COMBATING TRANSNATIONAL CRIME AT SEA: THE UNFINISHED INTEGRATION BETWEEN UNTOC AND UNCLOS

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1. The criminal exploitation of the «openness and opportunities of globalization» is perceived by the international community as a growing menace to the world's security and stability[1]. Among others, States are concerned about the proliferation of transnational criminal activities occurring at sea. Piracy off the coasts of Somalia and in the Gulf of Guinea, trafficking in drugs, weapons, and human beings; illegal, unreported and unregulated (IUU) fishing that depletes the oceans; these are some of the main challenges faced by States in ensuring maritime security. In addition to these, there are more recent threats, such as the Houthis attacks against private ships crossing the Red Sea[2]. As the United Nations (UN) Security Council has recently recognised[3], the political and economic consequences of transnational

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[1] UN Secretary-General Kofi A. Annan, *Address at the Opening of the Signing Conference for the United Nations Convention against Transnational Organized Crime*, Palermo, 12 December 2000.

[2] For more information, see *Conflit au Moyen Orient: les Etats-Unis et le Royaume-Uni frappent les houthistes au Yémen*, Le Monde, 12 January 2024 (available online); *Middle East Crisis Houthis Claim Lethal Attack on Commercial Ship Near Yemen*, The New York Times, 6 March 2024 (available online). While some of these attacks have been performed from land, others have been entirely conducted at sea. For more information, see *Update: Houthi rebels seize car carrier with 25 crew on board*, Sea Trade Maritime News, 20 November 2023 (available online).

[3] UN Security Council Resolution 2722, adopted on 10 January 2024, S/RES/2722 (2024), see para. 2 and 3.

maritime crimes are suffered not only by the respective flag States, but also by the international community as a whole.

The main treaty addressing activities taking place at sea, the 1982 United Nations Convention on the Law of the Sea ('UNCLOS')[4], contains some provisions that address security concerns of States. The rules on piracy are perhaps the most prominent example[5], but one can find security concerns also at the basis of rules dealing with innocent passage in the territorial sea[6] and even other UNCLOS provisions[7]. These norms, however, are mostly focused on individual criminal activities, and do not seem to consider that maritime crime is often organised at the transnational level and that there are significant linkages between different criminal activities[8]. More importantly, these provisions generally attribute powers on specific States to take measures against suspected criminals but do not oblige States to do so. Combating crime, therefore, seems dependant on the discretion of States. Finally, these provisions are mostly silent on how this law enforcement should take place. Law of the sea, therefore, goes only some way towards providing an international normative system to successfully address maritime security.

A more promising framework seems to be provided by transnational criminal law[9]. Since the end of the last century, States have intensively worked to address the challenges brought by the proliferation of criminal offences put in place by transnational criminal networks, at the regional and global levels[10]. Following the adoption of

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[4] *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS). To date, 169 State and the European Union are parties to the Convention.

[5] UNCLOS, articles 100-107. In scholarship, among others, see R. GEIß, A. PETRIG, *Piracy and Armed Robbery at Sea*, Oxford, 2011.

[6] See UNCLOS, articles 17-21.

[7] Just to provide some examples, see the UNCLOS rules dealing with illicit traffic in narcotic drugs and psychotropic substances (article 108), the exercise of enforcement powers with regard to the protection of the marine environment (articles 218-220) and the regime regulating the prompt release of vessels (article 292). G. ANDREONE, G. BEVILACQUA, G. CATALDI AND C. CINELLI, *Insecurity at sea: Piracy and other risks to navigation*, Napoli, 2013.

[8] J. MARTIN, *A Transnational Law of the Sea*, in *Chicago Journal of International Law*, 2021, 419 ss., 421 and 441.

[9] For a theoretical analysis on the concept and definition of "transnational criminal law" and "transnational crime" in the international legal culture, see, among others, V. MITSILEGAS, *Transnational Criminal Law*, in J.M. SMITS, J. HUSA, C. VALCKE, AND M. NARCISO, *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2023, 514-520; N. BOISTER, *Transnational Criminal Law?*, in *European Journal of International Law*, 2003, 953-976.

[10] For an activity led by one State see the 2003 United States *Proliferation Security Initiative* (PSI), White House, National Strategy to Combat Weapons of Mass Destruction (WMD),

treaties concerning specific maritime threats, which included drug trafficking[11] and maritime terrorism[12], in 1997 the UN General Assembly established an intergovernmental *ad hoc* committee[13] for elaborating a normative framework generally addressing the proliferation of transnational organized crime by air, land and sea. The process led to the adoption of the United Nations Convention on Transnational Organized Crime ('UNTOC'), signed in Palermo in 2000 and entered into force in 2003[14]. At February 2025, there are 190 States parties to the treaty, which is today considered as the «centrepiece of the legal regime against transnational organized crime»[15]. Aimed at fostering a high level of concertation between national criminal policies, UNTOC targets both generic and specific areas of organized crime, thus building a multifaceted treaty regime composed of a 'mother' Convention and three additional Protocols[16].

UNTOC came into existence almost twenty years after the adoption of UNCLOS and six years after its entry into force. By the time UNTOC was negotiated and drafted, States were well aware that maritime spaces were already regulated by a consolidated legal regime[17]. UNCLOS codified law of the sea rules that had been

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December 2002, p. 2. On the PSI see, among others, S. LOGAN, *The Proliferation Security Initiative: Navigating the Legal Challenges*, in *Journal of Transnational Law and Policy*, 2005 253 ss.; M. BYERS, *Policing the High Seas: The Proliferation Security Initiative*, in *The American Journal of International Law*, 2004, 526 ss.

[11] See the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (adopted 20 December 1988, entry into force 11 November 1990) 1582 UNTS 95. To date, 192 States are Parties to the Treaty.

[12] See the Convention for the Suppression of *Unlawful Acts against the Safety of Maritime Navigation* (adopted 10 March 1988, entry into force 1 March 1992) 1678 UNTS ('SUA'), signed in Rome in 1988, and entered into force in 1992. To date, 166 States are Parties to the Treaty.

[13] UNGA, Transnational Organized Crime, Res. 53/111 of 20 January 1999. This work of the *Ad Hoc Committee*, in turn, was based on the previous efforts made by a UN intergovernmental group of experts, established by the UN General Assembly in 1998 (See UNGA, Follow-Up to the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, Res. 52/85 of 30 January 1998).

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

[15] A. GALLAGHER, F. DAVID, *The International Law of Migrant Smuggling*, Cambridge, 2014, 36. On the history and the formation of UNTOC, see I. TENNANT, *Fulfilling the Promise of Palermo? A Political History of the UN Convention Against Transnational Organized Crime*, in *Journal of Illicit Economies and Development*, 2021, 53 ss.; S. FORLATI, *Organized Crime: the Road to the Palermo Convention*, in N. BOSTER, S. GLESS, F. JEBSBERGER, *Histories of Transnational Criminal Law*, Oxford, 2021, 178-187.

[16] See section 2.

