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NETwork of experts on the legal aspects
of MARitime SAFEty and security

COST ACTION IS1105

JURISDICTION AND CONTROL AT SEA

Some environmental and security issues

Edited by

Gemma Andreone

GIANNINI EDITORE
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This publication is supported by
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Foreword

Tullio Treves[*]

More than thirty years have elapsed since the United Nations Convention on the Law of the Sea was adopted (1982) and almost twenty since it entered in force (1994). The Convention now has 166 parties. Notwithstanding the absence, among these, of the United States and of other States, the impact of the Convention on customary law has been important. UNCLOS has become the text of first reference for all scholars and practitioners.[1]

While it is true that UNCLOS is a very long treaty, it is also true that it is not uniformly dense. While on some issues it is limited to very general statements, on other issues it enters into very specific detail.[2] Its lack of detail on some issues, and the fact that, on other issues, not all the detailed provisions are easily operable, should be remedied by the role recognized by UNCLOS to the institutions and mechanisms it establishes: the International Seabed Authority, the International Tribunal for the Law of the Sea (and the compulsory dispute-settlement system of which the Tribunal is a part), and the Commission for the Limits of the Continental Shelf. In addition to these, other previously established institutions, such as the International Maritime Organization, are called upon by UNCLOS to fill gaps and provide details.

This notwithstanding, it is a fact that there are new areas out of the scope of the Convention, in most cases simply because at the time the Convention was negotiated, these areas were unknown, or at least unknown to governments and international lawyers. The legal regime of the exploitation of genetic resources beyond the limits of national jurisdiction is the most important example. Then there are areas whose importance changed, sometimes unforeseeably, after certain provisions of the convention – which later proved incomplete or inadequate - were adopted: piracy is a clear example.

Attention to security issues has changed its approach. When the Convention was negotiated the discussion centred on finding a reasonable balance between

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[1] T. Treves, "UNCLOS at Thirty: Open Challenges", 27 *Ocean Yearbook* (2013), pp. 49-66 at 51.

[2] V. Lowe, "Was it Worth the Effort?", in D. Freestone (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas,* Leiden and Boston, 2013, pp. 201-207, especially 203.

the interests of the main naval powers and coastal States. Now new global threats are leading States which have traditionally been keen on preserving freedom of navigation towards accepting, and even seeking, certain limitations, for example as regards the halting and inspection of vessels suspected of carrying arms of mass destruction.

Environmental protection, although it is one the of main aspects of UNCLOS, and one in which very detailed provisions are set out, has become an ever more complex subject in the wake of UN-sponsored initiatives such as the Rio Declaration and other subsequent instruments , and of the myriad global and regional instruments that have been adopted after UNCLOS.

In the light of these developments it is natural that a new generation of international law of the sea specialists, matured, in most cases, after the adoption, or even after the entry into force, of UNCLOS, have considered it worthwhile to join forces in order to study the new aspects of the law of the sea which are emerging in the light of the achievements and also of the lacunae of UNCLOS.

This book contains some results of such an effort. Ably organized by Gemma Andreone, a number of specialists, mostly of the new generation, and from different countries and legal cultures, convened in Rome in June 2013 to discuss items under the title of "Jurisdiction and Control at Sea". Most of the papers considered and discussed in Rome appear in the present book.

They cover the kind of issues mentioned above. The reader will find an examination of the regime of genetic resources beyond national jurisdiction, of piracy tried before domestic judges in the contemporary environment, of various new aspects of fisheries and of environmental law. In particular, the reader will find developments on the connection – certainly not envisaged by the negotiators of UNCLOS – between the law of the sea and human rights.

Admittedly, the essays presented in this book regard only a sample of the issues which could be considered under the title of "Jurisdiction and Control at Sea", even considering the subtitle focusing on environmental and security issues. These essays must be seen as an early manifestation of work in progress, as evidence that the law of the sea remains a very vital and continuously changing branch of the law, deserving of close attention scholars, practitioners and Governments alike.

Editor's Preface

The existing international legal framework, including the 1982 UN Convention on the Law of the Sea, does not answer all contemporary needs for ensuring safety and security within a cross-sectorial and ecosystem-based approach to maritime governance.

The main aim of this volume is to investigate States practice at sea, with a focus on some environmental and security issues. It analyses various aspects of current maritime concerns, while dealing with State sovereignty, jurisdiction and control at sea. A general look at State practice seems to be a primary and necessary condition for a deeper understanding of the maritime safety and security legal regimes.

This volume, being the outcome of the Marsafenet Conference on "Jurisdiction and Control at Sea"[1] and of the research activities carried out in the framework of the Marsafenet working groups, presents some emerging legal issues concerning State powers at sea, with particular emphasis on different perspectives regarding the implementation of the principle of freedom of navigation, the need of security from crimes at sea, marine environment protection, marine resources security beyond national jurisdiction, and peaceful international relations.

The first part of the book focuses on some specific issues concerning the protection of the marine environment and its natural resources. In particular, the main question of marine resources security, in and beyond national jurisdiction, is treated, with a focus on IUU fishing, marine genetic resources, marine protected areas in fragile seas, such as the Antarctic ocean and the Mediterranean sea, and private regulations standards and corporate social responsibility in fisheries.

The second part of the book looks at the protection of individual rights in State enforcement and control at sea, addressing some specific matters of discussion in the domain of national piracy prosecution and of the protection of individual rights at sea in the European context.

The creation of this collective volume has been facilitated by the peer review of the Scientific Committee and the technical support and help of Ms. Monica Scala and of Dr. Claudia Cinelli.

Gemma Andreone
Rome, 30 July 2014

[1] The International Conference on "Jurisdiction and Control at Sea" was held in Rome on the premises of the Italian National Research Council, on the 6th June 2013, in the framework of the Cost Action IS1105 Marsafenet – Network of experts on the legal aspects of maritime safety and security.

I

PROTECTING MARINE ENVIRONMENT AND ITS RESOURCES

FAO PRINCIPAL INTERNATIONAL INSTRUMENTS TO ADDRESS ILLEGAL, UNREPORTED AND UNREGULATED FISHING

*Peter Deupmann and Blaise Kuemlangan**

I. Introduction; II. Areas Beyond National Jurisdiction (ABNJ); III. Fisheries and their management in ABNJ; IV. IUU Fishing in ABNJ; V. Addressing IUU fishing through FAO international instruments; VI. FAO initiatives in support of implementation; VII. Conclusion.

I. Introduction

The term security when used in relation to marine living resources and fisheries can be associated with different concepts.[1] Security can relate in a general sense to food security for those dependent on fish resources for their dietary needs or their livelihood. Security can also be associated with the security of access to resources, for example in having the ability to obtain rights to use such resources. Security may be related to fishing operations, for example in terms of ensuring the safety of vessels and crews at sea, and compliance with international labour standards on board fishing vessels. For the purposes of this paper, the term security is used in a broad sense in a way that associates security with sustainable management. Security in this context requires that responsible fisheries[2] should be promoted, among other things, through the elimination or reduction of activities or situations that give rise to illegal, unreported and unregulated (IUU) fishing that threaten or prevent the sustainable management of living marine re-

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* Peter Deupmann is Legal Officer, Development Law Branch Legal and Ethics Office FAO, and Blaise Kuemlangan is Chief, Development Law Branch Legal and Ethics Office, FAO. This paper was prepared for the conference on 'Jurisdiction and Control at Sea', organized in the framework of the Network of Experts on the Legal Aspects of Maritime Safety and Security (MARSAFENET) in relation to the topic 'Marine living resources security beyond national jurisdiction'. The authors also thank Karine Erikstein, Associate Professional Officer, Development Law Branch, Legal and Ethics Office, FAO, for having provided valuable contributions to an earlier version of this paper.

[1] The concept 'security of marine living resources' is not widely used in the world of fisheries. The term 'security' implies protection from threats also when associated with marine living resources. For the purposes of this paper, the concept is equated with sustainable and responsible fisheries.

[2] The FAO Code of Conduct for Responsible Fisheries introduces the term responsible fisheries, providing a framework for sustainable management of fisheries to achieve responsible fisheries.

sources. This will ensure that these resources are available for the use of future generations while meeting the needs of the present generation.

Among others, IUU fishing, overcapacity, and the practice of using destructive fishing gear may lead to over-exploitation, habitat destruction and the collapse of fish stocks. The negative effects of unsustainable fishing practices are compounded by scientific uncertainty about the status of fish stocks and habitats, and the inherent conflicts between using resources for short-term social and economic gain and ensuring that they meet long-term needs, such as the need for a secure source of food and livelihoods. Poor management practices, particularly the absence of respect for long-term rights, and the failure to ensure that stakeholders participate in management, as well as insufficient management capacity, further negatively affect the sustainable management of resources.[3]

The characteristics of fisheries in areas beyond national jurisdiction[4] (ABNJ) pose particular challenges.[5] These characteristics include the distance from the coast, the absence of coastal State sovereignty over living resources and the lack of scientific data for the management of certain stocks, especially deep-sea fish stocks. The cost of monitoring, control and surveillance (MCS) and the difficulty in enforcing applicable conservation and management measures within ABNJ are additional challenges.

Effective legal frameworks play an important role in facilitating responsible fisheries. Over the last decades, an elaborate international legal framework has been established that provides the basis for the sustainable conservation and management of marine living resources, including those occurring in ABNJ. This paper presents and discusses those international instruments that are relevant for addressing IUU fishing in ABNJ.

A brief description of the concept of ABNJ is given immediately below in order to place the discussion on the international legal framework for fisheries in context, in particular of the international instruments that have been established to prevent, deter and eliminate IUU fishing. An overview of the regime for cooperation in the management of fisheries in ABNJ is also provided.

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[3] K.L. Cochrane and S.M. Garcia, *A fishery manager's guidebook*, 2009, at 1.

[4] Maritime areas beyond national jurisdiction comprise the high seas and the seabed beyond the (extended) continental shelf of Coastal States.

[5] These challenges are in addition to challenges of fisheries management already existing regardless of the area in which the fishery takes place, such as over-capacity, market-distorting subsidies and the lack of market based incentives that promote long-term stewardship of resources and sustainable fishing practices.

