfree/2015/apr/20/immigration-language-of-genocide-british-politics
- NICHOLS, L., Comancheros gang's 'mother ship' drug trafficking plan scuppered by global police sting, *The New Zealand Herald*, 8 June 2021 https://www.nzherald.co.nz/nz/comancheros-gangs-mother-ship-drug-trafficking-plan-scuppered-by-global-police-sting/KCHYT2C3752X3IQLIPKNWHOI5Q/
- O'CARROLL, L., Priti Patel to reveal proposals for offshore centres for asylum seekers, *The Guardian,* 5 july 2021 https://www.theguardian.com/uk-news/2021/jul/05/priti-patel-to-reveal-proposals-for-offshore-centres-for-asylum-seekers
- O'HANLON, M., China's Unsinkable Aircraft Carriers, *Wall Street Journal*, Opinion, 6 august 2016 https://www.wsj.com/articles/chinas-unsinkable-aircraft-carriers-1438880237;
- OKERE, R., SALAU S., OKAFOR, C., 'Militants blow up Chevron oil facility, vow more attacks', *The Guardian* (the Nigerian, not the British one) 6 May 2016 https://guardian.ng/news/militants-blow-up-chevron-oil-facility-vow-more-attacks/.
- ORTOLLAND, D., The Greco-Turkish dispute over the Aegean Sea: a possible solution ?, *Diploweb.com : la revue géopolitique,* 10 april 2009 https://www.diploweb.com/The-Greco-Turkish-dispute-over-the.html.
- ØSTHAGEN, A., RASPOTNIK, A., Crabtacular! Snow Crabs on their March from Svalbard to Brussels, *The Arctic Institute*, 24 April 2018. https://www.thearcticinstitute.org/crabtacular-snow-crabs-march-svalbard-brussels/;
- PARAVICINI, G., 'Suspected Berlin attacker spent 4 years in Italian jails', *Politico,* 21 december 2016 https://www.politico.eu/article/suspected-berlin-attacker-spent-4-years-in-italian-jails/

- PELZ, D., 'Why is piracy increasing on the Gulf of Guinea?', *Deutsch Welle*, 21 january 2021 https://p.dw.com/p/3pe6v
- RUHALA, E., 'Horror at Sea: Adrift for Months, Starving Asylum Seekers Threw 98 Bodies Overboard', *The Time*, 19 february 2013 https://world.time.com/2013/02/19/horror-at-sea-adrift-for-months-starving-asylum-seekers-threw-98-bodies-overboard/
- SARZANINI, F., 'Attentato a Nizza, il killer era in Italia il 9 ottobre. Dopo lo sbarco a Lampedusa portato a Bari e identificato', *Il Corriere della Sera*, 29 october 2020 https://www.corriere.it/cronache/20_ottobre_29/attentato-nizza-killer-era-italia-9-ottobre-lo-sbarco-lampedusa-portato-bari-identificato-720de584-19f6-11eb-bdd5-3ce4cb03ccdf.shtml.
- SEPTIARI, D., 'Indonesian seafarers adrift in sea of exploitation, legal precarity', *The Jakarta Post*, 25 june 2020. https://www.thejakartapost.com/news/2020/06/22/indonesian-seafarers-adrift-in-sea-of-exploitation-legal-precarity.html
- SMITH, N., CAI, L., LOVEARD, D., 'Death on the high seas: Taiwanese rights groups demand end to modern slavery on fishing boats', *The Telegraph*, 14 January 2021 https://www.telegraph.co.uk/global-health/science-and-disease/death-high-seas-taiwanese-rights-groups-demand-end-modern-slavery/
- TONDO, L., 'The most unsafe passage to Europe has claimed 18,000 victims. Who speaks for them?', *The Guardian*, 2 december 2021 https://www.theguardian.com/commentisfree/2021/dec/02/unsafe-passage-europe-18000-victims-border-libya
- US, UK forces repel 'largest attack' by Houthis in Red Sea, *Reuters* 10 january 2024 https://www.reuters.com/world/us-uk-forces-shoot-down-houthi-missile-drone-attack-red-sea-us-military-2024-01-10/
-
- TONDO, L., Revealed: 2,000 refugee deaths linked to illegal EU pushbacks, *The Guardian*, 5 May 2021 https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks
- TRAINER, C., IZEWICZ, P., Unauthorized flags: a threat to the global maritime regime, CIMSEC 20 july 2020 https://cimsec.org/unauthorized-flags-a-threat-to-the-global-maritime-regime/.