[17] With regard to the concept of 'legal regime', among others, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International*

developed in the previous centuries, such as freedom of navigation, flag State jurisdiction, and sovereignty of coastal States and contributed to the crystallization of new rules of international law, such as the regime of the exclusive economic zone. At the same time, it was evident that UNCLOS provisions did not address crimes at sea, except cursorily. It was, therefore, necessary to complement the UNCLOS regime, without at the same time compromising the well-established order for the oceans provided by this treaty. As far as maritime crime was concerned, the purpose in drafting UNTOC was to make it complementary with UNCLOS and fill the gaps that the later left.

This article will focus on the legal relationship between UNTOC and UNCLOS and will examine whether this result has been achieved, and to what extent. The analysis is premised upon a systemic understanding of international law, that does not allow one regime to entirely rule out the application of another. In the first place, it will consider UNTOC and will discuss the extent to which this legal instrument is open to norms deriving from other legal regimes, in particular the law of the sea (Section 2). It will then turn to the law of the sea and its main legal instrument, UNCLOS, and will conduct a specular analysis (Section 3). Bringing the two together, it will discuss how specific UNTOC and UNCLOS rules interact and whether they strengthen each other or, on the opposite, hinder the applicability of rules coming from the other regime (Section 4). The article will end with some conclusions concerning the future of the fight against transnational organized crime at sea through the lens of the regime interaction between UNTOC and UNCLOS (Section 5).

Before delving into this discussion, it is necessary to highlight three premises underlying the proposed legal research. The first is that, for the most part, maritime crime does not exist at sea only but has its root causes on land. It is widely recognised that, unless related activities taking place on land before, during, and after crime at sea are faced, enforcement activities at sea alone will be unable to combat maritime crime. The second is that law can go only to a certain extent in addressing criminal activities, be they on land or at sea. In order to

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Law, Report of the Study Group of the International Law Commission, Finalized by MARTTI KOSKENNIEMI, UN Doc A/CN.4/L.682, 13 April 2006 (hereinafter 'Koskenniemi Report'), 65-99; A. UNDERDAL and O.R. YOUNG, *Regime Consequences: Methodological Challenges and Research Strategies*, Cham, 2004; S. KRASNER, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *International Organization*, 1982, 185 ss.; J. GERARD RUGGIE, *International Responses to Technology: Concepts and Trends*, in *International Organization*, 1975, 557 ss.

properly fight this phenomenon, it is necessary also to address the root causes, focusing on the political, economic, and social circumstances that make crime thrive; a legal framework, however complete, cannot by itself alone address criminal activities.

Finally, the third premise is semantic in nature, and concerns the use of terms such as 'transnational crime' and 'organised crime' in the prosecution of this work. While aware that the scope of transnational criminal law extends even beyond the UNTOC provisions, this study will focus exclusively on the analysis of this international treaty with reference to transnational criminal activities committed at sea. Consequently, the aforementioned terms are to be understood in full accordance with the meaning they acquire within the UNTOC regime. Keeping in mind these three caveats, we will now turn to the legal relationship between the two treaties, UNTOC and UNCLOS.

2. Inspired «by security reasons»[18], the main purpose of UNTOC is to promote a regime of international cooperation to combat transnational criminal activities[19]. To this end, it builds an elaborate legal system composed of an umbrella treaty and three additional Protocols[20]. The 'mother' Convention sets general provisions aimed at harmonising State national legislations in the fight against transnational organised crime. In so doing, the main Treaty pursues three fundamental objectives. First, it determines the scope of application of the UNTOC regime; second, it sets duties upon States to criminalise serious transnational offences, as defined in article 2[21]; third, it creates a regime

[18] V. MITSILEGAS, *Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, in *Indiana Journal of Global Legal Studies*, 2012, 3 ss., 6.

[19] Article 1 UNTOC.

[20] C. ROSE, *The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and its Protocols*, in *American Journal of International Law*, 2020, 51 ss.; N. BOISTER, *The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A Toolbox Rarely Used*, in *International Criminal Law Review*, 2016, 39 ss.

[21] Article 1, lett. b), UNTOC defines a «serious crime» as: «conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty».

of State cooperation for the judicial prosecution of such crimes[22]. Against this framework, the three additional Protocols deal with specific types of transnational criminal activities. The first Protocol regulates the prevention, suppression and punishment of the trafficking of persons, especially women and children ('Trafficking Protocol')[23]. The second Protocol addresses the smuggling of migrants by air, land and sea ('Smuggling Protocol')[24]. Lastly, the third Protocol concerns the illegal manufacturing and trafficking of firearms ('Firearms Protocol')[25]. The interrelation between these Protocols and the 'mother' Convention is provided by article 37 UNTOC, pursuant to which the latter are not to be considered as stand-alone instruments; on the opposite, they are integral part of the UNTOC regime. As a matter of fact, States which did not ratify UNTOC cannot join any of the three Protocols, and their provisions shall be interpreted together with those of the 'mother Convention'.

Since the beginning of UNTOC negotiations, States paid particular attention to the potential interactions occurring between its rules and other international norms, whether general or particular[26].

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[22] From a technical standpoint, although the majority of the UNCTOC provisions has a self-executing nature, in some cases the Treaty provides programmatic rules, leaving States free in deciding how to implement them within their national legal systems. A very clear example of a not self-executing UNTOC rule is article 15 UNTOC, dealing with State jurisdiction over transnational organized crimes. While articles 15, para. 2 and 15, para. 3 are mandatory, Articles 15, para. 2 and 15, para. 4 are to be considered as optional. In this regard, see D. MANDRIOLI, *Between the Principle of Legality and the Renvoi to International Treaties: the Italian Jurisdiction over Transnational Crimes Committed Beyond National Territory*, in *Italian Yearbook of International Law*, 2022, 481 ss.

[23] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, signed in 2000, entered into force in 2003. To date, 178 State are Parties to the Protocol.

[24] *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, signed in 2000, entered into force in 2004. To date, 150 States are Parties to the Protocol. To more in this regard, see A. SPENA, *Smuggled Migrants as Victims? Reflecting on the UN Protocol against Migrant Smuggling and on Its Implementation*, in *Brill Research Perspectives in Transnational Crime*, 2021, 43 ss.

[25] *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*, signed in 2001, entered into force in 2005. To date, 119 States are Parties to the Protocol.

[26] UN Legislative Guide, para. 22. I. TENNANT, *The Promise of Palermo: a Political History of the UN Convention on Transnational organized Crime*, in *Global Initiative against Transnational Organized Crime Report*, 2020, 2-3 (available online); F. MADSEN, *The Historical Evolution of the International Cooperation against Transnational Organised Crime: An Overview*, in P. HAUCK and S. PETERKE (eds.) *International Law and Transnational Organized Crime*, Oxford, 2016, 3.

Comprehensibly, the drafters of UNTOC, being well-conscious that the adoption of such a vast and ambitious project could lead to potential normative conflicts, worked to establish a treaty capable of strengthening the pre-existing international legal framework[27].

From a systemic perspective, the UNTOC regime presents a high level of openness to the international legal system. Indeed, many UNTOC provisions explicitly require to be read «without prejudice to»[28] or «in accordance with»[29] the «norms of general international law»[30] and to the «applicable international conventions»[31]. From this perspective, the drafters strongly relied on the principle of systemic integration[32], according to which the process of treaty interpretation needs to take into account «any relevant rules of international law applicable in the relations between the parties»[33].