II. Areas Beyond National Jurisdiction (ABNJ)

The United Nations Convention on the Law of the Sea (UNCLOS)[6] establishes a comprehensive legal regime for the world's oceans. Among other things, the Convention provides for the establishment of different maritime zones over which States exercise different levels of sovereignty and jurisdiction. For each of these zones, the Convention lays down specific rights and responsibilities regarding the use of the marine space and environment and the resources present in them. The coastal State exercises sovereignty in internal waters, archipelagic waters and territorial sea and the living resources occurring in these areas.[7] UNCLOS provides that coastal States can claim an exclusive economic zone (EEZ) of a breadth of up to 200 nautical miles, measured from the baseline.[8] The coastal State exercises sovereign rights over exploring, exploiting, conserving and managing natural resources occurring within its EEZ. The sovereign rights of a coastal State in relation to the natural resources within its EEZ are balanced by a number of duties and responsibilities, including the duty to have due regard to the rights and duties of other States,[9] as well as the duty to ensure the maintenance of the living resources in the EEZ through proper conservation and management measures.[10] In relation to stocks occurring within the EEZ of two or more coastal States, and in relation to stocks occurring both within and beyond the EEZ of a coastal State, as well as for highly migratory stocks, the coastal States and other States whose nationals fish for the resources have the obligation to agree on management and conservation measures.[11]

In the sea area beyond the EEZ of coastal States - the high seas - UNCLOS provides for a number of freedoms, including the freedom to fish.[12] While these freedoms are balanced by State responsibilities, the high seas regime is characterized by the absence of coastal State jurisdiction. State responsibilities in relation to the vessels flying its flag in the high seas include, among others, the obligation

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[6] UNCLOS was adopted on 10 December 1982 and came into force on 16 November 1994. UNCLOS is one of the main sources of the international law of the sea. Many provisions of UNCLOS are based on customary international law or have become customary international law and will therefore also bind non-Parties. In addition to the provisions of UNCLOS, rules of customary law, general principles of law, as well as a series of conventions on the law of the sea adopted in 1958, which remain binding on States parties that have not ratified UNCLOS, make up the core of the international law of the sea.

[7] Subject to a number of restrictions, notably in relation to innocent passage through a coastal State's territorial sea. See article 2 and article 17 UNCLOS.

[8] In the absence of conflicting claims of States with adjacent or opposite coasts. See article 74 UNCLOS.

[9] Article 56(2) UNCLOS.

[10] Article 61(2) UNCLOS.

[11] Articles 63 and 64 UNCLOS.

[12] Article 87 UNCLOS.

to effectively exercise jurisdiction and control over such vessels in administrative, technical and social matters.[13] Responsibilities also include the obligation to take measures for the conservation of the high seas living marine resources.[14] The provisions and the responsibilities relating to straddling and highly migratory stocks set forth by UNCLOS apply insofar as these stocks occur in the high seas.

In relation to the seabed, UNCLOS establishes sovereign rights for coastal States over the continental shelf up to a distance of 200 nautical miles, which, depending on geological factors, may be extended to a maximum of 350 nautical miles.[15] On its (extended) continental shelf, a coastal State has sovereign rights for exploring and exploiting natural resources, including living marine resources. The ocean floor beyond the extended continental shelves of coastal States is known as the 'Area'. UNCLOS provides that the Area and its mineral resources are the common heritage of mankind, and establishes a management regime for the exploration of such resources, under the auspices of the International Seabed Authority.[16] The living marine resources present on or in the ocean floor are excluded from the scope of these provisions.[17]

The high seas and the areas beyond the (extended) continental shelf of a coastal State is considered ABNJ.

While most marine capture fisheries take place in coastal areas, significant fisheries also occur in ABNJ. IUU fishing in ABNJ undermines fisheries management and poses challenges, given the specific governance regime applying in ABNJ, in particular the absence of a single State jurisdiction in these areas.

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[13] Article 94 UNCLOS.

[14] Article 116 and 117 UNCLOS.

[15] The outer limit of national jurisdiction in respect of management and conservation of national resources in coastal waters is determined by the limit of its EEZ, which may extend up to 200 nautical miles (article 57 UNCLOS), or, if states do not claim an EEZ, by its territorial sea. Jurisdiction and sovereignty in respect of sedentary species living on the sea-bed and subsoil of submarine areas may extend up to the outer limit of the continental margin, or up to 200 nautical miles, measured from the baseline, if the continental margin does not extend up to that distance (article 76(1) UNCLOS).

[16] Article 137(2) UNCLOS.

[17] Part XI of UNCLOS determines that the sea-bed beyond national jurisdiction (the Area) and its mineral resources beyond national jurisdiction are the common heritage of mankind (article 136). The Convention establishes the Authority (article 156), to which all parties are member and which organizes and controls the activities in the area, in particular with a view to administering the mineral resources in the Area (article 157(1)).

III. Fisheries and their management in ABNJ

Tuna and tuna-like species constitute a substantial portion of marine living resources. Parts of these stocks are located within the EEZs while generally, a significant portion of such stocks and the fisheries based on them take place in the high seas. The very broad distribution and nature of highly migratory species, the high mobility of the fleets that fish them and the global markets that deal in them, especially tuna, necessitate international cooperation for the management of the fisheries based on such species, and for fisheries research in support of management. In 1995 the UN Fish Stocks Agreement[18] was established to elaborate and facilitate the implementation of the provisions of UNCLOS relating to cooperation for the conservation and management of highly migratory and straddling fish stocks.

In addition to tuna fisheries, deep-sea fisheries take place in ABNJ. In general, deep-sea fisheries are conducted at depths considerably below 200 m, on continental slopes or isolated oceanic topographic structures such as seamounts, ridge systems and banks.[19] They are characterized by a total catch which comprises species that can sustain only low exploitation rates, although some deep-sea species are highly productive and support larger fisheries.

While some deep-sea fisheries takes place in EEZs, most deep-sea fisheries activities are concentrated in high seas areas. The great depths and distances from the coast at which marine living resources are caught by deep-sea fisheries in the high seas pose scientific and technical challenges, particularly in providing scientific support for management. Considerable concern has arisen globally about the consequences of deep-sea fishing in terms of impact on target stocks, associated species and habitats, especially deep-sea habitats. These concerns have been reflected in resolutions adopted by the United Nations General Assembly,[20] which led to the adoption of the *FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas,* in August 2008.[21] The management and conservation of living marine resources in ABNJ is the responsibility of all States. In particular, States whose nationals fish for these resources, are required to cooperate in developing measures for the conservation of marine living resources and to establish, as appropriate, subregional or regional fisheries organizations to this end (article 118 UNCLOS). Special provisions apply to highly migratory and straddling stocks. Where stocks occur both within and

[18] Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

[19] There is no definition of deep-sea fisheries, as its characteristics vary substantially depending on the location.

[20] Including Resolution A/RES/61/105, paragraph 76-95.

[21] http://www.fao.org/fishery/topic/4450/en.

in an area beyond and adjacent to the EEZ, UNCLOS requires that the coastal State in whose territory the stocks occur, cooperate directly or through appropriate subregional or regional organizations, with States fishing for the same stock in the adjacent high seas areas in order to agree on the measures necessary for the conservation of these stocks (in the adjacent area).[22] States in whose waters highly migratory species as defined in Annex I of UNLCOS occur, and States whose nationals fish for such species are similarly obliged to cooperate directly or through appropriate international organizations with a view to ensuring the conservation and optimum utilization of such species. Where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region must cooperate to establish such an organization and participate in its work.[23]

Intergovernmental cooperation occurs largely through regional fisheries bodies (RFBs), which are established by multilateral agreements or arrangements. Some regional fisheries bodies have a management and regulatory mandate - regional fisheries management organizations or arrangements (RFMO/As). This paper will focus on the role of RFMO/As with a management mandate in ABNJ. Many RFMO/As manage a specific type of fishery, such as the tuna fishery by tuna-RFMO/As. The competence areas of RFMO/As with a management mandate for fisheries in ABNJ cover a significant portion of high seas areas.[24]

The UN Fish Stocks Agreement furnishes detailed provisions on the conservation and management of straddling fish stocks and highly migratory fish stocks, building on the framework provisions of UNCLOS regarding these stocks (articles 63 and 64 of UNCLOS). The Fish Stocks Agreement applies to high seas areas, while some provisions apply within the EEZ. Among other things, it lays down detailed provisions on the cooperation of States in managing and conserving straddling and highly migratory stocks, and on the role and functioning of RFMO/As. The paramount importance of RFMO/As in the management and conservation of the stocks is reflected in article 8(4) of UNFSA, which states that only States applying the conservation and management measures adopted by the RFMO/A for a given fishery have access to that fishery. The UNFSA includes a number of provisions on the functioning and role of RFMO/As, and dedicates a section to compliance and enforcement, introducing obligations for the boarding and inspection of vessels operating in the competence area of the RFMO/A.[25] UNFSA furthermore provides for flag State duties and responsibilities,[26] as well as for general port State duties.[27]

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22 Article 63 UNCLOS.

23 Article 64 UNCLOS.

24 Although for certain fisheries, gaps exist.

25 Article 21 UNFSA.

26 Article 19 UNFSA.

27 Article 23 UNFSA.

IV. IUU fishing in ABNJ

The term "illegal, unreported and unregulated fishing" is defined in FAO's International Plan of Action to Prevent, Deter and Eliminate IUU fishing. Illegal fishing can be described as fishing in contravention of applicable national laws and regulations, or in breach of measures for the conservation and management of marine living resources adopted by intergovernmental organizations with a regulatory management mandate, such as regional fisheries management organizations or arrangements (RFMO/As). Unreported fishing relates to fishing activities in breach of applicable reporting obligations. Unregulated fishing refers to fishing activities conducted in areas where no conservation and management measures are in force, particularly where a State has the responsibility under international law to conserve living marine resources in such areas. Unregulated fishing also refers to fishing activities carried out by vessels flying the flag of a State to which the conservation and management measures adopted by an RFMO/A do not apply (e.g. vessels flying the flag of a non-cooperating State, or vessels without a flag).[28]

A major cause of IUU fishing in ABNJ is the lack of effective flag State control. Some flag States fail to meet their obligations under international law to exercise responsibility over vessels flying their flag. IUU fishing undermines national and regional efforts to conserve and manage fish stocks and, as a consequence, inhibits progress towards achieving the goals of long-term sustainability and responsibility**.** Often, IUU fishing constitutes unfair competition for fishers who fish responsibly and respect conservation and management measures, such as time, area and catch restrictions as well as gear and vessel specifications.[29]

V. Addressing IUU fishing through FAO international instruments

The need for the effective implementation of UNCLOS has led to the development of a number of associated hard law instruments in the field of fisheries and the conservation of marine living resources. These instruments are complemented by an array of non-binding instruments.

The FAO Compliance Agreement[30] was adopted on 24 November 1993 and entered into force on 24 April 2003. It currently has 39 Parties. The Compliance Agreement extends the State duty to exercise effectively its jurisdiction and control over vessels flying its flag, explicitly to fishing vessels and vessels providing

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[28] Paragraph 3, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).