- TREVES, T., The International Tribunal for the Law of the Sea and the Oil and Gas Industry , *Second International Oil and Gas Conference –Managing Risk –Dispute Avoidance and Resolution London 20-21 September 2007*, p. 6 https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/treves_oil_gas_200907_eng.pdf
- URBINA, I., 'Lawless Ocean: The Link Between Human Rights Abuses And Overfishing', *Yale Evironment360*, 20 November 2019 Https://E360.Yale.Edu/Features/Lawless-Ocean-The-Link-Between-Human-Rights-Abuses-And-Overfishing

- URBINA, I., 'The Outlaw Ocean. 'Sea Slaves': The Human Misery That Feeds Pets and Livestock', *The New York Times*, 27 july 2015 https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html
- VAM., Sea trafficking report reveals how ships move guns and drugs, *The Guardian*, 30 January 2012 https://www.theguardian.com/world/2012/jan/30/sea-trafficking-report-guns-drugs
- GAMBRELL, J., US Navy seizes attackers who held Israel-linked tanker. Missiles from rebel-controlled Yemen follow, *Associated Press*, 27 November 2023 https://apnews.com/article/israel-palestinians-hamas-war-yemen-ship-attack-526842504dc9f6bb7ca6e1d5104f77a3
- VAUGHAN, A., Torrey Canyon disaster – the UK's worst-ever oil spill 50 years on, *The Guardian* 28 march 2017 https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary

6. Law blogs, specialised and institutional websites and other digital legal sources

- 'More action needed for seafarers, 'collateral victims' of measures to curb COVID-19', *UN News*, 6 october 2020 https://news.un.org/en/story/2020/10/1074732
- 'UN launches key initiative to protect seafarers' human rights amid COVID-19 crisis', *UN News*, 6 may 2021 https://news.un.org/en/story/2021/05/1091372
- INTERNATIONAL CHAMBER OF SHIPPING, *Shipping Industry Flag State Performance Table 2022/2023*, London (2023), https://www.ics-shipping.org/wp-content/uploads/2023/01/Shipping-Industry-Flag-State-Performance-Table-2022-2023.pdf
- AKANDE, D., Court between A Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC, EJIL:Talk May 15 2013 (2013): https://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/
- AMBOS, K., Protecting the Environment through International Criminal Law?, *EJIL:Talk!* 29 june 2021 https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2#;
- HELLER, K.J., Ecocide and Anthropocentric Cost-Benefit Analysis, *OpinioJuris*, 26 june 2021 http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/;
- Armed Pirates Rob Offshore Platform in Bay of Campeche', *The Maritime Executive*, 19 june 2022 https://maritime-executive.com/article/armed-pirates-rob-offshore-platform-in-bay-of-campeche.
- CLARK, R., Martin Jano Found Guilty of Conspiracy to Commit Money Laundering & Lukner Weilbacher Found Guilty of Conflict of Interest in Micronesia International Ship Registry Case, *FSM Information Services*, 31 January 2023 https://www.gov.fm/index.php/component/content/article/35-pio-articles/news-and-updates/699-martin-jano-found-guilty-of-conspiracy-to-commit-money-laundering-lukner-weilbacher-found-guilty-of-conflict-of-interest-in-micronesia-international-ship-registry-case?Itemid=177.