The intention to build an 'open normative system' is particularly evident in respect of interaction of UNTOC with human rights law and the law of the sea. That is because many UNTOC rules deal with the prevention and repression of specific transnational criminal activities, such as the smuggling of migrants and the trafficking of persons, the commission of which often occurs at sea[34] and intrinsically undermines human dignity[35].

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[27] A clear example of the capacity of UNTOC to fill the gaps in the pre-existing legal framework is the text of the Trafficking Protocol, dealing with human trafficking. Indeed, before UNTOC, this topic was widely addressed by many international conventions; however, none of these treaties provide a definition of 'human trafficking'. In this regard, the Trafficking Protocol has completed the pre-existing legal framework with the definition at article 3, lett. a). This topic is analyzed in depth by S.X. ZANG, *Progress and Challenges in Human Trafficking Research: Two Decades after the Palermo Protocol*, in *Journal of Human Trafficking*, 2022, 4 ss.; G. BEVILACQUA, *Criminalità e sicurezza in alto mare*, Napoli, 2018, 86-90; E. PAPASTAVRIDIS, *The Interception of Vessels on the High Seas*, Oxford, 2014, 261-262; N. KLEIN, *Maritime Security and the Law of the Sea*, Oxford, 2011, 126-127.

[28] UNTOC, article 15, para. 6; Trafficking Protocol, article 11, para. 3; Smuggling Protocol, article 11, para. 3.

[29] Smuggling Protocol, article 7, para. 7.

[30] UNTOC, article 15, para. 6.

[31] Trafficking Protocol, article 11, para. 3 and Smuggling Protocol, article 11, para. 3.

[32] The principle is analyzed in depth for example by P. MERKOURIS, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Cham, 2015; Koskenniemi report, 206-243.

[33] *Vienna Convention on the Law of Treaties* (adopted 23 May 1968, entry into force 27 January 1980) 115 UNTS 311 art 34 (VCLT), article 31, para. 3, lett. c).

[34] A. PROELSS and T. HOFMANN, *Law of the Sea and Transnational Organized Crime*, in P. HAUCK and S. PETERKE, *International Law and Transnational Organized Crime*, Oxford University, 2016.

[35] A. GALLAGHER, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, in *Human Rights Quarterly*, 2001, 975 ss.

As far as human rights are concerned, article 14 Trafficking Protocol and article 19 Smuggling Protocol contain a general 'safeguard clause', pursuant to which any treaty provision shall not affect the rights, the obligations and the responsibilities of States and individual provided by international humanitarian law and human rights law[36]. According to the ordinary meaning of their terms, this clause ensures that the UNTOC Protocols operate in full harmony with existing human rights instruments[37]. The adopted approach – explicitly declared even in the *travaux préparatoires* of the treaty[38] – imposes upon States Parties the duty «to pay particular attention to how the Organized Crime Convention interacts with international human rights law»[39].

In a similar vein, UNTOC provisions need also to be read together with the law of the sea; as mentioned above, these two fields are «closely related to each other owing to the great importance of shipping and navigation as means of international transport»[40]. However, it is only the Smuggling Protocol[41] that contains provisions which expressly address the maritime component of the crime (smuggling of persons). The 'mother Convention' and the other two Protocols, on the contrary,

[36] UNTOC, Arts. 14 and 19 Trafficking Protocol and Smuggling Protocol: «1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein. 2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination». The text of the two provisions fully coincides.

[37] Such an interpretation is also confirmed by the reading of many other UNTOC rules, which explicitly call upon respect for human rights law. Indeed, see Trafficking Protocol, article 8, para. 6, which states that: «This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons». Similarly, Smuggling Protocol, article 16, para. 1: «In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment».

[38] See Interpretative notes for the official records (*travaux preparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 3 November 2000 A/55/383/Add.1, 15 and 21.

[39] UN Legislative Guide, para. 22.

[40] A PROELSS and T. HOFMANN, op. cit., 446.

[41] This is evident also by its title, which mention smuggling "by sea".

do not contain any provisions explicitly mentioning the maritime dimension of the crimes addressed by them. Nonetheless, since the UNTOC regime addresses transnational organised crime generally, it is to be inferred that their provisions could also apply to crimes being committed, in whole or in part, at sea.

Looking more closely at the Smuggling Protocol, it is worth noting that it lacks a generic safeguard clause dealing with the law of the sea such as to the one on human rights. That being said, article 7 anyway requires States to cooperate to prevent and suppress the smuggling of migrants «in accordance with international law of the sea»[42]; again, article 9 Smuggling Protocol imposes upon them not to interfere with the rights and obligations of coastal States granted by customary law of the sea[43].

Beyond this more straightforward way, the UNTOC regime employs a more indirect technique to harmonize its provisions with the law of the sea. This is achieved through the frequent recourse to some specific legal terms, such as 'freedom of navigation'[44], 'flag State'[45] and 'coastal State'[46], whose definitions are not provided by the UNTOC. Clearly, their interpretation must follow the meaning they have within their international legal regime of origin, namely the law of the sea. Indeed, these terms have a well-recognized «meaning in customary international law, to which the parties can therefore be taken to have intended to refer»[47]. More importantly, by referring to the traditional distinction between flag and coastal States and to the maritime zones established by UNCLOS, UNTOC incorporates them and their relevant regulation into transnational criminal law.

From all that has been said so far, one may reasonably come to the conclusion that UNTOC is to be considered as a conventional regime capable of communicating with the pre-existing international norms. Such rules, therefore, acquire a fundamental role in the process of

[42] Smuggling Protocol, article 7. In scholarship, see F. ATTARD, *Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas*, in *Journal of Maritime Law and Commerce*, 2016, 219 ss.

[43] Smuggling Protocol, article 9, para. 3: «Any 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 with the international law of the sea».

[44] Smuggling Protocol, article 8.

[45] *Ibidem*.

[46] Smuggling Protocol, article 9, para. 3.

[47] Koskenniemi report, 235.

integration and definition of the scope of application of UNTOC provisions.

3. The law of the sea, as traditionally understood, includes «the rules and principles that bind States in their international relations concerning maritime matters»[48]. Initially conceived to strengthen arguments in favour of the freedom of navigation against claims for the territorialisation of the oceans, it has now developed into a complex and well-articulated regime that addresses issues as diverse as the protection of the marine environment, the fight against piracy, the protection of underwater cultural heritage, the exploitation of the resources of the seabed and the conduct of scientific research[49].

The quasi-constitutional nature[50] of UNCLOS is further reflected when assessing the content of this regime. From a normative perspective, the law of the sea contains two separate sets of rules which are conceptually and ontologically different. The first includes those provisions that can be defined as 'structural'[51], whilst the second includes all substantial rules[52].

Structural rules specific to the law of the sea are of particular relevance in assessing the relationship between this regime and UNTOC, because they affect the legal premises upon which its duties are based. These rules are much more complex than analogous rules

[48] R. CHURCHILL, V. LOWE and A. SANDER, *The Law of the Sea*, Manchester, 2022, 1.

[49] T. SCOVAZZI, *The Evolution of International Law of the Sea: New Issues, New Challenges*, in *Collected Courses of the Hague Academy of International Law* (286), 2001, 39, provides a captivating account of the historical evolution of the legal framework. The significance of the 10-year long Third United Nations Conference on the Law of the Sea for the development of the law of the sea in its present form is discussed in T. TREVES, *Codification du droit international et pratique des Etats dans le droit de la mer*, in *Collected Courses of the Hague Academy of International Law* (223), 1990.