[29] http://www.fao.org/fishery/topic/3195/en

[30] Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted on 24 November 1993 and entered into force on 24 April 2003.

support. The Compliance Agreement applies to vessels of 24 metres in length or more that are used or destined to be used for fishing on the high seas. It provides detailed obligations for flag States to ensure that vessels flying their flag comply with international conservation and management measures, by reinforcing the flag State's central role in registering vessels and authorizing high seas fishing activities by vessels flying its flag. In particular, it subjects high seas fishing to the requirement that high seas fishing vessels must obtain flag State authorization, which may only be granted if the flag State is able to exercise its responsibilities under the agreement. The Compliance Agreement requires that the authorization shall not be granted if the fishing vessel has previously (under a different flag) undermined international conservation and management measures.[31] Port States are to notify flag States if they have reason to believe the vessel has been used in breach of international conservation and management measures and may be engaged by the flag state to carry out investigatory measures. The Compliance Agreement requires that States establish a record of fishing vessels, an update of which is to be kept centrally at FAO. However, there are some important limitations in the use of the High Seas Vessel Register (HSVAR), mainly as a result of its lack of specificity (e.g. no fields that list gear types, etc.), its limited country coverage and updates from parties, as well as applicable access restrictions.

Despite the low number of ratifications, the Compliance Agreement is an important instrument for the management and conservation of fisheries in ABNJ as it provides clear criteria for the registering and authorizing of fishing vessels for use on the high seas, and thus contributes to the strengthening of the role of flag States in exercising responsibility over vessels flying their flag in accordance with the law of the sea.

The Code of Conduct for Responsible Fisheries (CCRF) was adopted by the FAO Conference during its Twenty-Eighth Session, held from 20 to 31 October 1995.[32] The CCRF is a voluntary instrument that is global in scope and applies to all fisheries, irrespective of where they take place.[33] It is directed towards members and non-members of FAO, fishing entities, subregional, regional and global organizations, and all persons concerned with the conservation of fishery

[31] Article III(5) Compliance Agreement provides for the following exemptions: if a period of suspension by another Party to the agreement of the authorization of the vessel has expired; if an authorization of the vessel has not been withdrawn by a Party to the Agreement for the last three years; or if the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficiary or financial interest in or control of the fishing vessel; or where the Party has determined that to grant the authorization would not undermine the objective of the agreement.

[32] FAO Conference Resolution 4/1995, adopted during the Twenty-Eighth Session of the FAO Conference, C 1995/REP, paragraph 81.

[33] Article 1.1, 1.2 and 1.3 Code of Conduct.

resources and management and development of fisheries.[34] The Code of Conduct lays down principles and standards for responsible fisheries, stating also the need for legal and institutional frameworks to support responsible fisheries and the formulation and implementation of appropriate measures.[35] The Code of Conduct is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea.[36] The Code calls for collaboration in the fulfilment and implementation of its objectives and principles.[37]

The Code of Conduct provides that States should ensure compliance with, and enforcement of, conservation and management measures. To this end, States should establish effective mechanisms to monitor and control the activities of fishing vessels and fishing support vessels, in accordance with international law, and within the framework of subregional or regional fisheries conservation and management organizations or arrangements.[38]

States authorizing fishing and fishing support vessels to fly their flags should exercise effective control over those vessels so as to ensure the proper application of the Code, and should ensure that the activities of such vessels do not undermine the effectiveness of conservation and management measures taken in accordance with international law. In respect of vessels flying its flag, a State should ensure that obligations concerning the collection and provision of data relating to their fishing activities are fulfilled.[39] States should furthermore adopt measures to ensure that no vessel be allowed to fish unless so authorized, in a manner consistent with international law for the high seas, or in conformity with national legislation

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[34] Article 1.2 Code of Conduct.

[35] Article 2, in particular Article 2(c), Code of Conduct.

[36] Article 3.1 Code of Conduct. Article 3.2 Code of Conduct provides that the Code is also to be interpreted and applied: in a manner consistent with the relevant provisions of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; in accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party and in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21, adopted by the United Nations Conference on Environment and Development (UNCED, in particular Chapter 17 of Agenda 21, and other relevant declarations and international instruments.

[37] Article 4.1 Code of Conduct.

[38] Article 6.10 Code of Conduct. Article 7.1.7 Code of Conduct furthermore provides that States should establish effective mechanisms for fisheries monitoring, surveillance, control and enforcement to ensure compliance with their conservation and management measures as well as those adopted by subregional or regional organizations or arrangements.

[39] Article 6.11 Code of Conduct. Article 8.1.3 Code of Conduct provides that States should maintain statistical data on all fishing operations allowed by them.

within areas of national jurisdiction.[40] States should maintain a record, updated at regular intervals, on all authorizations to fish issued by them.[41] The provisions relating to fishing authorizations and fishing vessel records are further specified in article 8.2, related to flag State duties. In this context, the Code provides that States should maintain records of fishing vessels entitled to fly their flag and authorized to be used for fishing, including associated information.[42] Flag States should ensure that no fishing vessels entitled to fly their flag fish on the high seas or in waters under the jurisdiction of other States unless properly registered and in possession of an applicable authorization to fish.[43] Under the article dedicated to flag State duties, the Code of Conduct provides that fishing vessels authorized to fish on the high seas or in waters under the jurisdiction of a State other than the flag State, should be marked in accordance with uniform and internationally recognizable vessel marking systems.[44] The Code provides that States not Party to the Compliance Agreement should be encouraged to accept the Agreement and to adopt laws and regulations consistent with it.[45] Flag States should take enforcement measures in respect of fishing vessels entitled to fly their flag which have been found by them to have contravened applicable conservation and management measures.[46]

The Code of Conduct also contains provisions relating to port State duties.[47] It provides that port States should take such measures as are necessary to achieve and to assist other States in achieving the objectives of this Code.[48] Port States should furthermore provide such assistance to flag States as is appropriate when a fishing vessel is voluntarily in a port and the flag State of the vessel requests the port State for assistance in respect of non-compliance with inter alia subregional, regional or global conservation and management measures.[49]

The Code of Conduct has a number of provisions that largely restate international law, and elaborates practical ways of cooperation in the management and conservation of fish stocks. States should cooperate at subregional, regional and global levels through fisheries management organizations, other international

[40] Article 7.6.2 Code of Conduct.
[41] Article 8.1.2 Code of Conduct.
[42] Article 8.2.1 Code of Conduct.
[43] Article 8.2.2 Code of Conduct.
[44] Article 8.2.3 Code of Conduct.
[45] Article 8.2.6 Code of Conduct.
[46] Article 8.2.7 Code of Conduct.
[47] Article 8.3 Code of Conduct.
[48] Article 8.3.1 Code of Conduct. These measures should be established in their national legislation, be in accordance with international law, including applicable international agreements or arrangements, and applied indiscriminately. Details of such measures should be made known to other States.
[49] Article 8.3.2 Code of Conduct.

agreements or other arrangements to promote conservation and management.[50] Where transboundary fish stocks, straddling fish stocks, highly migratory fish stocks and high seas fish stocks are exploited by two or more States, the States concerned, including the relevant coastal States, should cooperate to ensure effective conservation and management of the resources and, where appropriate, establish regional fisheries management organizations or arrangements to this end.[51] States with a real interest in a fishery in respect of which a regional fisheries management organization or arrangement has the competence to establish conservation and management measures, should cooperate by becoming a member,[52] or at least cooperate by giving effect to conservation and management measures adopted by such organization or arrangement.[53] The Code provides that States should cooperate to establish systems for the monitoring, control, surveillance and enforcement of applicable measures with respect to fishing operations and related activities in waters outside their national jurisdiction, within the framework of subregional or regional fisheries management organizations or arrangements.[54] The code provides that members of RFMO/As should implement internationally agreed measures adopted within the framework of such organizations or arrangements, and consistent with international law, to deter the activities of vessels flying the flag of non-members or non-participants which engage in activities which undermine the effectiveness of conservation and management measures established by such organizations or arrangements.[55]

The Code recognises the need for legal frameworks to support responsible fisheries. States and all those involved in fisheries should, through an appropriate policy, legal and institutional framework, adopt conservation and management measures for fisheries resources.[56] States should ensure that an effective legal and administrative framework at local and national level is established for fisheries resource conservation and management,[57] and that legal frameworks provide for

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[50] Article 6.12 Code of Conduct.

[51] Article 7.1.3 Code of Conduct.

[52] Article 7.1.4 Code of Conduct.

[53] Article 7.1.5 Code of Conduct. The cooperation includes, for example, as specified in Article 8.4.3 Code of Conduct, ensuring that documentation with regard to fishing operations, retained catch of fish and non-fish species and, as regards discards, the information required for stock assessment as decided by relevant management bodies, is collected and systematically forwarded to those bodies.

[54] Article 8.1.4 Code of Conduct. Article 7.7.3 Code of Conduct provides that States should implement effective fisheries monitoring, control, surveillance and law enforcement measures that should be promoted and, where appropriate, implemented by subregional or regional fisheries management organizations and arrangements in accordance with procedures agreed by such organizations or agreements.

[55] Article 7.7.5 Code of Conduct.

[56] Article 7.1.1 Code of Conduct.

[57] Article 7.7.1 Code of Conduct.

sufficiently severe sanctions in respect of violations.[58] States should implement effective fisheries monitoring, control and surveillance and law enforcement measures.[59]

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) is a non-binding instrument, adopted under the auspices of FAO on 2 March 2001. The IPOA-IUU is broad in scope and targets States, organizations, fishing entities, and all persons engaged in the conservation and management of fishing. The IPOA-IUU proposes a comprehensive set of measures to prevent, deter and eliminate IUU fishing including measures that States should take in their capacity as flag State, port State or market State. As the IPOA-IUU applies to all fisheries, in this section some of its provisions that are relevant for fishing in ABNJ will be discussed.