- COLLINS, R., Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS issues its ruling in the M/V "Norstar" Case, EJIL Talk (2019) https://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/;
- DAOUST, Q., Human Rights Abuses & Organized Crime on IUU Fishing Vessels, *American Security Project*, 9th November 2021: https://www.americansecurityproject.org/iuufishingcrimes/.
- ECOCIDELAW, Independent Expert Panel for the Legal Definition of Ecocide, *COMMENTARY AND CORE TEXT June 2021*

https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf.
- ECOCIDELAW, *Independent Expert Panel for the Legal Definition of Ecocide,* https://ecocidelaw.com/independent-expert-drafting-panel/.
- ECOCIDELAW, *Selected Previous Drafts of the International Crime of Ecocide:* https://ecocidelaw.com/selected-previous-drafts/.
- FLANDERS MARINE INSTITUTE, *Maritime Boundaries Geodatabase: Maritime Boundaries and Exclusive Economic Zones* (200NM), version 11 (2019) http://www.marineregions.org/. https://doi.org/10.14284/386
- GIANNI, M. SIMPSON, W., *The Changing Nature of High Seas Fishing: how flags of convenience provide cover for illegal, unreported and unregulated fishing*, Canberra (2005) https://assets.wwf.org.uk/downloads/flagsofconvenience.pdf
- GUILFOYLE, D., Political Motivation and Piracy: What History Doesn't Teach Us About Law, *EJIL:Talk*, 17 june 2013 https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/;
- HELLER, K.J., Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't), OpinioJuris, 23 june 2021 https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/.
- HELLER, K.J., The Crime of Ecocide in Action, *OpinioJuris,* 28 june 2021 http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/
- HRASARB, *Arbitration White Paper*, https://hrasarb.com/wp-content/uploads/2020/07/20200324-HRAS_ShearmanLLP_Arbitration_Human_Rights_White_Paper-UPDATED_20200505-ORIGINAL-SECURED.pdf
- ICRC DATABASE, *Customary IHL, Prosecution of War Crimes*, https://ihl-databases.icrc.org/ein n/customary-ihl/v1/rule158
- IMO, *Status of conventions* (as the 22 march 2023): https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/x-Status.pdf
- INTERNATIONAL TRANSPORT WORKERS' FEDERATION, Current registries listed as FOCs: https://www.itfseafarers.org/en/focs/current-registries-listed-as-focs.
- KENNEY, S., *Fraudulent Registries and their impact* https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/6%20Panel%202_Kenney.pdf:
- LADAS, K., *Symposium on Flag State Responsibilities and the Future of Article 91 of UNCLOS*, 5 march 2020 https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/9%20Panel%203_Ladas.pdf
- Largest Countries of Ship Registry' 2020, in RODRIGUE, J-P ET AL. (eds.) *The Geography of Transport Systems*, (2020) https://transportgeography.org/contents/chapter5/maritime-transportation/tonnage-country-registery/.

- OECD, Ownership And Control Of Ships, March 2003 https://seafarersrights.org/wp-content/uploads/2018/03/INTERNATIONAL_REPORT_OWNERSHIP-AND-CONTROL-FOR-SHIPS_2002_ENG.pdf
- PAPANICOLOPULU, I., LONGO, A., MANDRIOLI, D., *To the International Relations and Defence Committee, UK Parliament, Submission in response to the call for evidence UNCLOS: fit for purpose in the 21st century?* 12th November 2021 https://committees.parliament.uk/writtenevidence/40874/pdf/
- PEZZOT, R., GRAF, J-P., Ecocide – Legal Revolution or Symbolism?, *Völkerrechtsblog*, 03.02.2022, doi: 10.17176/20220203-120935-0
- PROMISE INSTITUTE FOR HUMAN RIGHTS (UCLA) GROUP OF EXPERTS, *Proposed Definition of Ecocide*, 9 April 2021 https://ecocidelaw.com/wp-content/uploads/2022/02/Proposed-Definition-of-Ecocide-Promise-Group-April-9-2021-final.pdf.