[50] In literature, the 'quasi-constitutional nature of UNCLOS is in-depth analyzed, among others, by R BARNES, *The Continuing Vitality of UNCLOS*, in J. BARRETT and R. BARNES (eds.), *The United Nations Convention on the Law of the Sea: A Living Instrument*, London, 2016, 459-489; A. ELFERINK, *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, Cham, 2005; A. BOYLE, *Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change*, in D. FREESTONE, R. BARNES and D. ONG, *The Law of the Sea. Progress and Prospects*, Oxford, 2006, 40 ss.

[51] We avoid speaking of procedural rules, since this expression may bring into the reader's mind law-making rules, such as those concerning the sources of law, procedures through which new norms are adopted or the organs or institutions to which this function is devolved. See P. ALLOTT, *Power Sharing in the Law of the Sea*, in *American Journal of International Law*, 1983, 1 ss., 17, where he considers that sea areas have a 'structural character'.

[52] S.V. SCOTT, *The LOS Convention as a Constitutional Regime for the Oceans*, in A. ELFERINK (ed.), *Stability and Change in the Law of the* Sea, op. cit., 15-16, considers that only the former can be properly considered parts of UNCLOS 'constitutional regime'.

that apply on land, where the basic rule, at least up to now, has been the exclusivity of State sovereignty[53]. Their complexity derives from the fact that apart from a narrow band of territorial waters, the seas are not subject to the exclusive sovereignty of one State, to the exclusion of all others. Rather, they are divided into different maritime zones, each accommodating jurisdictional rights of more than one State through a shifting paradigm[54]. Structural law of the sea rules, therefore, allocate power among States to rule – that is, to regulate and enforce – in the different zones and for different purposes[55]. Such rules include those concerning the existence and breadth of maritime zones, as well as those that assign jurisdiction to the flag State, the coastal State, the port State, and occasionally to other States. As will be seen, these rules have had an impact upon specific UNTOC provisions[56].

Turning to the general relationship between UNCLOS and other conventions, article 311 UNCLOS addresses conflicts between the Convention and other treaties, distinguishing between different types of treaties[57]. Firstly, UNCLOS prevails over the 1958 Geneva Conventions[58]. Secondly, UNCLOS permits *inter se* modifications – that is, treaties agreed by some of its parties – subject to three conditions. The modification shall not prevent effective execution of the object and purpose of UNCLOS, it must not affect the application of its basic principles, and it must not affect the rights and obligations

[53] Although challenges to sovereignty and its absolute nature are gathering momentum in international legal discourse and the practice of global governance institutions, it is still very much the case that any regulation applicable within a State's territory still needs to be mediated through one, and one only, State: the State having sovereignty. See J. L. COHEN, *Globalization and Sovereignty*, Cambridge, 2012. The prominence of sovereignty results in particular from debates relating to instances where sovereignty itself runs the risk of being set aside, as in the case of failed States and States against which an intervention is being discussed. For instance, the territorial integrity of the State has been consistently affirmed in Security Council resolutions concerning Somalia (e.g., UNSC Res. 2158 (29 May 2014) UN Doc. S/RES/2158, second preambular para.) and Syria (e.g., UNSC Res 2139 (22 February 2014) UN Doc. S/RES/2139, second preambular para).

[54] M. GAVOUNELI, *Functional Jurisdiction in the Law of the Sea*, Leiden, 2007.

[55] As Allott noted (see note 10), UNCLOS «is a massive structure of powers» which are carefully "fettered" by power modifiers. In this respect, Allott distinguishes between 'freedom,' which «implies the absence of legal control» and 'power,' which «implies the absence of unfettered discretion».

[56] Infra, Section 4.

[57] On the interaction between UNCLOS and other international law regimes, see generally A. Boyle, op. cit., 40.

[58] UNCLOS, article 311, para. 1.

of third States[59]. Thirdly, parties cannot amend the principles of article 136 relating to the common heritage of humanity[60]. Fourthly, article 311 addresses the relationships between UNCLOS and other pre-existing or subsequently-enacted treaties. In this respect, article 311 distinguishes treaties expressly provided for in UNCLOS provisions, from all other treaties.

On the one hand, all treaties which are expressly preserved or permitted by specific provisions are not affected by the conclusion of UNCLOS[61]. Notably, this provision applies both to treaties predating UNCLOS, as well as to treaties concluded afterwards[62]. References to other treaties are common in UNCLOS. By way of example, articles 92, para. 1 and 110, para. 1 preserve treaties that attribute jurisdiction, including enforcement jurisdiction, over vessels sailing on the high seas to States other than the flag State[63]. But reference to other norms of international law is to be found also in some of the fundamental provisions allocating power at sea. UNCLOS provides that «[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law»[64], and that «[f]reedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law»[65]. Reference to 'other rules of international law' in these provisions arguably includes reference to duties arising out of legal instruments to combat transnational organised crime, first and foremost UNTOC. These duties could therefore be considered as prevailing over the UNCLOS provisions in the measure in which they deviate from the rights and duties provided for in this Convention. On the other hand, UNCLOS: «shall not alter the rights and obligations of States Parties which arise

[59] UNCLOS, article 311, para. 3. According to UNCLOS, article 311, para. 4, there is a duty of notification in this respect.

[60] UNCLOS, article 311, para. 6. The discussion of this provision, including whether article 136 of UNCLOS is part of *jus cogens*, is beyond the scope of this paper. See J. HARRISON, *Making the Law of the Sea*, Cambridge, 2011, 133-134; K. BASLAR, *The Concept of the Common Heritage of Mankind in International Law*, Leiden, 1998.

[61] UNCLOS, article 311, para. 5.

[62] M. NORDQUIST, S. ROSENNE and L. SOHN (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume V*, Leiden, 1989, 243: «[a]lthough doubts were expressed as to the necessity for this paragraph, its presence has the effect of precluding any argument of possible inconsistency between the *lex generalis* of article 311 and the *lex specialis* of the other articles».

[63] For other examples see M. NORDQUIST, S. ROSENNE and L. SOHN (eds.), op. cit., para. 311.8.

[64] UNCLOS, article 2, para. 3.

[65] UNCLOS, article 87, para. 1.

from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention»[66].

At first sight, this provision might be taken to provide for the prevalence of obligations contained in other instruments[67]. However, the reference to «agreements compatible» with UNCLOS seems to point to the opposite direction: that UNCLOS prevails over all agreements that are not compatible with it, or which prejudice the rights and duties deriving from UNCLOS[68]. Furthermore, the language used in this provision demands a determination of the level of analysis. Does compatibility refer to the two norms or to the two treaties? While both readings are possible, the reference to the 'object and purpose' in the following paragraph seems to point towards an assessment of the compatibility between the treaties, rather than their provisions, or at least between the provision of the other treaty and UNCLOS as a unitary instrument. As long as the other treaty does not go against the object and purpose of UNCLOS, its provisions will prevail.