Among other things, the IPOA-IUU calls for the implementation of obligations deriving from international law and the conservation and management measures adopted by RFMO/As.[60] It calls on all States to exercise control over nationals, wherever they are,[61] to take steps against non-cooperating States of RFMO/As,[62] and to exercise effective monitoring, control and surveillance (MCS) of fishing activities.[63] In respect of flag States, the IPOA-IUU largely echoes the provisions of the FAO Compliance Agreement and calls on flag States to ensure that its vessels do not engage in IUU fishing and, prior to registering the vessel, to ensure that it can exercise its responsibilities over the vessels.[64] The IPOA-IUU provides that flag States should avoid flagging vessels with a history of non-compliance, providing similar, yet simplified, exemptions as given in the Compliance Agreement.[65] It explicitly refers to 'flag-hopping', including a description of the phenomenon, and provides that States should take all practical steps, including denial of an authorization to fish and refuse to register such vessels .[66] The IPOA-IUU seeks to strengthen the link and coordination between registration and authorization to fish, and provides that States should consider making the registration of a vessel subject to the granting of an authorization to fish to the vessel.[67] The IPOA-IUU calls for the establishment of fishing vessel records. For vessels operating on the high seas, it explicitly refers to the relevant provisions of the Compliance Agreement, while providing additional information that States

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58 Article 7.7.2 Code of Conduct.
59 Article 7.7.3 and article 7.1.7 Code of Conduct.
60 Paragraphs 11-15 IPOA-IUU.
61 Paragraphs 18-19 IPOA-IUU.
62 Paragraph 22 IPOA-IUU.
63 Paragraph 24 IPOA-IUU.
64 Paragraphs 34-35 IPOA-IUU.
65 Paragraph 36 IPOA-IUU.
66 Paragraphs 38-39 IPOA-IUU.
67 Paragraphs 40-41 IPOA-IUU.

may require to be included in the record.[68] It furthermore provides that flag States should ensure that no vessel be allowed to fish unless so authorized.[69]

The IPOA-IUU provides a set of port State measures similar to the ones that will be discussed below under the FAO Port State Measures Agreement. Port States should publish lists of ports where foreign flagged fishing vessels may enter.[70] They should require that foreign flagged vessels provide reasonable advance notice of port entry and submit documentation to the port State that will facilitate the determination by the port States of the vessel's possible prior involvement in IUU fishing.[71] Vessels suspected of having engaged in IUU fishing must be denied port entry,[72] except in cases of force majeure or distress,[73] while vessels allowed to enter the port should be inspected[74] before the vessel is allowed to land its catches or make use of port services. The IPOA-IUU calls for the involvement of, and reporting to, flag States of cases of denial of port entry or suspicion of engagement in IUU fishing,[75] and calls for cooperation both at national and regional level, including exchange of information.[76] While the IPOA-IUU provides that States can take any measures consistent with international law where port inspection leads to suspicion of engagement in IUU fishing activities, it does not explicitly provide for measures a port State may take in such a case.[77]

Regarding internationally agreed market related measures, the IPOA-IUU provides that States should take measures to prevent fish caught by vessels identified by RFMO/As as having been engaged in IUU fishing from being traded or imported into their territories.[78] It calls on States to cooperate in adopting appropriate multilaterally agreed trade-related measures, consistent with WTO, that may be necessary to prevent, deter and eliminate IUU fishing.[79]

The IPOA-IUU also provides a range of measures to be adopted by RFMO/As, including those in relation to: institutional strengthening, reporting, exchange of information, establishment of records of vessels authorized to operate in the competence area and those engaged in IUU fishing, MCS, boarding and inspection schemes, observer programmes and market measures.[80] It also calls on States to

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68 Paragraph 42 IPOA-IUU.
69 Paragraph 44 IPOA-IUU.
70 Paragraph 57 IPOA-IUU.
71 Paragraph 55 IPOA-IUU.
72 Paragraph 56 IPOA-IUU.
73 Paragraph 54 IPOA-IUU.
74 Paragraph 58 IPOA-IUU.
75 Paragraph 59 IPOA-IUU.
76 Paragraphs 62-64 IPOA-IUU.
77 Paragraph 59 IPOA-IUU.
78 Paragraph 66 IPOA-IUU.
79 Paragraph 68 IPOA-IUU.
80 Paragraph 80 IPOA-IUU.

make available information relevant to the prevention, deterrence and elimination of IUU fishing in the RFMO/A competence area.[81] The IPOA-IUU furthermore provides a number of measures in relation to the strengthening of the institutional structures of RFMO/As,[82] and calls on States to encourage non-contracting parties with a real interest in the fisheries of an RFMO/A to become Parties.[83]

The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement) was approved by the FAO Conference during its Thirty-Sixth Session, held from 18 to 23 November 2009. It has not entered into force. The objective of the Port State Measures Agreement is to prevent, deter and eliminate IUU fishing through the implementation of port State measures, in order to ensure the long-term conservation and sustainable use of living marine resource and marine ecosystems. The Port State Measures Agreement introduces measures that provide a cost effective tool for States to prevent IUU caught fish from entering the market, based on the sovereignty a port State exercises over its internal waters, which include its ports. It applies to foreign-flagged fishing vessels[84] that are seeking entry into the ports of a Party or are in its ports, to illegal, unreported or unregulated fishing, and to related activities in support of such fishing, irrespective of where these activities take place. The Port State Measures Agreement is global in scope and applies to all ports.

The Port State Measures Agreement establishes primarily obligations for States in their capacity as port State. It requires that State Parties designate and make known the ports to which foreign flagged vessels may request entry.[85] Parties are required to request vessels seeking entry into their ports to provide information in advance of their estimated time of entry,[86] on the basis of which the State Party must take a decision to authorize or deny the entry of the vessel.[87] Where a State Party has sufficient proof that the vessel has engaged in IUU fishing, access must be denied.[88] The Port State Measures Agreement states that nothing in the Agreement affects the right of entry of vessels into ports, in ac-

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[81] Paragraph 81 IPOA-IUU.

[82] Paragraph 82 IPOA-IUU.

[83] Paragraph 83 IPOA-IUU.

[84] Article 1(j) PSMA provides that 'vessel' means any vessel, ship or another type of boat used for, or equipped to be used for, or intended to be used for, fishing or fishing related activities.

[85] Article 7 PSMA.

[86] Article 8 PSMA.

[87] Article 9(1) PSMA.

[88] Article 9(4) PSMA. However, in accordance with article 9(5) PSMA, a State Party may decide to allow entry for the purpose of inspection and for taking other appropriate actions that are at least as effective as denial of port entry.

cordance with international law, for reasons of force majeure or distress.[89] Where a vessel is already in one of the ports of a Party, the Port State Measures Agreement provides a number of circumstances under which that Party is required to deny the vessel the use of the port.[90] A Party which has denied the use of its port is required to promptly notify the flag State and, as appropriate, relevant coastal States, RFMOs and other relevant International Organizations of its decision.[91]

Parties are required to carry out port inspection of vessels to a level sufficient to achieve the objective of the Agreement, in accordance with the inspection procedures specified in Annex B of the Agreement, and in observance of a number of requirements.[92] The latter include the requirement to invite the flag State of the vessel to participate in the inspection, in the case where appropriate arrangements with the flag State exist. The Port State Measures Agreement requires that the Parties draw up a report of the port inspections. These inspection reports are transmitted to the flag State and, as appropriate to other relevant Parties and States.[93]

Where, following inspection, there are clear grounds for believing the vessel has engaged in IUU fishing or related activities in support of such fishing, the inspecting Party is required to notify the flag State and, as appropriate, relevant coastal States, RFMOs, other international organizations, and the State of which the master is a national. The inspecting Party is furthermore required to deny the vessel the use of its port.[94]

The Port State Measures Agreement dedicates a specific article to the role of flag States.[95] Parties must require that vessels entitled to fly their flag cooperate with the port inspections carried out pursuant to the Agreement. A flag State Party is required to request a port State to carry out port inspections or to take other measures consistent with the Agreement in respect of the vessel entitled to fly its flag of which the flag State has clear grounds to believe that it has engaged in IUU fishing. Each Party is required to encourage vessels entitled to fly its flag to land, transship, package and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with this Agreement. Flag States are required to immediately and fully investigate and, where appropriate take enforcement actions, when an inspection report transmitted to the flag State indicates clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or related activities in support of such fishing. A Party in its capacity as flag State is required to report on actions taken in respect of vessels entitled to fly its flag which, as a result of port State meas-

[89] Article 10 PSMA.
[90] Article 11(1) PSMA.
[91] Article 11(3) PSMA.
[92] Articles 11 and 12 PSMA.
[93] Articles 14 and 15 PSMA.
[94] Article 18 PSMA.
[95] Article 20 PSMA.

ures, have been determined to have engaged in IUU fishing or related activities in support of such fishing. A Party in its capacity as flag State is required to ensure that measures applied to vessels entitled to fly its flag are at least as effective as those applied to vessels entitled to fly the flag of a foreign State.

The Port State Measures Agreement requires that Parties encourage non-Parties to become Parties and /or to introduce legislation and implement measures consistent with the provisions of the Agreement. Parties are furthermore required to take fair, non-discriminatory and transparent measures to deter activities of non-Parties that undermine the effective implementation of the Agreement.[96]

The Voluntary Guidelines on Flag State Performance (VGFSP) were endorsed by FAO's Committee on Fisheries on 11 June 2014. They aim to prevent, deter and eliminate IUU fishing[97] through the effective implementation of flag State responsibilities.[98] The VGFSP apply to fishing and fishing related activities in ABNJ.[99] The guidelines provide a set of performance assessment criteria, largely based on flag State duties and responsibilities deriving from international instruments. On the basis of these criteria, the guidelines call for the periodical assessment of flag State performance,[100] providing procedures for self-assessment[101] as well as principles for external assessment.[102] The guidelines furthermore provide options for actions to be taken in the light of the outcomes of the assessment, including cooperative and corrective actions, as well as actions based on the IPOA-IUU.[103] The guidelines lay down provisions related to cooperation with, and assistance to, developing States, with a view to improving their performance as flag States.[104]

The criteria provided in the guidelines address a number of responsibilities and duties against the implementation of which the performance of the flag State can be assessed. They provide that the flag State implements obligations deriving from international instruments, contributes to the functioning of RFMO/As in which it participates, and ensures that vessels flying its flag do not engage in activities that undermine the conservation and management measures adopted by the RFMO/A. They also provide that the flag State ensures that vessels flying

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96 Article 23 PSMA.

97 As well as related activities in support of such fishing.

98 Paragraph 1 VGFSP.

99 Paragraph 3 VGFSP, however, provides that they might also apply to fishing and fishing related activities within the national jurisdiction of the flag State, or of a coastal State, upon their respective consent.

100 Paragraph 44 VGFSP.

101 Paragraph 45 VGFSP.

102 Paragraph 46 VGFSP.

103 Paragraph 47 VGFSP.

104 Paragraph 48-55 VGFSP.

its flag do not engage in unauthorized fishing.[105] The guidelines provide criteria related to the management of fisheries, including: the flag State must establish an adequate institutional, legal, and technical framework for fisheries management[106] and adopt legal instruments for the implementation of conservation and management measures.[107] The guidelines provide that the flag State effectively ensure the implementation of the conservation and management measures, in particular in relation to vessels, owners, operators and crews, as well as to the fishing industry.[108] The criteria furthermore relate to information, records and registry, and provide that the flag State adhere to information requirements and information standards,[109] and to registration procedures and exchanges of registration information.[110] The criteria provide that the flag State maintain and update a record of vessels, including, for vessels authorized to engage in fishing in high seas areas, information as specified in article VI(1),(2) of the Compliance Agreement.[111] The guidelines also provide criteria in relation to fishing authorizations, providing that the flag State establish and implement a regime for authorizing fishing activities, specifying certain information that must be documented.[112] In relation to MCS, the guidelines furnish criteria that provide elements for a monitoring and enforcement regime, provide that the flag State conducts and contributes to joint MCS, and that the flag State implements effective and timely sanctions.[113]

VI. FAO initiatives in support of implementation

A selection of international legal instruments for responsible fisheries, in particular those that are designed to help States and other stakeholders address IUU fishing, has been presented in this paper, many of which have been developed under the auspices of FAO. In addition to facilitating the development of international legal instruments, FAO provides assistance to countries in implementing these international instruments into national policy and legal instruments. Indeed, the majority of the instruments presented in this paper highlight the need for providing assistance to developing countries in implementing the instruments. On-the-ground technical support for improving the application of best practices and suitable management strategies, tools and instruments is provided to coun-

105 Paragraph 6-9 VGFSP.
106 Paragraph 11 VGFSP.
107 Paragraph 12 VGFSP.
108 Paragraph 13 VGFSP.
109 Paragraph 14 VGFSP.
110 Paragraphs 14-24 VGFSP.
111 Paragraphs 25-28 VGFSP.
112 Paragraph 29-30 VGFSP.
113 Paragraphs 31-38 VGFSP.

tries by FAO to ensure that the normative work is paired with practical results. It goes beyond the scope of this paper to exhaustively address the various activities through which FAO supports responsible fisheries in ABNJ, which include support to RFMO/As and RFBs, specific activities on tuna fisheries, IUU, port State measures, as well as programmatic work on deep-sea fisheries. However, one FAO initiative that is of particular importance in addressing IUU fishing in ABNJ is the Global Record.

The Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record) is a voluntary global initiative, requested by FAO's Committee on Fisheries,[114] to make information on vessel identification and other relevant data available . Fishing vessel registration and the comprehensive records of fishing vessels are fundamental for effective fisheries management and essential for collaborative efforts at regional and global levels. Their importance is recognised in most major international fisheries instruments, but comprehensive data on the world's fishing fleets is not readily available.

The proposed Global Record will provide a tool to bring consistency on a global scale among national vessel records. It is envisaged as a web-based global repository (database) that will provide the reliable identification of vessels authorized to engage in fishing. An essential element will be the assignment of a unique vessel identification number (UVI) to each vessel. The UVI will provide the permanent identification of a vessel regardless of change of ownership, vessel name, or flag over time, as the UVI will remain the same. This will ensure the reliability of the vessel record and facilitate the accurate association of vessel related information. Once the core vessel record is established, it will be possible to associate a wide range of information modules providing a comprehensive information picture on all aspects of the vessel's operation.[115]

The FAO Committee on Fisheries decided that the UVI should be introduced in a phased approach. As a first step, it was suggested that the UVI be applied to vessels above 100 gross ton, and it was noted that RFMOs should coordinate their vessel records with the Global Record.[116] In subsequent phases, the application of the UVI should be extended to include vessels over 18 metres or 50 gross ton, and in the last phase vessels over 12 metres or 10 gross ton.[117]

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[114] Report of the Thirtieth Session of the FAO Committee on Fisheries (COFI), paragraph 56.

[115] http://www.fao.org/fishery/topic/18051/en

[116] Report of the Thirtieth Session of the FAO Committee on Fisheries (COFI), paragraph 56.

[117] FAO Technical Consultation to identify a structure and strategy for the development and implementation of the global record of fishing vessels, refrigerated transport vessels and supply vessels, Rome 8-12 November 2010, FAO Fisheries and Aquaculture Report No. 956, Rome, FAO, 2010.

VII. Conclusion

The ABNJ poses particular challenges for the management of fisheries in ensuring that responsible fisheries are practiced in such a way as to enhance the security of marine living resources, in order to support food security and safeguard the livelihoods of peoples that depend on these resources. The distance from the coast, the absence of coastal State sovereignty over living resources, the cost of monitoring, control and surveillance (MCS) and the difficulty in enforcing applicable conservation and management measures in ABNJ constitute particular (ABNJ) challenges. Management of the fisheries in ABNJ, consisting mainly of pelagic fisheries (tuna and tuna-like species) and deep-sea fisheries, is the responsibility of States, which must cooperate through RFMO/As to this end.

Effective legal frameworks play an important role in facilitating responsible fisheries. Over the last decades, an elaborate international legal framework has been established which provides the basis for the conservation and management of marine living resources, including those occurring in ABNJ. Of particular importance are the instruments that have been developed to address a particular challenge: IUU fishing. IUU fishing constitutes a threat to the sustainability of fisheries and poses a particular problem to fisheries in ABNJ, given the difficulty of monitoring, control and surveillance of fisheries activities, of enforcing applicable conservation and management measures, and of the reliance principally on flag States for the enforcement of such measures.

Through a number of international legal instruments, States have developed options for addressing IUU fishing. These instruments introduce measures based on the jurisdiction of States over vessels in their capacity as flag States, port States and market States. They introduce minimum standards for the registration of fishing vessels and for the authorization of vessels to fish in the high seas. They introduce the obligation to establish transparent and accessible vessel records. The instruments introduce measures targeting foreign vessels when approaching or in port, including minimum standards for port inspections and the introduction of sanctions, including the denial of port entry and the denial of port use, when there is sufficient evidence that the vessel has been engaged in IUU fishing. The instruments furthermore introduce a mechanism and detailed criteria for the assessment of the performance of flag States. Through associated activities, States are seeking to improve the identification of vessels by subjecting vessels to a vessel identification system, making use of a unique vessel identifier.

Together, these instruments provide a framework for addressing IUU fishing in ABNJ. Despite the obvious need for more action to be taken to support States in implementing these instruments, they provide resourceful and cost-effective mechanisms to engage port States, flag States, market States and other States in addressing IUU fishing in ABNJ both through their own initiatives and together through international cooperative efforts.

The exploitation of marine genetic resources in areas beyond national jurisdiction

Tullio Scovazzi[*]

I. The relevant aspects of the present UNCLOS regime; A. The high seas; B. The concept of common heritage of mankind; II. The question of genetic resources; A. The prospects for the exploitation of genetic resources in the deep seabed; B. Common heritage of mankind vs. freedom of the high seas; C. A banality and its consequences; III. Possible future developments.

I. The relevant aspects of the present UNCLOS regime

New challenges are facing States regarding the subject of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, especially in the field of genetic resources. In this regard, two basic components of the present international law of the sea, as embodied in the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS), are particularly relevant, namely the regime of the high seas and the regime of common heritage of mankind.

A. The high seas

Art. 86 UNCLOS refers to defines the high seas as to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".

The basic aspect of the high seas regime is freedom. According to Art. 87 UNCLOS,

> "1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
> (d) freedom to construct artificial islands and other installations permitted under

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international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area".

As can be clearly inferred from Art. 87, para. 2, the freedom of the high seas is not absolute, but is subject to a number of conditions, as specified by the relevant rules of international law. Freedom of the sea must be understood today in its appropriate context.

When, in the 17th century, the principle of freedom of the sea was elaborated by Grotius[1] and his followers, nobody had in mind the problems that would be posed by supertankers, nuclear-propelled vessels, off-shore drilling, mining for polymetallic nodules, fishing with driftnets and many other activities which take place in the marine environment today. This obvious consideration leads to an equally obvious consequence. We cannot today evoke the same concepts that Grotius used and give them the same intellectual and legal strength that Grotius gave them.

To rely in an absolute way on the principle of freedom of the sea was perhaps justified in the circumstances existing in the past. But this is no longer true. Today it cannot be sustained that a State has the right to engage in specific marine activities simply because it enjoys freedom of the sea, without giving any further explanations and without being ready to consider the opposing positions, if any, of other interested States. The concept of freedom of the sea is also to be understood in the context of the present range of marine activities and in relation to the other potentially conflicting uses and interests.

The needs of navigation and of other activities falling under the regime of freedom of the sea are important elements that must be taken into consideration. But they have to be balanced with other interests, in particular those which have a collective character, such as the protection of the marine environment and the sustainable use of marine resources, as they concern the international community as a whole. Far from being an immutable theological dogma, the principle of freedom of the sea is to be understood not in an abstract way, but in the light of the peculiar circumstances under which it must be applied.

[1] Anonymous (the author's name Hugo Grotius appeared for the first time in a Dutch translation published in 1614), *Mare liberum sive de jure, quod Batavis competit ad Indicana commercia, dissertation* (1609).

B. The concept of common heritage of mankind

Under Art. 136 UNCLOS, the "Area", that is the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, and its resources, are the common heritage of mankind. This is the main innovating aspect of the UNCLOS with respect to the previous law of the sea regime. While other important innovations, such as the exclusive economic zone, may be considered to be the result of a foreseeable evolution in the international law of the sea, the concept of common heritage of mankind has a revolutionary character. It presupposes a third kind of regime which is completely different from the traditional concepts both of sovereignty, which applies in the territorial sea, and of freedom, which applies on the high seas.

The concept of the common heritage of mankind was launched in a memorable speech made at the United Nations General Assembly on 1 November 1967 by the representative of Malta, Mr. Arvid Pardo.[2] The practical opportunity for proposing a new regime came from the technological developments which were expected to lead in a relatively short time to the commercial exploitation of polymetallic nodules lying on the surface of the deep seabed and containing various minerals of appreciable economic value, such as manganese, nickel, cobalt and copper.

The application of the scheme of sovereignty was likely to lead to a series of competitive extensions of the limits of national jurisdiction on the sea bed. The application of the scheme of freedom was likely to lead to a rush towards the exploitation of economically and strategically valuable minerals falling under the regime of freedom of the high seas. According to Mr. Pardo's speech, the consequences of both possible scenarios would be equally undesirable. They would encompass political tension, economic injustice and risks of pollution. In a few words, "the strong would get stronger, the rich richer".[3]

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[2] A notable precedent can be found in a proposal made in 1927 by the Argentine jurist José León Suárez. He was entrusted by the League of Nations Experts Committee for the Progressive Codification of International Law with the drafting of a report on the international rules relating to the exploitation of marine living resources. Mr. Suárez proposed that the living resources of the sea, and whales in particular, should be considered a heritage of mankind: "Les richesses de la mer, en particulier les richesses immenses de la région antarctique, constituent un patrimoine de l'humanité, et notre Commission, constituée par la Société des Nations, est tout indiquée pour proposer au Gouvernement un moyen d'action avant qu'il ne soit trop tard": Société des Nations, *Comité d'experts pour la codification progressive du droit international, Rapport au Conseil de la Société des Nations* (1927), at 123.

[3] "The known resources of the seabed and of the ocean floor are far greater than the resources known to exist on dry land. The seabed and ocean floor are also of vital and increasing strategic importance. Present and clearly foreseeable technology also permits their effective exploration for military or economic purposes. Some countries may therefore be tempted to use their technical competence to achieve near-unbreakable world dominance through predominant

The basic elements of the regime of common heritage of mankind,[4] applying to the seabed beyond the limits of national jurisdiction, are the prohibition of national appropriation, the destination of the Area for peaceful purposes, the use of the Area and its resources for the benefit of mankind as a whole with particular consideration for the interests and needs of developing countries, as well as the establishment of an international organization entitled to act on behalf of mankind in the exercise of rights over the resources.[5]

The proposal by Malta led to Resolution 2749 (XXV), adopted on 17 December 1970, whereby by the United Nations General Assembly solemnly declared that "the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (…), as well as the resources of the area, are the common heritage of mankind" (Art. 1).