- RAUNEK, Top 10 Largest Flag States in the Shipping Industry, *Marine Insight*, 6 april 2022 https://www.marineinsight.com/maritime-law/top-10-largest-flag-states-in-the-shipping-industry/.
- ROBINSON, D., Your guide to Ecocide: Part 1, *Opinio Juris*, 16 july 2021. http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/
- SADAT, L.N., *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, Whitney R. Harris World Law Institute Crimes Against Humanity Initiative (2010), https://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/02/CompHistoryFinal01-06-11.pdf
- SAFETY4SEA, *Crewman Reveals Torture Ordeal*, 23 april 2012 https://safety4sea.com/crewman-reveals-torture-ordeal/
- SCHOLAERT, F., SMIT-JACOBS, K., Addressing ship reflagging to avoid sanctions, *Think Tank European Parliament*, 13 march 2023 https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/745686/EPRS_ATA(2023)745686_EN.pdf.
- Stahn, C., *Fair and Effective Investigation and Prosecution of International Crimes Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2*, p. 14 https://www.nurembergacademy.org/fileadmin/user_upload/Fair_and_Effective_Investigation_and_Prosecution_of_International_Crimes.pdf
- STOP ECOCIDE FOUNDATION, Independent Expert Panel for the Legal Definition of Ecocide, COMMENTARY AND CORE TEXT, June 2021, available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf
- TREVES, T., Introductory note: 1958 Geneva Conventions On The Law Of The Sea, *United Nations Audiovisual Library of International Law*, p. 1 https://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf.

- UNITED STATES COAST GUARD, *Report Of Investigation Into The Circumstances Surrounding The Explosion, Fire, Sinking And Loss Of Eleven Crew Members Aboard The Mobile Offshore Drilling Unit Deepwater Horizon In The Gulf Of Mexico, April 20 – 22, 2010,* p. viii: https://www.bsee.gov/sites/bsee.gov/files/reports/safety/2-deepwaterhorizon-roi-uscg-volume-i-20110707-redacted-final.pdf
- UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes, Research report*, October 2011,
- US, *Securities And Exchange Commission Form 10-K, Annual Report Pursuant To Section 13 And 15(D) Filing Date: 2010-02-24 | Period Of Report: 2009-12-31 Sec Accession No. 0001451505-10-000023, Filer Transocean Ltd.*, p. 3 http://edgar.secdatabase.com/1568/145150510000023/filing-main.htm
- LANZA, G., Qualche breve considerazione sulla confirmation of charges decision della prima camera preliminare della Corte Penale Internazionale nel caso Gbagbo, *Diritto Penale Contemporaneo* 01 ottobre 2014 https://archiviodpc.dirittopenaleuomo.org/d/3320-qualche-breve-considerazione-sulla-confirmation-of-charges-decision-della-prima-camera-preliminare
- TREVES, T., 'Procedural history', 1958 Geneva Conventions on the Law of the Sea Geneva, 29 April 1958, *UN Audiovisual Library of International Law*, https://legal.un.org/avl/pdf/ha/gclos/gclos_ph_e.pdf;
- UNITED STATES DEPARTMENT OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, *Limits in the Seas No. 148 Norway Maritime Claims and Boundaries,* August 28, 2020 https://www.state.gov/wp-content/uploads/2020/08/LIS148-Norway.pdf
- WEILER, G., 'Nino in His Own Words', *EJIL Talk*, 3 january 2012 (2012) https://www.ejiltalk.org/nino-in-his-own-words/

7. Other sources

- 'complete', *Merriam-Webster* https://www.merriam-webster.com/dictionary/complete.
- 'Smuggle', *Collins Dictionary* https://www.collinsdictionary.com/dictionary/english/smuggle
- 'Smuggling', *Cambridge Dictionary* https://dictionary.cambridge.org/dictionary/english/smuggling
- 'The High Seas, an Undisclosed World', *Connected Oceans*, 6 december 2021 https://oceansconnectes.org/en/the-high-seas-an-undisclosed-world/.