However, if the other treaty or one of its provisions frustrate the objectives of UNCLOS, the latter will prevail. This conclusion requires an assessment of the 'object and purpose' of UNCLOS, since its contrariety with these (rather than with the content of any specific provision) that would render the other treaty non-applicable. In the case of a sizeable and complex treaty such as UNCLOS, it is difficult to identify a single object and scope. Multiple interests were advanced during the negotiations and while it is certain that navigation, access to resources, and the protection of the marine environment were key aspects of the negotiating process, they cannot be considered as representing the entire object and scope of UNCLOS[69]. Furthermore, any of the other issues that were debated and agreed upon by the drafters cannot be done so either[70].

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[66] UNCLOS, article 311, para. 2.

[67] VCLT, article 30, para. 2.

[68] In this regard, see M. NORDQUIST, S. ROSENNE and L. SOHN (eds.), op. cit., 243.

[69] UNCLOS Preamble.

[70] The fact that UNCLOS was a package deal, achieved through a balancing of different interests and the sacrifice of some individual positions in order to obtain a binding legal instrument, strengthens the conclusion that there is no single substantial issue that could be considered as its main object. The remark of the president of UNCLOS III at the closing of the negotiations that «we celebrate human solidarity and the reality of interdependence which is symbolised by the United Nations Convention on the Law of the Sea» goes in the same direction, as do the declarations of States during the signature of the final text (Tommy T.B. Koh, 'A Constitution for the Oceans' available online).

Rather, the object of UNCLOS is a broader one: providing a stable jurisdictional framework and the consolidation of the rule of law at sea. UNCLOS Preamble opens by mentioning:

«the desire to settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world»; and subsequently refers to the: «desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment»[71].

This objective is not subject-specific, but embraces all issues relating to the law of the sea. As a consequence, agreements that further the rule of law and respect the division of jurisdictional competences established within UNCLOS should be considered compatible with this Convention for the purposes of article 311, para. 2, and their provisions may prevail over those of UNCLOS. This is the case of UNTOC, as will be discussed in the next section.

4. The above analysis has shone light upon the fact that UNTOC and UNCLOS have not been conceived as self-contained regimes. Both the treaties contain clauses that purport to regulate the relationship with other international rules. In addition, UNTOC, having been adopted after UNCLOS, contains some explicit provisions considering the legal framework created by the latter. Furthermore, there is no evidence of a will, on the parts for the drafters, to create wilful conflicts with other regimes. On the opposite, there is convincing evidence that the two treaties – and the two legal regimes based on them – are mindful of the existence of the 'other field'. This is true at both the macro and the micro level.

At the macro level, the aim and objective of the two regimes are certainly not incompatible. On one hand, the scope of UNCLOS is to «settle […] all issues relating to the law of the sea»[72], albeit it is well known that there are issues that have been left out, as the final paragraph

[71] UNCLOS Preamble.
[72] UNCLOS Preamble.

of the UNCLOS preamble confirms. On the other hand, the main purpose of UNTOC is to promote international cooperation among the parties in the fight against transnational organised crime. This aim is not frustrated by UNCLOS, which also contains legal rules on action of States to address criminal activities at sea and the need to coordinate their actions in this respect[73]. Put differently, their objects and purposes, albeit different, are complementary.

At the micro level, various UNTOC and UNCLOS provisions are in dialogue with each other. The UNTOC regime makes large use of basic tenets of the law of the sea codified in UNCLOS, while at the same time further clarifying and developing some of the concepts and duties that are just sketched in UNCLOS. This is particularly the case with respect to the Smuggling Protocol, which is the one instrument of the UNTOC regime that more closely deals with (a particular kind of) transnational crime at sea. In many cases the interaction is smooth, with UNTOC using basic law of the sea concepts in accordance with their regulation in UNCLOS. In a few cases, UNTOC goes even one step further, helping to clarify rather vague terms or rules included in the UNCLOS.

In yet other cases, however, there may be clashes between specific provisions of UNCLOS and UNTOC. Finally, and perhaps most importantly, the interactions between them do not fill all the gaps, but still leave some aspects that need to be completed.

4.1. The complementarity between UNCLOS and UNTOC emerges in particular when dealing with the allocation of jurisdictional powers over ships involved in transnational criminal activities. As far as enforcement jurisdiction is concerned, UNTOC relies very much on the scheme for the distribution of coercive powers incorporated in the UNCLOS rules on maritime zones and the jurisdiction of the flag State. For example, as provided by the Smuggling Protocol, a State Party suspecting a vessel of migrant smuggling may notify the flag respective State, request confirmation of registry, and, if confirmed, seek authorization to take appropriate measures[74].

[73] In this regard, many articles of UNCLOS explicitly state States' duties of cooperation. See UNCLOS, articles 87, para. 2; 108; 118; 123; 129; 138; 143 and 150. As it is known, the ITLOS has recently dealt with the analysis of these duties (see Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Reports, 21 May 2024, paras. 294-321). On the legal nature of duties of cooperation, see R. WOLFRUM, International Law of Cooperation, in *Encyclopedia of Public International Law*, 1995, available online.

[74] Article 8, para. 2 Smuggling Protocol.

Looking at this provision, it emerges that activities of enforcement jurisdiction over ships enjoying freedom of navigation must be exclusively exercised by the flag State (or by other States with the prior authorization of the former). Against this background, UNTOC poses itself in full compliance with article 92, para. 1 UNCLOS, which provides for the exclusive jurisdiction of the flag State over its vessels that sail on the high seas. At the same time, it promotes a regime of cooperation among the parties, in order to prevent that the exclusivity of flag State jurisdiction could favour the commission of transnational crimes occurring beyond territorial waters, that could go unpunished.
The interactions between UNCLOS and UNTOC may sometimes go even further, with UNTOC clarifying rather vague UNCLOS provisions, *de facto* filling the gaps left by the latter. This is the case, for example, of the UNTOC provisions dealing with law enforcement against vessels suspected to smuggle migrants, which do not fly any flag, pursuant to which a State Party may board a vessel without nationality if suspected of migrant smuggling and take appropriate action if evidence is found[75].

According to this provision, UNTOC makes explicit what UNCLOS left implicit, namely that States may enforce their jurisdiction over foreign ships not flying any national flag. Indeed, except for article 110 UNCLOS – which mentions flagless ships as potential targets of the right to visit of States on the high seas[76] – no other UNCLOS provision precisely deals with the allocation of States' jurisdiction over flagless vessels[77], thus leaving this topic quite open for debate[78]. From

[75] Smuggling Protocol, article 8, para. 7: «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 […] 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».

[76] UNCLOS, article 110, para. 1, lett. d).

[77] Beyond Article 110, the expression «ships without nationality» is not present in any other UNCLOS provision, except for Article 92, para. 2, where it is clarified that a ship flying two flags is assimilated to a vessel without nationality.