All the basic elements of the concept of common heritage of mankind can be found in Part XI of the UNCLOS. The Area and its resources are the common heritage of mankind (Art. 136). No State can claim or exercise sovereignty over any part of the Area, nor can any State or natural or juridical person appropriate any part thereof (Art. 137, para. 1). The Area can be used exclusively for peaceful purposes (Art. 141). All rights over the resources of the Area are vested in mankind as a whole, on whose behalf the International Sea-Bed Authority (ISBA), which is the international organization created by the UNCLOS (Art. 137, para. 2), is entitled to act. Activities in the Area are carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the inter-

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control over the seabed and the ocean floor. This, even more than the search for wealth, will impel countries with the requisite technical competence competitively to extend their jurisdiction over selected areas of the ocean floor. The process has already started and will lead to a competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and in its implications last century's colonial scramble for territory in Asia and Africa. The consequences will be very grave: at the very least a dramatic escalation of the arms race and sharply increasing world tensions, also caused by the intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations. The strong would get stronger, the rich richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder. Between the very few dominant powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed and, at the same time, the world would face the growing danger of permanent damage to the marine environment through radioactive and other pollution: this is a virtually inevitable consequence of the present situation": Arvid Pardo, *The Common Heritage - Selected Papers on Oceans and World Order* (1975), at 31.

[4] The very word "heritage", which renders the idea of the sound management of a resource to be transmitted to the heritors, was preferred to the word "property", as the latter might have recalled the *jus utendi et abutendi* (right to use and misuse) that private Roman law gave to the owner": *Introduction* by Elisabeth Mann Borgese to Pardo, see n.3 above, X.

[5] A fifth element is the protection and preservation of the marine environment, which however relates to any kind of marine spaces.

ests and needs of developing States (Art. 140, para. 1). The ISBA provides for the equitable sharing of financial and other economic benefits derived from activities in the Area through an appropriate mechanism (Art. 140, para. 2).

For the first time in the historical development of the international law of the sea a world regime based on the management of resources by an international organization was included in a treaty of codification. The common heritage of mankind is a third conceptual option (*tertium genus*) which applies to a particular kind of resources located in a specific marine space. It does not eliminate the traditional notions of freedom or sovereignty applying in the other marine spaces. But it provides for a different and much more equitable approach.

As is well known, the text of the UNCLOS was not adopted by consensus. It was submitted to vote after all efforts to reach consensus had been exhausted. It received 130 votes in favour, 4 against and 17 abstentions. Many developed States were among those which cast a negative vote or abstained. The main criticisms were addressed to the regime of the Area. According to the developed States, the UNCLOS regime would discourage mining activities by individual States and private concerns, would favour unduly the monopoly of activities by the ISBA, would burden the contractors with excessive financial and other obligations relating also to the field of transfer of technology and would disregard the interests of industrialized countries in the decision-making procedures of the Council, the executive organ of the ISBA.

In 1994 it was clear that the UNCLOS was expected to formally enter into force without the participation of many developed countries, that is without the participation of the limited number of States having the command of the technological and financial capability required to engage in deep seabed mining activities. To avoid the practical failure of a regime based on the principle of common heritage of mankind, the United Nations promoted a new negotiation on Part XI of the UNCLOS. It resulted in the Agreement Relating to the Implementation of Part XI of the UNCLOS, which was annexed to Resolution 48/263, adopted by the General Assembly on 17 August 1994. This resolution, while reaffirming that the Area and its resources are the common heritage of mankind, recognizes that "political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources".

The provisions of the 1994 Implementation Agreement and those of Part XI of the UNCLOS "shall be interpreted and applied together as a single instrument" (Art. 2). However, in the event of any inconsistency between the 1994 Implementation Agreement and Part XI, the provisions of the former shall prevail. In fact, the label of "implementation agreement" is a diplomatic device that covers the evident reality that in 1994 the UNCLOS was amended[6] and several

[6] "The 1994 Implementation Agreement is a curious creature. The 1982 LOSC does not permit reservations (arts. 309, 310) and the procedures for its amendment are both protracted

aspects of the original concept of common heritage of mankind were substantively changed.[7]

Following the adoption of the 1994 Implementation Agreement, the UNCLOS has achieved almost universal participation (with some notable exceptions). Although modified under the 1994 Implementation Agreement, the original spirit of the UNCLOS has not been betrayed. The principle of common heritage of mankind still applies and remains a major source of inspiration for a treaty that achieves the codification and the progressive development of international law.

For several years the ISBA has been working on the subject of exploration of the various mineral resources of the Area. In 2000 the ISBA Assembly approved the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (the so-called mining code).[8] This has enabled the ISBA to sign contracts for exploration with eight investors. In 2010 and 2012 the ISBA Assembly approved, respectively, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area. Unlike polymetallic

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and open only to State parties (arts. 311-17). Neither route was suitable for modifications of the Convention sought by the industrialised States that remained outside the Convention. Instead, the 1994 Implementation Agreement was made, its title disingenuously implying that it was concerned to put into effect the 1982 provisions rather than to change them. In fact, it stipulates that several provisions of Part XI of the LOSC 'shall not apply' and modifies the effect of others": R. Churchill & V. Lowe, *The Law of the Sea* (1999), at 20.

[7] For instance, the obligation of State Parties to finance the deep seabed mining operations of the Enterprise, that is the organ of the ISBA which carries out mining activities in the Area directly, is abrogated and the independent activities by the Enterprise are delayed until it is able to conduct mining operations through joint-ventures. A contractor which has contributed a particular area to the ISBA as a reserved area has the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of that area. If the Enterprise does not submit an application for a plan of work for activities with respect to a reserved area within fifteen years, the contractor which contributed the area is entitled to apply for a plan of work for that area, provided that it offers in good faith to include the Enterprise as a joint-venture partner. The Enterprise and developing States wishing to obtain technology for deep seabed mining shall seek to obtain it on fair and reasonable commercial terms and conditions on the open market or through joint-venture arrangements. The decision-making procedure by the Council is modified by the introduction of the rule that, if all efforts to reach consensus have been exhausted, decisions on questions of substance are taken by a two-thirds majority, provided that such decisions are not opposed by a majority in any one of the chambers. This means that any of the five chambers of States established under Part XI of the UNCLOS (for example, the chamber composed of four of the major consumer or importer States) can veto the taking of decisions by the Council.

[8] "Polymetallic nodules are lumps of metallic ore, between golf ball and soccer ball in size, scattered loosely in expansive fields on abyssal plains. Their quantity in a given area can be assessed simply by photographing the ocean bottom. They can be scooped up by mechanical harvesters with little physical damage to the seabed" (ISBA, *Press Release*, SB/9/1 of 23 July 2003, 2).

nodules, which are found partially buried in areas of the deep seabed, sulphides[9] and crusts[10] are localized in their deposits. Concentrations of methane hydrates[11] are also found in the Area and may fall in the future under the regulatory powers of the ISBA.

However, the prospects of development of the mineral resources in the Area remain uncertain. A number of factors have inhibited progress towards their commercial exploitation. These factors include the hostile environment in which exploration and mining will take place as regards both the open-ocean surface environment and the great depths at which deposits occur, the high costs involved in research and development of mining technology and the fact that, under current economic conditions, deep seabed mining remains uncompetitive compared to land-based mining.

Yet the concept of common heritage of mankind, that is a third and more equitable scheme departing from both the scheme of freedom and from that of sovereignty, has now been set up under an international regime, and an international organization has been established to manage marine mineral resources falling under this regime. But what seems now to be missing is the possibility to exploit in the short or medium term the resources to which the regime is intended to apply.

II. The question of genetic resources

A. The prospects for the exploitation of genetic resources in the deep seabed

While the prospects for commercial mining in the deep seabed are uncertain, the exploitation of commercially valuable genetic resources may in the near future become a promising activity taking place beyond the limits of national jurisdiction.

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[9] "Hydrothermal polymetallic massive sulphides occur typically in chimney-like structures, called smokers, surrounding undersea hot-spring vents. Their minerals come mainly from magma, the mass of molten rock deep beneath the earth's crust, where it breaches the ocean bottom in volcanic regions along the margins of ocean basins. Individual deposits are small and scattered. Mining would require the destruction of the smokers, with potentially catastrophic consequences for the exotic animal communities that live in the superheated, oxygen-deprived water and cannot exist in a normal environment dependent on sunlight" (ISBA, *Press Release*, SB/9/1 of 23 July 2003, 2).

[10] "Cobalt-rich ferromanganese crusts, derived like the nodules from metals precipitated out of seawater, are fused to the seabed in layers up to tens of centimetres thick, often buried beneath other seabed deposits. They are found on the flanks and ridges of globe-encircling, mid-ocean mountain range. Assessment of their occurrence and metal content and their eventual exploitation will require digging or drilling the ores out of a solid rock bed", ibid.

[11] These are ice-like materials that occur in abundance in marine sediments and store immense quantities of methane.

The deep seabed is not a desert, despite extreme conditions of cold, complete darkness and high pressure. It is the habitat of diverse forms of life associated with typical features, such as hydrothermal vents, cold water seeps, seamounts or deep water coral reefs. In particular, it supports biological communities that present unique genetic characteristics. For instance, some animal communities live in the complete absence of sunlight where warm water springs from tectonically active areas (so-called hydrothermal vents).[12] Several species of microorganisms, fish, crustaceans, polychaetes, echinoderms, coelenterates and molluscs have been found in hydrothermal vent areas. Many of these are new to science. These communities, which do not depend on plant photosynthesis for their survival, rely on specially adapted micro-organisms able to synthesize organic compounds from the hydrothermal fluid of the vents (chemosyntesis).[13] The ability of some deep seabed organisms to survive extreme temperatures (thermophiles and hyperthermofiles), high pressure (barophiles) and other extreme conditions (extremophiles) makes their genes of great interest to science and industry.

But what is the international regime applying to genetic resources in areas beyond national jurisdiction?[14] In fact, neither the UNCLOS nor the 1992 Convention on Biological Diversity (CBD) provide any specific legal framework in this regard. The factual implications of the question are pointed out in a document issued in 2005 by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) established under the CBD.[15]

First, only a few States and private entities have access to the financial means and sophisticated technologies needed to reach the deep seabed:

> "Reaching deep seabed extreme environments and maintaining alive the sampled organisms, as well as culturing them, requires sophisticated and expensive technologies. (...) Typically, the technology associated with research on deep seabed genetic resources involves: oceanographic vessels equipped with sonar technology, manned or unmanned submersible vehicles; *in situ* sampling tools; technology related to culture methods; molecular biology technology and techniques; and technology associated with the different steps of the commercialization process of derivates of deep

[12] Hydrothermal vents may be found both in the Area and on the seabed falling within the limits of national jurisdiction, according to the definition of continental shelf given by Art. 76 UNCLOS.