- ANDERSON, J., *Implementation of a Regional Fisheries Strategy For The Eastern-Southern Africa and India Ocean Region. Options to Reduce IUU Fishing in Kenya, Tanzania, Uganda and Zanzibar*, SF/2011/21 (2011) https://www.fao.org/3/az391e/az391e.pdf;
- Are Offshore Rigs & Platforms Jones Act Vessels?, *Arnold & Itkin,* https://www.offshoreinjuryfirm.com/offshore-injury-blog/2021/june/are-offshore-rigs-platforms-jones-act-vessels-/.
- Article 113-1-14 Code Pénale Francaise,
- *Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Refugees in Libya* submitted to the Office of the Prosecutor of the International Criminal Court by three associations of jurists on the 17th january 2022, available at https://www.strali.org/warcrimeslibya
- Artt. 12-3 Criminal Code of the Russian Federation
- ATTI PARLAMENTARI XIV LEGISLATURA, CAMERA DEI DEPUTATI, DOC. XXII-BIS N.1-BIS, COMMISSIONE PARLAMENTARE D'INCHIESTA SULLA MORTE DI ILARIA ALPI E MIRAN HROVATIN […], *Relazione di minoranza (presentata da:Mauro Bulgarelli) Presentata alla Commissione in data 23 febbraio 2006 Comunicata al Presidente della Camera il 28 febbraio 2006*, pp. 31-48 https://leg14.camera.it/_dati/leg14/lavori/documentiparlamentari/indiceetesti/022bis/001bis/INTERO.pdf
- BASEL INSTITUTE ON GOVERNANCE, *Wildlife crime – understanding risks, avenues for action Part 4: Corruption in marine wildlife trafficking Associated Institute of the University of Basel Green Corruption team*, June 2021
- BERG, P. (directed by), *Deepwater Horizon* (2016) (*movie)*
- BIBLIA (Septuaginta), *Evangelium secundum Joannem*
- BYRNE, J., BYRNE, J., SOMERVILLE, G. (RUSI), The Orient Express: North Korea's Clandestine Supply Route to Russia, *RUSI* 16 October 2023 https://rusi.org/explore-our-research/publications/commentary/report-orient-express-north-koreas-clandestine-supply-route-russia;
- CASSESE, A., 'Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal, introductory note', *United Nations Audiovisual Library of International Law* (2009) https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf.

- CISSÉ, Y., *Annex C. Prevention and repression of piracy and armed robbery at sea* https://legal.un.org/ilc/reports/2019/english/annex_c.pdf
- CRAGIN, K., HOFFMAN, B., *Arms Trafficking and Colombia*, Santa Monica (Rand Corporation) (2003),
- Delphi Copy, Block B. lin 8-12, reported in MATAIX FERRÁNDIZ, E., A Sea of Law: The Romans and their Maritime World, *The Ancient Near East Today* 11(5)(2023). Accessed at: https://www.asor.org/anetoday/2023/05/seaof-law.
- DRYAD GLOBAL, *ANNUAL REPORT 2021,* pp. 13, 17-8: https://safety4sea.com/wp-content/uploads/2022/03/Dryad-Global-Annual-Report-2021-2021_03.pdf.
- DRYAD GLOBAL, *ANNUAL REPORT 2021*: https://safety4sea.com/wp-content/uploads/2022/03/Dryad-Global-Annual-Report-2021-2021_03.pdf
- EJF, *SLAVERY AT SEA: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry* (2014)
- EMPEROR IUSTINIANUS *Novellae* CXXXIV.5
- EMPEROR IUSTINIANUS *Novellae* LXIX.1
- EMPEROR IUSTINIANUS, *Digesta Iustiniani*, 14.II.9 (*De Lege Rhodia de Iactu*)
- EMPEROR IUSTINIANUS, *Digesta*, I.8.2
- EMPEROR IUSTINIANUS, *Digestum* 1.1.1.2, Ulpianus 1 inst.