[78] The issue concerning State jurisdiction over flagless ships is largely discussed in scholarship. In the view of some authors (among others, see A. ANDERSON, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law*, in *Journal of Marine and Commercial Law*, 1982, 323 ss.; M. MCDOUGAL, *The Maintenance of Public Order at Sea and the Nationality of Ships*, in *The American Journal of International Law*, 1960, 25 ss.), the absence of the nationality of the ships is a so dangerous threat to the tightness of the regime of governance at sea to be *universally* persecuted by every State. From this perspective, the absence of flag State's protection means that every State may enforce its jurisdiction over stateless vessels. According to other scholars (see R. CHURCHILL, V. LOWE AND A. SANDER, *The Law of the Sea*, op. cit., L. LUCCHINI and M. VOELCKEL, *Droit de la mer*,

this perspective, one may say that the UNTOC regime takes not one but two 'steps forward' if compared to UNCLOS. First, it expressly allows foreign States to «take appropriate measures» against ships without nationality involved in the smuggling of migrants[79]; second, the scope of this power is not limited to the high seas, as in the case of article 110 UNCLOS, but potentially applies in other parts of the sea[80].

Decision by Italian judges, for example, provide evidence of the synergy between UNCLOS and UNTOC, in allowing for the exercise of jurisdiction by the State vis-à-vis flagless vessels. In a 2014 judgment, the Italian Court of Cassation[81], based on the conceptual premise that the seas cannot be considered as a place where no state may exercise its jurisdiction, but rather that the rule of law applies at sea, as it does on land, eventually ruled that any State may take action against a flagless vessel if it has a legitimate interest in doing so. This legitimate interest can well derived, the Court of Cassation noted, from the powers attributed to the State under article 8 of the Smuggling Protocol[82].

The interactions between UNTOC and UNCLOS are not limited to the substantive provisions of the two treaties but could also concern procedural aspects. Unlike UNCLOS, UNTOC lacks a compulsory mechanism for the resolution of international disputes concerning its

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Paris, 1990, 82), the non-applicability of the regime of flag State jurisdiction does not allow any State to assert jurisdiction over flagless ships: only those States that have a jurisdictional nexus with them may enforce their sovereign powers.

[79] In this regard, see T. COVENTRY, *Seizing Stateless Smuggling Vessels on the Mediterranean High Seas*, in *Leiden Journal of International Law*, 2023, 925 ss., 941: «Under this account of state criminal jurisdiction, the term 'appropriate measures' in Article 8 (7) of the Migrant Smuggling Protocol arguably extends the scope of enforcement action permitted to the states parties beyond the UNCLOS right of visit over stateless vessels».

[80] On the same advice, see T. COVENTRY, *Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels*, in *Maritime Safety and Security Law Journal*, 2019, 5 ss., and F. ATTARD, *Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?*, in *Journal of Maritime Law and Commerce*, 2016, 230 ss.

[81] Italian Court of Cassation, Judgement of 23 May 2014, n. 36052. The position assumed by the Italian Court has been consolidated in its many subsequent decisions. Just to provide some examples, see judgements n. 15556 of 7 December 2021 and n. 31652 of 2 July 2021, (both the decisions are analysed in D. MANDRIOLI, *La giurisdizione penale extra-territoriale e la Convenzione di Palermo: analisi del nuovo orientamento assunto dalla Corte di cassazione a partire dalla sentenza Tarek*, in *Quaderni di SIDIBlog 2022*, 2023, 237-251).

[82] On Italian case law concerning the exercise of jurisdiction with respect to vessels involved in the smuggling of migrants, see I. PAPANICOLOPULU, *Immigrazione irregolare via mare e esercizio della giurisdizione: il contesto normativo internazionale e la recente prassi italiana*, in A. ANTONUCCI, I. PAPANICOLOPULU AND T. SCOVAZZI, *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, Torino, 2016, 19-21.

interpretation and application. While it is true that article 35 UNTOC somehow regulates the settlement of UNTOC disputes, it merely requires the Parties to solve controversies through the process of negotiation[83]. Only in the case these disputes cannot be settled through negotiation 'within a reasonable time', States may be required to submit them to international arbitration[84]. However, paragraphs 3 and 4 of article 35 UNTOC explicitly allow reservations to the abovementioned rule, leaving States essentially free to choose whether or not to bring a dispute before an international judicial body. Nonetheless, with respect to the maritime context, this gap may be partially filled by UNCLOS. Part XV UNCLOS, in fact, sets a composite system for the compulsory settlement of international disputes concerning the interpretation and the application of the Convention by unilateral application of one State only. Given that activities under UNTOC may well fall within the scope of UNCLOS rules[85], the judges who are competent to decide disputes on the basis of Part XV UNCLOS may also take into account the provisions of UNTOC and its Protocols.

4.2. There are however some instances in which the provisions under UNTOC and UNCLOS might be considered as being partially in conflict. This is the case for the UNTOC provisions on State jurisdiction, which require the Parties to criminalise certain conducts and to take judicial action against individuals suspected of having committed those crimes. Since UNTOC aspires to prevent criminals from benefiting from the 'free zones' between national legal systems, article 15 UNTOC (in particular, its fourth paragraph) allows States to adopt judicial measures – beyond the limits of applicability of the general principles of territoriality and personality – when «the alleged offender is present in its territory» even after the commission of the offence covered by UNTOC[86].

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[83] UNTOC, article 35, para. 1.

[84] UNTOC, article 35, para. 2.

[85] For the sake of completeness, it must be added that disputes concerning law enforcement activities may be excluded from compulsory jurisdiction in virtue of UNCLOS, article 298, para. 1, lett. b), pursuant to which State Parties can decide not to accept any judicial procedure with respect to one or more of the listed categories of disputes.

[86] UNTOC, article 15, para. 4. In scholarship, the content of this provision (and even UNTOC, article 15, para. 2) has been recently analysed by K. GAVRYSH, *La natura obbligatoria del criterio di giurisdizione previsto dall'articolo 15, par. 2, della Convenzione di Palermo del 2000, nella sentenza del 17 giugno 2020 della Cassazione italiana*, in *Diritti Umani e Diritto Internazionale*, 2021, 715 ss.; N. ZUGLIANI, *Implementing International Treaties into the Italian*

Applying this provision to the maritime context, if the persons suspected of a transnational crime are in the territory of a State party to UNTOC, that State may exercise its judicial powers even in relation to activities that took place beyond the territorial sea of that State and even on the high seas[87]. Furthermore, it may adopt judicial measures also with regard to people on board ships other than those flying its flag. The existence of this provision begs the issue concerning whether the UNTOC regime somehow clashes with UNCLOS rules concerning the allocation of State jurisdictional powers at sea.

To answer this question, it is necessary to keep in mind the dual approach to the regulation of State jurisdiction that has always characterised international law[88]. On one hand, the more 'classic' approach permits the exercise of legislative jurisdiction by a State also extraterritorially, unless this is specifically prohibited. This assumption finds its origins in the *Lotus* case decided by the Permanent Court of International Justice (PCIJ) in 1927[89]. The case concerned a collision between two vessels, the French *S.S. Lotus* and the Turkish *Bozkourt*, caused by the crew of the French vessel and leading to the death of eight Turkish nations aboard the *Bozkourt*. The PCIJ had been called upon to decide whether Turkey was empowered to exercise jurisdiction over the crew of the French vessel *S.S. Lotus* for an event which they have caused while navigating on the high seas, that is, outside the jurisdiction of Turkey, but affecting Turkish nationals. On that occasion, the Court affirmed that «Restrictions upon the independence of States cannot […] be presumed»[90] and that, therefore, the exercise of State prescriptive jurisdiction, where non-explicitly excluded by international law, is always allowed.