[13] The discovery of hydrothermal vent ecosystems has given rise to a new theory as to how life began on earth. It could have originated and evolved in association with hydrothermal vents in the primeval ocean during the early Archaean period (about 4,000 million years ago).

[14] See in general D. Leary, *International Law and Genetic Resources of the Deep Sea* (2006).

[15] *Status and Trends of, and Threats to, Deep Seabed Genetic Resources beyond National Jurisdiction, and Identification of Technical Options for their Conservation and Sustainable Use*, doc. UNEP/CBD/SBSTTA/11/11 of 22 July 2005.

seabed genetic resources. With the exception of basic molecular biology techniques, most of the technology necessary for accessing the deep seabed and studying and isolating its organisms is owned by research institutions, both public and private. To date, only very few countries have access to these technologies".[16]

Second, the prospects for commercial applications of bioprospecting activities seem promising:

"Deep seabed resources hold enormous potential for many types of commercial applications, including in the health sector, for industrial processes or bioremediation. A brief search of Patent Office Databases revealed that compounds from deep seabed organisms have been used as basis for potent cancer fighting drugs, commercial skin protection products providing higher resistance to ultraviolet and heat exposure, and for preventing skin inflammation, detoxification agents for snake venom, anti-viral compounds, anti-allergy agents and anti-coagulant agents, as well as industrial applications for reducing viscosity".[17]
"The commercial importance of marine genetic resources is demonstrated by the fact that all major pharmaceutical firms have marine biology departments. The high cost of marine scientific research, and the slim odds of success (only one to two percent of pre-clinical candidates become commercially produced) is offset by the potential profits. Estimates put worldwide sales of all marine biotechnology-related products at US $ 100 billion for the year 2000".[18]

Last, but not least, another important element to be taken into consideration is that the patent legislation of several States does not compel the applicant to disclose the origin of the genetic materials used:

"Assessing the types and levels of current uses of genetic resources from the deep seabed proves relatively difficult for several reasons. First, patents do not necessarily provide detailed information about practical applications, though they do indicate potential uses. Moreover, information regarding the origin of the samples used is not always included in patent descriptions"[19].

The 2011 report of the United Nations Secretary-General on "Oceans and the law of the sea" provided the following information on the relevant commercial developments:

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[16] Ibid., paragraphs 12 and 13. "A limited number of institutions worldwide own or operate vehicles that are able to reach areas deeper than 1,000 meters below the oceans' surface, and can therefore be actively involved in deep seabed research" (ibid., paragraph. 16).

[17] Ibid., paragraph 21.

[18] Ibid., paragraph 22.

[19] Ibid., paragraph 22.

"Recent work has focused in discerning the degree to which genetic resources from areas beyond national jurisdiction have contributed to commercial developments, such as patents applied for and granted. To date, it appears that a very small number of patents have originated from the seabed beyond national jurisdiction (generally related to deep-sea bacteria), while a great number have been used on genetic resources from the high seas (primarily micro-organisms, floating sargassum weed, fish and krill). Of concern are applications with potentially large environmental consequences, such as the proposed use of sargassum weed for biofuels".[20]

B. Common heritage of mankind vs. freedom of the high seas

In 2006 the subject of the international regime for the genetic resources in the deep seabed was discussed within the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction,[21] established under United Nations General Assembly Resolution 60/30 of 29 November 2005. Opposing views were put forward by the States concerned.

Some States took the position that the UNCLOS principle of common heritage of mankind and the mandate of the ISBA should be extended to cover also genetic resources:

> "Several delegations reiterated their understanding that the marine genetic resources beyond areas of national jurisdiction constituted the common heritage of mankind and recalled article 140 of the Convention, which provides that the activities in the Area shall be carried out for the benefit of mankind and that particular consideration should be given to the interest and needs of developing States, including the need for these resources to be used for the benefit of present generations and to be preserved for future generations. (…) A number of delegations mentioned that the International Seabed Authority constituted an existing mechanism in this area and that consideration should accordingly be given to the possibility of broadening its mandate".[22]

Other States relied on the UNCLOS principle of freedom of the high seas, which would imply a right of freedom of access to, and unrestricted exploitation of, deep seabed genetic resources:

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[20] Doc. A/66/70 of 22 March 2011, paragraph 63.

[21] Hereinafter: the Working Group.

[22] *Report of the Ad Hoc Open-ended Working Group to Study Issues Relating to their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction*, doc. A/61/65 of 20 March 2006, paragraph 71.

"Other delegations reiterated that any measures that may be taken in relation to genetic resources in areas beyond national jurisdiction must be consistent with international law, including freedom of navigation. In their view, these resources were covered by the regime of the high seas, which provided the legal framework for all activities relating to them, in particular marine scientific research. These delegations did not agree that there was a need for a new regime to address the exploitation of marine genetic resources in areas beyond national jurisdiction or to expand the mandate of the International Seabed Authority".[23]

The Working Group held a second meeting in 2008.[24] Again, very different views were expressed as regards the regime to be applied to marine genetic resources, repeating what had already taken place in 2006:

> "In that regard, divergent views were expressed on the relevant legal regime on marine genetic resources beyond areas of national jurisdiction, in particular whether those marine genetic resources were part of the common heritage of mankind and therefore fell under the regime of the Area, or were part of the regime for the high seas".[25]

The same different positions were manifested during the 2010 meeting of the Working Group.[26]

This basic disagreement on the international regime of genetic resources leaves a sentiment of dissatisfaction. In fact, both the divergent positions move from the same starting point:

> "The United Nations Convention on the Law of the Sea was recognized as the legal framework for all activities in the oceans and seas, including in respect of genetic resources beyond areas of national jurisdiction".[27]

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[23] Ibid., paragraph. 72.

[24] The United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, also, addressed the subject of marine genetic resources at its 2007 meeting. However, the meeting was unable to reach overall agreement on the elements to be suggested to the U.N. General Assembly as regards the legal regime of such resources. See the co-chairpersons' possible elements to be suggested in the annex to U.N. doc. A/62/169 of 30 July 2007.

[25] *Joint Statement of the Co-Chairpersons of the Working Group*, doc. A/63/79 of 16 May 2008, paragraph 32.

[26] See *Letter Dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, doc. A/65/68 of 17 March 2010, paragraphs 70-72.

[27] Doc. quoted *n. 25 above*, paragraph 36. The statement is repeated in the resolutions on "Oceans and the Law of the Sea" yearly adopted by the U.N. General Assembly. See, lastly, the preamble of Resolution 65/37, adopted on 7 December 2010, which emphasizes

Why do two groups of States, moving from the same assumption, namely that the UNCLOS is the legal framework for all activities taking place in the sea, reach two completely opposite conclusions as regards the matter in question? A possible answer to the question is that some elaboration is required on the starting point itself.[28]

C. A banality and its consequences

There is no doubt that the UNCLOS is a cornerstone in the field of codification of international law. It has been rightly qualified as a "constitution for the oceans", "a monumental achievement in the international community", "the first comprehensive treaty dealing with practically every aspect of the uses and resources of the seas and the oceans", an instrument which "has successfully accommodated the competing interests of all nations".[29]

Nevertheless, the UNCLOS, as any legal text, is linked to the time when it was negotiated and adopted (from 1973 to 1982 in the specific case). Being itself a product of time, the UNCLOS cannot stop the passing of time. While it provides a solid basis for the regulation of many matters, it would be illusory to think that the UNCLOS is the end of legal regulation in this field . The international law of the sea is subject to a process of natural evolution and progressive development which is linked to States' practice and involves also the UNCLOS. Because of limits of space, it is not possible to elaborate here on the instances where changes with respect to the original UNCLOS regime have been integrated into the UNCLOS itself (evolution by integration); where different interpretations of the relevant UNCLOS provisions are in principle admissible and State practice may be important in making one interpretation prevail (evolution by interpretation); where the UNCLOS does not provide any clearly defined regime and the relevant legal regime is to be inferred only from State practice (evolution in another context); or where, since the UNCLOS regime is clearly unsatisfactory – it happens very seldom, but it may happen –, a new instrument of universal scope has been drafted to avoid the risk of undesirable consequences (evolution by further codification).[30]

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that the UNCLOS "sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national, regional and global action and cooperation in the marine sector, and that its integrity needs to be maintained (…)".

[28] See T. Scovazzi, *Is the UN Convention on the Law of the Sea the Legal Framework for All Activities in the Sea? The Case of Bioprospecting*, in D. Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation* (2010), at 309.

[29] T. Koh, *A Constitution for the Oceans*, in U.N., *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), xxiii.

[30] See T. Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, in Hague Academy of International Law, *Recueil des cours*, vol. 286 (2001), at 39.

What follows from the assumption that the UNCLOS is linked to the time when it was negotiated comes close to a banality, but has the great strength of banalities. It is a fact that the UNCLOS cannot perform miracles. In particular, the UNCLOS cannot regulate those activities that its drafters did not intend to regulate for the simple reason that they were not foreseeable in the period when this treaty was being negotiated. At that time, very little was known about the genetic qualities of deep seabed organisms. For evident chronological reasons, the potential economic value of the units of heredity of this kind of organisms was not considered by the UNCLOS negotiators. When dealing with the special regime of the Area and its resources, the UNCLOS drafters had only mineral resources in mind.

This is fully evident from the plain text of the UNCLOS. The term "activities" in the Area is defined as "all activities of exploration for, and exploitation of the resources of the Area" (Art. 1, para. 1). Art. 133, *a*, defines the "resources" of the Area to "all solid, liquid or gaseous mineral resources *in-situ* in the Area at or beneath the seabed, including polymetallic nodules".[31] The UNCLOS regime of common heritage of mankind does not include the non-mineral resources of the Area. However, for the same chronological reasons, the regime of freedom of the high seas does not apply to genetic resources either. While including provisions regarding living and mineral resources in areas beyond national jurisdiction, the UNCLOS does not provide any specific regime for the exploitation of marine genetic resources. The words "genetic resources" or "bioprospecting" do not appear anywhere in the UNCLOS. A legal gap exists in this regard. Sooner or later it must be filled (better sooner than later) through a regime which, to be consistent, should encompass within the same legal framework the genetic resources of both the Area and the superjacent waters.

However, not all of the UNCLOS should be left aside when envisaging a future regime for marine genetic resources beyond national jurisdiction. The scope of the regime of the Area is already broader than may be believed at first sight. Under the UNCLOS, the legal condition of the Area has an influence also on the regulation of activities that, although different from minerals and mining activities, are also located in that space. The regime of the Area already encompasses subjects which are more or less directly related to mining activities, such as marine scientific research,[32] the preservation of the marine environment[33] and the protection of underwater cultural heritage.[34] As far as the first two subjects are concerned, it is difficult to draw a clear-cut distinction between what takes place on the seabed and what in the superjacent waters.