- ENVIRONMENTAL JUSTICE FOUNDATION, *BLOOD AND WATER: Human rights abuse in the global seafood industry* (2019)
- ENVIRONMENTAL JUSTICE FOUNDATION, *Blood And Water: Human rights abuse in the global seafood industry* (2019),
- FAO, *The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation,* Rome (2022), p. 3 https://doi.org/10.4060/cc0461en
- GREENGRASS, P. (directed by), *Captain Phillips* (2013) (*movie*)
- GREENPEACE, *Turn The Tide: Human Rights Abuses and Illegal Fishing in Thailand's Overseas Fishing Industry* (2018)
- GURMENDI, A., Tracking State Reactions to the ICC's Arrest Warrant against Vladimir Putin, *Opinio Juris* 29 march 2023 https://opiniojuris.org/2023/03/29/tracking-state-reactions-to-the-iccs-arrest-warrant-against-vladimir-putin/.
- HARPER, D. (n.d.), 'Etymology of confusion', *Online Etymology Dictionary*. https://www.etymonline.com/word/confusion.
- HONNIBALL, A., The 'Private Ends' Of International Clarity In Relation Necessity Of Legal Piracy: The To Violent Political Activists, *ICD Brief* 13(2015)
- How Do Semisubmersibles Work?, *Rigzone* https://www.rigzone.com/training/insight/?insight_id=338&c_id=24.
- HUMAN RIGHTS WATCH, *Hidden Chains Rights Abuses and Forced Labor in Thailand's Fishing Industry* (2018)

- INTERPOL *Fighting illegal, unreported and unregulated fishing*, 7th December 2020: https://www.interpol.int/en/News-and-Events/News/2020/Fighting-illegal-unreported-and-unregulated-fishing
- JACKSON, R. H., Opening Statement At The International Military Tribunal (21 November 1945), https://voicesofdemocracy.umd.edu/wp-content/uploads/2019/10/JACKSON_SPEECH-TEXT.pdf
- JAGHAI-BAJULAIYE, S., *Joint Submission to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children*, 1 june 2020 https://www.ohchr.org/Documents/Issues/Trafficking/submissions-HRC47/NGOs-and-academia/FRC.pdf
- JENKINS, B.M., 'Potential Threats To Offshore Platforms', in *World air and seaport security and defence reference book 1989*, Cornhill (1988) https://apps.dtic.mil/sti/citations/ADA216866.
- KAPOGIANNI, V., MAGUGLIANI, N., 'When Aerial Surveillance Becomes the Sine Qua Non for Interceptions at Sea: Mapping the EU and its Member States' Complicity in Border Violence' In P. Czech, L. Heschl, K. Lukas, M. Nowak, & G. Oberleitner (Eds.), *European Yearbook on Human Rights*, Oxford (2023)
- LAW INSIDER, Bunkering definition, https://www.lawinsider.com/dictionary/bunkering.
- LEWIS, O., Timeline - Main events in the Gaza flotilla affair, *Reuters* 1 June 2010 https://www.reuters.com/article/uk-israel-flotilla-timeline/timeline-main-events-in-the-gaza-flotilla-affair-idUKTRE65046720100601/;
- LI J, XING Q, LI X, ARIF M, LI J. Monitoring Off-Shore Fishing in the Northern Indian Ocean Based on Satellite Automatic Identification System and Remote Sensing Data. Sensors 24(3)(2024);
- LYCAN, T. ET AL, *What We Know About Maritime Environmental Crime*, One Earth Future, Stable Seas, Safe Seas July 2021
- *Memory Laws in European and Comparative Perspective*: https://melaproject.org/.
- MILLER, R., High Seas Treaty aims to fill in gaps for ocean protection, *Professional Mariner*, 4 april 2024 https://professionalmariner.com/high-seas-treaty-aims-to-fill-in-gaps-for-ocean-protection/.