On the other hand, it has been argued that the exercise of prescriptive jurisdiction must always be necessarily justified by the existence of a clear connection (or link) between that conduct and the State. This connection usually rests on the well-identified grounds of

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Legal Order: Diverging Views on the Identification of Self Executing Provisions, in *Italian Yearbook of International Law*, 2020, 488.

[87] This topic has been already observed by T. COVENTRY, *Appropriate Measures at Sea*, op. cit. 8-19.

[88] For an overview of the law of jurisdiction, see, among many others, C. RYNGAERT, *Jurisdiction in International Law*, Oxford, 2008; F. MANN, *The Doctrine of Jurisdiction in International Law*, in *Collected Courses of the Hague Academy of International Law* (111), 1964. With specific regard to the regulation of State jurisdiction at sea, see M. GAVOUNELI, *Functional Jurisdiction in the Law of the Sea*, op. cit.

[89] *The Case of the S.S. "Lotus"* (France v. Turkey), Judgment, P.C.I.J. Reports, 1927.

[90] *The Case of the S.S. "Lotus"*, 18.

territoriality and nationality, with other grounds, such as universality or the protective principle, sometimes admitted. Whenever this condition is not fulfilled, the State has no right to exercise jurisdictional powers[91]. According to this approach, the State that wants to regulate a certain activity or event that takes place outside its territory must demonstrate the link between the activity or event and itself.

From the above, it follows that, in case we assume the operability within the UNCLOS regime of the first-mentioned approach, article 15, para. 4 UNTOC may legitimately guide States' jurisdictional powers over human activities at sea, unless excluded by a specific provision. Otherwise, adopting the latter approach, it could be more difficult to sustain that the faculty granted by UNTOC is coherent with the law of the sea, because of the weakness of the jurisdictional link between the States and the commission of the crimes[92].

While the Lotus principle is occasionally contested by international judges[93], it is our belief that it continues to be relevant, at least at sea[94]. It is true that article 97 UNCLOS now regulates circumstances analogous to those that had occurred in the Lotus case in the very opposite way, precluding the exercise of jurisdiction by States other than that of nationality of the ship in case of incidents of navigation[95]. However, it is also true that this provision is an exception within the legal framework of the law of the sea. Unlike the large majority of UNCLOS provisions concerning jurisdiction at sea, article 97 has a very limited scope of application: broadly speaking, it does not establish a general rule for the allocation of State powers, but rather concerns one

[91] P. FIORE, *Trattato di diritto internazionale pubblico*, Torino, 1879, 390: «Il complesso di questi diritti costituisce quello che si addimanda diritto di dominio e di giurisdizione internazionale, e ad esso è correlativo il dovere per parte di tutti gli Stati di astenersi da qualunque fatto che possa direttamente o indirettamente equivalere come manifestazione della *publica potestas*, dell'*imperium*, del *dominium eminens*». More recently, for the same view, see C. RYNGAERT, *Jurisdiction*, op. cit.; B. CHENG, *The Extra-Territorial Application of International Law*, in *Current Legal Problems*, 1965, 132 ss.; F. MANN, *The Doctrine*, op. cit. 46.

[92] In this regard, it must be clarified that, adopting the second mentioned approach, in the event of a non-coastal and non-flag State exercising adjudicative powers, this conduct, which appears to comply with UNTOC, might not be consistent with the UNCLOS regime.

[93] See M/V "*Norstar*" (Panama v. Italy), Judgment, ITLOS Report, 2019.

[94] On the same view, see M/V "*Norstar*", Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *Ad Hoc* Treves.

[95] UNCLOS, article 97, para. 1: «In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national».

specific instance. As such, beyond the case of incidents in navigation, article 97 indirectly confirms, rather than questions, the applicability of the Lotus principle at sea. To sum up, in the absence of a specific provision precluding the faculty of States from enlarging the exercise of prescriptive powers for acts that have occurred beyond coastal and flag jurisdiction regarding transnational crimes[96], UNTOC seems to be coherent with the UNCLOS regime and to integrate it.

From the above, it might seem that UNTOC and UNCLOS not only generally interact smoothly, but also provide, read jointly, a complete framework to address maritime crime. This is certainly true to a certain extent, also in light of relevant State practice. Notably, the Italian Court of Cassation has repeatedly relied on article 15 UNTOC to assert Italian jurisdiction over vessels engaged in the smuggling of migrants on the high seas[97].

Unfortunately, this is not always the case. Notwithstanding the aim of UNTOC to provide a comprehensive instrument addressing transnational crime, including maritime crime, there are still some gaps in the system, notwithstanding the joint application of both UNTOC and UNCLOS. In the first place, there is an uneven regulation of criminal activities. While three main fields – trafficking of human beings, trafficking in firearms, and smuggling of migrants – are regulated in quite some detail through *ad hoc* Protocols to UNTOC, other serious maritime crimes are not. In some cases, this might be due to the fact that these crimes are the object of *ad hoc* treaties, as happens with drug trafficking[98] and maritime terrorism[99]. Other crimes, however, are left out, with notable examples being IUU fishing and the use of forced labour in shipping and fishing[100]. For the latter criminal activities, one

[96] It could be argued that article 92 of UNCLOS limits the exercise of States' prescriptive jurisdiction. However, as recently observed by ITLOS in *M/V "Norstar"*, para. 225, this rule operates with exclusive regard to lawful activities, and not to unlawful behaviours like transnational criminal activities.

[97] Among others, we refer to the following judgements of the Italian Court of Cassation: n. 432 of 18 January 2023; n. 15556 of 7 December 2021; n. 31652 of 2 July 2021; n. 48250 of 27 November 2019; n. 20503 of 8 April 2015 and n. 14510 of 28 February 2014.

[98] We recall, once again, the *Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (see note 11).

[99] In particular, the SUA Convention (see note 10).

[100] The issue concerning the lack of specific international rules for fighting the proliferation of such transnational crimes is carefully addressed in scholarship. Among many others, see A. STEFANUS and J. VERVAELE, *Fishy business: regulatory and enforcement challenges of transnational organised IUU fishing crimes*, in *Trends in Organized Crime*, 2021, 581 ss.; P. J. RIDINGS, *Labour Standards on Fishing Vessels: A Problem in Search of a Home?*, in *Melbourne*

has to refer to the general provisions in UNTOC, which, however, may need to be adapted to the particular nature of the maritime environment. Nor can one find any detailed regulation in UNCLOS which, apart from piracy, does not directly address any other crime at sea.

In the second place, even for activities that are the object of a specific Protocol, there is a great difference between the smuggling of migrants, on the one hand, and the trafficking of persons and firearms on the other. The two Protocols on the latter activities in fact do not contain any provision on the maritime dimension of the activity. It is thus uncertain whether the detailed regime concerning law enforcement action that is set out in the Smuggling Protocol might be applied also to the other two instances especially in its most innovative part concerning action against flagless vessels.

Therefore, for a significant number of criminal activities that take place at sea and often involve transnational criminal networks, there is no well-defined legal regime notwithstanding the existence of UNCLOS and UNTOC. These two treaties should therefore be seen as important steps in the process towards addressing maritime security which however need to be completed by further rules and instruments to fully address all criminal activities that take place at sea.

