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

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Abstract

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

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

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1. Introduction

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

13 Guilfoyle (above n 6) 187-9.

14 Boister (above n 11) 26.



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

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

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

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

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

17 Boister (above n 9) 38.



2. Interdiction of Stateless Vessels in International Law

The recent migrant crisis has exposed the unsettled nature of criminal jurisdiction over stateless vessels engaged in crime in international waters. Approximately 1.5 million people escaping conflict or poverty have reached Europe by sea since 2015.¹⁸ Most of these migrants and asylum seekers have been transported across the Mediterranean from Turkey and the Magreb states on inflatable dinghies or wooden fishing boats by migrant smugglers.¹⁹ In June 2015, the EU naval operation, EUNAVFOR MED Operation Sophia, was launched in response to the overwhelming numbers of people fleeing the Syrian conflict.²⁰ The mission's core mandate was to identify, capture and destroy vessels and weapons used by suspected migrant smugglers to 'disrupt the business model of human smuggling and trafficking networks'.²¹ Operation Sophia is the latest of several naval operations commenced by the EU over the last decade to 'save lives' and 'strengthen border control' at sea.²² In contrast to the often secretive, unilateral interdictions by individual states, their multilateral nature has required greater transparency about the legal bases permitting the operations in international waters. As a consequence, Operation Sophia has been carefully packaged as a legitimate extraterritorial action in accordance with international law.²³

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

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

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

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

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

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

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

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



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

2.1 Extraterritorial Criminal Jurisdiction

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

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

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

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

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

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

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

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

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

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

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



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

Ignoring the muddling *Lotus* debate,³⁶ contemporary international law 'permits states to exercise jurisdiction (whether by way of legislation, judicial activity or enforcement) upon a number of grounds,'³⁷ but as with all customs, their standing between states varies.³⁸ This means a state cannot safely assert jurisdiction without a sufficient connection to interests, people or activities falling within its sovereign sphere. State practice has confirmed territoriality and active nationality (perpetrator) as undisputable bases for jurisdiction.³⁹ States also routinely assert subjective and objective territorial jurisdiction for conduct initiated territorially and completed extraterritorially, and the reverse.⁴⁰ More recently, the assertion of extraterritorial prescriptive jurisdiction by a state where the victim is a national (passive personality), and if a crime threatens the internal or external security of a state, have crystallized as accepted heads of jurisdiction.⁴¹ But no standard practice has coalesced around entirely objective territorial jurisdiction where only 'effects' are felt by the legislating state, despite promulgation by the United States,⁴² and, at times, the EU.⁴³ Finally, international law recognizes universal jurisdiction only for the most heinous crimes of international concern, being grave war crimes⁴⁴ as well as the *sui generis* case of piracy on the high seas.⁴⁵

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

35 Boister (above n 9) 246.

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

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

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

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

40 Staker (above n 31) 317.

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

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

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

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

45 UNCLOS art 104.



2.2 Prescribing and Enforcing

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

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

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

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

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

48 Mann (above n 29) 34–35.

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

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

51 Liivoja (above n 28) 54.

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

53 Brownlie (above n 26) 311.



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

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

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

2.3 Stateless Vessels in the Law of the Sea

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

54 Liivoja (above n 28) 54.

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

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

57 O’Keefe (above n 45) 741.

58 *ibid*.

59 Staker (above n 31) 316.

60 Akehurst (above n 30) 147.

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



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

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

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

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

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

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

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

66 *ibid.*

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

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

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

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



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

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

3. Interdiction of Migrant Smuggling Vessels in Transnational Criminal Law

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

71 UNCLOS arts 91 and 92.

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

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

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

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

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

77 Mallia (above n 25) 114.



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

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

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

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

79 Gallagher and David (above n 72) 245.

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

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

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

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

84 *ibid.*

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

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



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

3.1 Ambiguity in the Migrant Smuggling Protocol

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

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

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

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

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

⁸⁸ Kulick (above n 15) 7.

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

⁹⁰ United Nations Office on Drugs and Crime (‘UNODC’), *Model Law against the Smuggling of Migrants* (Vienna 2010)

84: ‘Articles 7-9 of the Smuggling of Migrants Protocol should be read in the context of the international law of the sea[...] in drafting national laws[...] states parties will need to ensure consistency with’ UNCLOS.



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

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

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

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

92 Migrant Smuggling Protocol art 8(2).

93 Migrant Smuggling Protocol art 8(7).

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

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

96 Boister (above n 9) 250-251.

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

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



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

3.2 Ambiguity in Antecedent Treaty Practice

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

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

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

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

102 UNCLOS art 107.



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

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

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

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

¹⁰³ Guilfoyle (above n 60) 17.

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

¹⁰⁵ O'Connell (above n 60) 752.

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



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

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

4. Cross-Pollination in Transnational Criminal Law

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

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

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

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

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

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

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



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

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

4.1 Drafting History of the Migrant Smuggling Protocol

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

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

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

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

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

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

118 Boister (above n 11) 27.



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

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

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

119 Gallagher and David (above n 72) 29.

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

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

122 *ibid* 2.

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

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

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

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

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

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



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

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

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

¹²⁹ *ibid* 59, 81.

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

¹³¹ Draft Elements art M.

¹³² Draft Elements arts G and I.

¹³³ UNCLOS art 33.

¹³⁴ *Travaux préparatoires* 496.



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

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

Despite reservations from some states in the IMO drafting groups that the Interim Measures Circular was potentially inconsistent with UNCLOS, Pedrozo claims that 'paragraph 16 makes clear that all States have jurisdiction over a ship without nationality', entitling states to take enforcement action if unsafe practices associated with the trafficking or transport of migrants is found.¹³⁷ Attached to the chapter are 'proposed provisions to combat the smuggling of migrants', providing draft provisions to insert in the preamble and definitions, and also 'article xx: smuggling of migrants by sea'.¹³⁸ These provisions are almost identical to the rolling text at the fourth session of the negotiations from 28 June to 9 July 1999.¹³⁹ The minor differences in wording and formatting reflect they were not extracted from the draft protocol, but likely produced beforehand.

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

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

136 Pedrozo (above n 128) 64-5.

137 *ibid* 61.

138 *ibid* 66-72.

139 Travaux préparatoires, 496-8.

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



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

5. Recent Practice Subsequent to the Migrant Smuggling Protocol

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

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

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

142 Boister (above n 11) 26.

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

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

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

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

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

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



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

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

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

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

150 Council Decision 2015/778 para. 7.

151 Council Decision 2015/778 art 2.

152 UNSC Res 2240(2015) para. 5.

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

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



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

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

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

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

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

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

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

159 Kelly (above n 14) 453.

160 *ibid* 522.

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

162 Guilfoyle (above n 60) 95.



6. Conclusion

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

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

163 Bo (above n 154) 1.

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

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

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

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



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