- MØLLER, B., *Piracy, Maritime Terrorism And Naval Strategy*, Danish Institute For International Studies Report n. 2 (2009)
- MOSSLER, M., Illegal, Unreported, and Unregulated Fishing, *Sustainable Fisheries* (University of Washington): https://sustainablefisheries-uw.org/seafood-101/iuu-fishing/
- MURPHY, A., TUCKER, H., The Global2000, *Forbes*, 8 june 2023 https://www.forbes.com/lists/global2000/?sh=257422915ac0.
- N. 1680/96 RGNR, *Declassified Document pursuant to the communication of the Prosecutor of the Tribunal pf Reggio Calabria to the President of the Chamber of Deputies, 17 september 2015*
- NEWS DESK, Captain and First Officer of Wakashio get 20 months in prison for endangering safe navigation, *Shippingandfreightresource*, 28 december 2021 https://www.shippingandfreightresource.com/captain-and-first-officer-of-wakashio-get-20-months-in-prison-for-endangering-safe-navigation/
- NEWS DESK, Should the Captain of the Wakashio be held responsible for dead dolphins, *Shippingandfreightresource*, 29 august 2020

https://www.shippingandfreightresource.com/should-the-captain-of-the-wakashio-be-held-responsible-for-dead-dolphins/.
- Nuremberger, Lexico https://www.lexico.com/definition/nuremberger
- OFFICE OF THE PROSECUTOR (hereinafter, OTP), Situation on Registered Vessels of Comoros, Greece and Cambodia, *Article 53(1) Report*, 6 November 2014,
- PENNINGTON INSTITUTE, International Overdose Awareness Day, Facts & Stats Worldwide https://www.overdoseday.com/facts-stats/.
- POPE ALEXANDER VI, *Bulla 'Inter Caetera'*, 4 May 1493
- POPE PIUS XII, 'Radiomessaggio di Sua Santità Pio XII rivolto ai governanti ed ai popoli nell'imminente pericolo della guerra', in *Discorsi e Radiomessaggi di Sua Santità Pio XII*, I, Primo anno di Pontificato, 2 marzo 1939 - 1° marzo 1940 (1940)
- ROSI, G., (directed by), *Fuocoammare* (2016) (*movie*)
- ROTH, A., UK sends UN experts photographs of North Korean shipments to Russia, *The Guardian* 22 january 2024 https://www.theguardian.com/world/2024/jan/22/uk-sends-un-experts-photographs-north-korean-shipments-russia.
- RUDOLPH, T.A. Seeing like an algorithm: the limits of using remote sensing to link vessel movements with worker abuse at sea. *Maritime Studies* 23(13)(2024).
- SMALL ARMS SURVEY, Breaking New Ground? The Arms Trade Treaty. In *Small Arms Survey 2014: Women and Guns*, Geneva (2014)
- TAYLOR, G., Confronting illegal, unreported, and unregulated fishing on the Fraser, *Watershed Watch Salmon Society*, 26 May 2021 https://watershedwatch.ca/confronting-illegal-unreported-and-unregulated-fishing-on-the-fraser/.
- THE COMMON ENGLISH BIBLE, *Thessalonians* II, 2: 4-8
- THE EDITORIAL TEAM, IFC: Maritime Security Situation Mid-Year Report 2022, *Safety4Sea*, 22 August 2022: https://safety4sea.com/ifc-maritime-security-situation-mid-year-report-2022/
- THE FUND FOR PEACE, *Threat Convergence Transnational Security Threats in the Straits of Malacca* (2012)
- TOMOV, A. (VesselFinder Limited), Re: Vesselfinder.com historical data request from Giampaolo Guizzardi Righetti g.guizzardirighet@campus.unimib.it, received by Giampaolo Guizzardi Righetti, 09/01/2024 at 16.53.
- WALKER, G. K. (ed.), *Definitions for the Law of the Sea,* Leiden (2011),