5. The UNTOC and UNCLOS provisions are important instruments in addressing crime at sea and ensuring maritime security, in all its aspects. As the above analysis has shown, they tend to integrate rather well and complement each other. UNTOC addresses aspects of transnational organised crime, also occurring at sea, that UNCLOS does not directly regulate. Furthermore, it does so by creating a complex web of unilateral and multilateral obligations, that build upon the key concept of cooperation in criminal matters provided by UNTOC itself, and the jurisdictional framework at sea as regulated by UNCLOS. Cooperation is particularly relevant in this domain since, as past and present experience shows, no State can curb the speeding of transnational criminal activities by itself. International cooperation promoted by UNTOC is fundamental for ensuring that the exercise of State jurisdictional powers is concerted, effective and appropriate to address such a growing challenge.

Journal of International Law, 2021, 1 ss.; D. LIDDIK, *The Dimensions of a Transnational Crime Problem: the Case of IUU Fishing*, in *Trends in Organized Crimes*, 2014, 290 ss.

In order to pursue this goal, UNTOC produces its effects in harmony with the jurisdictional scheme posed by UNCLOS. The complementarity between the two treaty regimes is particularly evident with regard to the exercise of enforcement jurisdiction. As noted above, UNTOC aligns itself with UNCLOS rules concerning the repartition of state coercive powers; in particular, the regime of flag State jurisdiction delineates the normative path in which intergovernmental cooperation against transnational crime must operate. At the same time, UNTOC complements UNCLOS by rendering cooperation mandatory, and this complementarity may facilitate the practical application of the provisions of the two treaties by all actors involved. Furthermore, and while a discussion of the rule of law at sea falls beyond the scope of this article, it is worth highlighting that a combined reading and application of UNCLOS and UNTOC may also contribute towards legal certainty and the regulation of illegal activities at sea, thus contributing to the furtherance of the rule of law at sea.

Abstract compatibility between UNTOC and UNCLOS should simplify concrete operations against transnational organized crime at sea. However, the main legal and conceptual strength of this harmonious relationship – the coordinated provisions on the exercise of enforcement jurisdiction at sea – may also prove to be its main weakness in practice. While, on the one hand, UNTOC guarantees systemic coherence within the international legal system, on the other hand, it renews some 'classic' issues of the law of the sea. Precisely, the complex allocation of jurisdiction at sea codified by UNCLOS might frustrate the successful fight against transnational organised crime, because it *de facto* allows for the existence of areas where activities lie outside the effective control of flag States. The well-known phenomena of flags of convenience and of open registries[101] may concretely frustrate the achievement of UNTOC goals: an unconditional trust in the cooperation of flag States with other States is not particularly effective for implementing a satisfactory international response to the proliferation of transnational crimes occurring on the high seas. In other words, the harmonious normative integration between UNTOC and UNCLOS, although rather functional from a systemic perspective, is necessarily unable to correct the weak points

[101] Among many others, see A. MARCOPOULOS, *Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flag of Convenience*, in *Tulane Maritime Law Journal*, 2007, 277 ss.; F. MONTERO LLACER, *Open Registers: Past, Present and Future*, in *Marine Policy*, 2003, 513 ss.

characterizing the UNCLOS regulation of State governance at sea; as a clear consequence, this fact endangers even more the concrete functioning of the international cooperation envisaged by UNTOC.

In addition to these issues, an examination of the interaction between UNTOC and UNCLOS has shown that the two treaties, while providing a rather coherent framework to address transnational organised maritime crime, do not address all relevant aspects to the same extent. Leaving aside root causes of maritime crime as well as the component of that crime that focuses on land – which in any case would not form the object of 'maritime' rules – there are still gaps in the system that make it more difficult to take action at sea. In particular, the uneven treatment of different types of crime and the uncertainty about the actual extent of legislative and enforcement jurisdiction over different maritime crimes may hinder a concerted effort to address all criminal activities. This would lead to failure, as it is now proven that transnational criminal networks generally 'invest' in different illegal activities.

To address these gaps, it seems necessary that States intervene on the regimes established by both UNCLOS and UNTOC, not only by way of ensuring the harmonised reading of their provisions, but also, and eventually, by promoting normative change through the adoption of further legally binding instruments. Lack of control by flags of convenience must be addressed within the law of the sea, lest any rule that relies on flag State action be frustrated. Similarly, it is now time for States to come together and, moving beyond the issue of maritime migration, start thinking about new protocols to the UNTOC Convention, which would address significant maritime crimes, including IUU fishing and new forms of slavery.

This article demonstrated that UNCLOS and UNTOC may work well together and that their combined reading and application may contribute to addressing maritime crime. Furthermore, the significance of transnational criminal conventions beyond UNTOC, such as those targeting drug trafficking and maritime terrorism, has also been highlighted. These treaties, by focusing on specific types of conduct and by providing for more precise rules, which also take into account the peculiarities of different criminal conducts, contribute to a more comprehensive international legal framework for suppressing criminal activities at sea. The trend of clarifying applicable rules and adapting them to different types of crimes through the adoption of *ad hoc* legal instruments has gained further momentum with the adoption of the

United Nations Convention against Cybercrime in 2024[102]. Notably, the drafters of this international treaty have expanded the jurisdiction of State Parties, enabling the prosecution of cybercriminal activities initiated from ships flying their flags[103]. This development is a prime example of the kind of meticulous and comprehensive approach needed to tackle transnational crime at sea, reinforcing a more effective and coherent rule of law.

In conclusion, it is necessary that the international community continues the road traced by the negotiation and adoption of UNTOC, also with respect to criminal activities taking place at sea, to address emerging challenges and evolving methods of criminal conduct. There is also much room for scholarly research, in identifying the different criminal conducts which have not been specifically addressed so far, as well as proposing adequate legal frameworks which take into account the basic principles of UNCLOS and UNTOC, while at the same time adapting them to the specificities of different maritime crimes. It is only by improving the interaction between the relevant international legal regimes, on the basis of a comprehensive approach based on the rule of law at sea, that an effective legal framework can be developed to facilitate more effective collaboration and address the specific challenges related to maritime crime.

ABSTRACT

Combating Transnational Crime at Sea:
The Unfinished Integration between UNTOC and UNCLOS

Within the context of international maritime safety and security, this paper examines the systemic legal relationship between the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention on the Law of the Sea (UNCLOS). The study seeks to determine the extent to which these two treaty regimes interact and complement each other. Adopting a systemic approach to international law, the analysis posits that no single legal regime should entirely exclude the application of another. Following a brief introduction (section 1), the paper first explores the UNTOC regime, analyzing its openness to international rules

[102] United Nations Convention against Cybercrime, adopted by the General Assembly of the United Nations on 24 December 2024 in New York by Res. 79/243. This multilateral treaty has not entered into force yet.

[103] United Nations Convention against Cybercrime, article 22, para. 1 (b).

from other legal frameworks, particularly the law of the sea (section 2). It then examines the law of the sea, with a focus on UNCLOS as its principal legal instrument (section 3). The discussion subsequently centers on the interaction between specific provisions of UNTOC and UNCLOS, evaluating whether they mutually reinforce or undermine each other (section 4). The paper concludes with reflections on the future of combating transnational organized crime at sea, viewed through the lens of the interaction between the UNTOC and UNCLOS regimes (section 5).