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[31] In so providing, the UNCLOS narrows the term "resources" that was used in a more abstract and broad sense in Art. 1 of U.N. General Assembly Resolution 2749 (XXV) (see *supra*, para. 2.B).

[32] See Art. 143 UNCLOS.

[33] See Art. 145 UNCLOS.

[34] See Art. 149 UNCLOS.

While a specific regime for exploitation of genetic resources is lacking, the aim of sharing the benefits among all States, which was the main aspect of the seminal proposal made by Arvid Pardo, can still be seen as a basic objective embodied in a treaty designed to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular the special interests and needs of developing countries, whether coastal or land-locked" (UNCLOS preamble). In the field of genetic resources, too, the application of the principle of freedom of the sea (that is the "first-come-first-served" approach) leads to inequitable and hardly acceptable consequences.[35] New cooperative schemes, based on provisions on access and sharing of benefits, should be envisaged in a future agreement on genetic resources beyond the limits of national jurisdiction. This is also in full conformity with the principle of fair and equitable sharing of the benefits arising out of the utilization of genetic resources set forth by Art. 1 of the CBD and, more recently, by Art. 10 of the Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010).[36]

Moreover, bioprospecting, that is what is currently understood as the search for commercially valuable genetic resources of the deep seabed, can already be considered as falling under the UNCLOS regime of marine scientific research. The UNCLOS does not provide any definition of "marine scientific research". However, Art. 246, which applies to the exclusive economic zone and the continental shelf, makes a distinction between two kinds of marine scientific research projects, namely those carried out "to increase scientific knowledge of the marine environment for the benefit of all mankind" (para. 3) and those "of direct significance for the exploration and exploitation of natural resources, whether living or non-living" (para. 5, *a*). This distinction supports the conclusion that, under the

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[35] See *supra*, para. 1.B.

[36] "Parties shall consider the need for and the modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally". While the Nagoya Protocol does not apply to areas beyond national jurisdiction, it could become a source of inspiration. As stated in the 2011 report of the U.N. Secretary General on "Oceans and the law of the Sea", the adoption and implementation of the Nagoya Protocol "may provide further opportunities to inform and advance the discussions on marine genetic resources, including by providing examples of how the sharing of benefits from the utilization of resources from areas within national jurisdiction may be addressed in a multilateral context" (doc. cit. *supra* at note 20, para. 256). Another source of inspiration could be the International Treaty on Plant Genetic Resources for Food and Agriculture, concluded in 2001 under the auspices of the Food and Agriculture Organization (FAO).

UNCLOS logic, also research activities of direct significance for the purpose of exploration and exploitation of genetic resources fall under the general label of "marine scientific research".[37] Bioprospecting, also is consequently covered by Art. 143, para. 1, of the UNCLOS, which sets forth the principle that "marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole".[38] This provision refers to any kind of marine scientific research and is not limited to research on mineral resources. Yet the reading of Art. 143 in combination with Art. 246 contradicts the assumption that there is an absolute freedom to carry out bioprospecting in the Area.[39] States which are active in bioprospecting in this space are already bound to contribute to the benefit of mankind as a whole.[40]

[37] There is an inextricable factual link between marine scientific research (either pure or applied) and bioprospecting. A research endeavour organized with the intent to increase human knowledge may well result in the discovery of commercially valuable information on genetic resources.

[38] Art. 241 UNCLOS is also relevant in a discussion on the legal condition of the genetic resources of the deep seabed. It provides that "marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources".

[39] Art. 143, para. 3, grants to the States the right to carry out scientific research in the Area, but binds them to co-operate with other States and the ISBA in various fields, including dissemination of results. This provision also refers to any kind of marine scientific research in the Area. Yet, the mandate of ISBA deserves close scrutiny, especially if it is to be understood not only as an entity involved in marine mining activities in competition with others, but as the international organization which bears the main responsibility to realize a just and equitable economic order of the oceans and seas. Nothing prevents States from expanding the mining focus of the ISBA and granting to it some broader management competences in the field of genetic resources.

[40] "The principle of common heritage in its substantive aspect is, like any norm of international law, capable of being applied in a decentralised manner by states. Even in the absence of *ad hoc* institutions every state is under an obligation to respect and fulfil the principle of the common heritage by ensuring that subjects within its jurisdiction do not act contrary to its object and purpose. This would be the case if a state authorised or negligently failed to prevent biotechnological activities in common spaces that had the effect of causing severe and irreversible damage to the unique biodiversity of that space. Similarly, a state would fail the common heritage if it authorised exclusive appropriation of genetic resources without requiring equitable sharing of pertinent scientific knowledge and without ensuring that a fair portion of economic benefits accruing from their exploitation be devoted to the conservation and sustainable development of such common resources": Francesco Francioni, *Genetic Resources, Biotechnology and Human Rights: The International Legal Framework*, in F. Francioni (ed.), *Biotechnologies and International Human Rights* (2007), at 14.

III. Possible future developments

New prospects emerged at the 2011 meeting of the Working Group.[41] A number of States, both developed and developing, proposed the commencement of a negotiation process towards a new implementation agreement of the UNCLOS that could fill the gaps in the present regime of conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.[42] While a general consensus on this proposal has not yet been achieved, commonalities are being developed among a number of States that were previously putting forward divergent positions. The States participating in the 2011 meeting of the Working Group recommended that

> "(a) A process be initiated by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea.
> (b) This process would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and transfer of marine technology.
> (c) This process would take place: (i) in the existing Working Group; and (ii) in the format of intersessional workshops aimed at improving understanding of the issues and clarifying key questions as an input to the Work of the working Group".[43]

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[41] Resolution 65/37, adopted by the U.N. General Assembly on 7 December 2010, encouraged the Working Group, in view of its 2011 meeting, "to improve progress on all outstanding issues on its agenda" (para. 164).

[42] A new implementation agreement was already envisaged by certain States during the 2008 meeting of the Working Group: "Several delegations considered that an implementation agreement under the United Nations Convention on the Law of the Sea was the most effective way to establish an integrated regime and address the multiplicity of challenges facing the protection and sustainable use of marine biodiversity in areas beyond national jurisdiction. These delegations suggested that such an instrument was necessary to fill the governance and regulatory gaps that prevented the international community from adequately protecting marine biodiversity in the areas beyond national jurisdiction. It was proposed that such an instrument would address currently unregulated activities, ensure consistent application of modern ocean governance principles in sectoral management regimes and provide for enhanced international cooperation" (doc. quoted *supra* at note 25, para. 47).

[43] Doc. A/66/119 of 30 June 2011, paragraph 1 of the annex.

At its 2012 meeting, the Working Group requested the United Nations Secretary-General to convene in 2013 two intersessional workshops on the topics of "marine genetic resources" and "conservation and management tools, including area-based management and environmental impact assessment". The workshops are intended to improve understanding of the issues and clarify key questions in order to enable the United Nations General Assembly to make progress on ways to fulfil its mandate.[44]

With Resolution 67/78, adopted on 11 December 2012, the U.N. General Assembly decided (para. 182) to convene the two workshops in May 2013[45] and recalled (para. 181)

> "that in 'The future we want' States committed to addressing, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea".[46]

The workshops, which were held in May 2013,[47] attracted a wide participation of scientists, industry and non-governmental organizations and resulted in a well-informed presentation and discussion of the two topics.

With Resolution 68/70, adopted on 9 December 2013, the U.N. General Assembly requested, *inter alia*, the Working Group to make recommendations to the Assembly on the scope, parameters and feasibility of an international instrument under the Convention" (para. 198), in order to prepare the decision to be taken at the General Assembly 69th session (starting in September 2014).

In all these discussions, the possibility of a third UNCLOS implementation agreement is envisaged as a possible way to move forward, inasmuch as the existing instruments cannot fill the present governance and regulatory gaps and cannot provide the required specific regime. Rather than elaborations on theoretical questions and legal principles, what is needed for the time being is the

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[44] See doc. A/67/95 of 13 June 2012, paragraph 1 and appendix.

[45] The workshop on marine genetic resources will address the following subjects: "Meaning and scope; extent and types of research, uses and applications; technological, environmental, social and economic aspects; access-related issues; types of benefits and benefit-sharing; intellectual property rights issues; global and regional regimes on genetic resources, experiences and best practices; impacts on and challenges to marine biodiversity beyond areas of national jurisdiction; exchange of information on research programmes regarding marine biodiversity in areas beyond national jurisdiction".

[46] "The Future We Want" is the outcome document adopted by the U.N. Conference on Sustainable Development, held in Rio de Janeiro in 2012 (so-called Rio+20 Conference (doc. A/RES/66/288 of 11 September 2012).

[47] See doc. A.AC/276/6 of 10 June 2013.

consolidation of a general understanding on a number of "commonalities" that could become the key elements in the "package" for a future global regime for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. This package could include a network of marine protected areas, environmental impact assessment, marine genetic resources, including access to and sharing of benefits from them, as well as capacity building and technology transfer.

Private self-regulation standards, corporate social responsibility and environmental governance in the fisheries

*Marco Fasciglione**

I. Introduction; II. The problem of fisheries sustainability and the origins of private sector self-regulation in fisheries management; III. Codes of conduct, ecolabelling schemes and other private self-regulation instruments for fisheries sustainability; A. Codes of conduct; B. Ecolabelling and fisheries certification schemes in capture fisheries and aquaculture; 1. Non-profit or non-governmental organizations-driven ecolabels; 2. Industry-driven ecolabel and certification schemes; 3 Retailer-driven ecolabels; 4. Public or governmental ecolabelling schemes; (a). FAO labels in the fisheries sector; (b). The FAO guidelines for the ecolabelling of fish and fishery products from marine capture fisheries; (c). The FAO guidelines for the ecolabelling of fish and fishery products from inland capture fisheries; (d). The FAO technical guidelines on aquaculture certification; (e). The FAO draft evaluation framework to assess the conformity of public and private ecolabelling schemes with the FAO guidelines; IV. The effectiveness of certification and of ecolabelling schemes: concluding remarks.

I. Introduction

In the contemporary economic and social environment, Wit is increasingly accepted that issues relating to social responsibility and sustainability play a more and more pivotal role, especially in the business sector; indeed business goals are inseparable from the societies and environments within which they operate. Corporate social responsibility, in effect, is usually described as the 'responsibility of enterprises for their impacts on society'.[1] Furthermore, in order to fully meet their corporate social responsibility, enterprises 'should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;

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[1] See the European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, Communication COM (2011) 681 final, 25.10.2011, at 6.

identifying, preventing and mitigating their possible adverse impacts'.[2] Therefore, whilst short-term economic gain can be pursued, the failure to account for longer-term social and environmental impacts makes those business practices unsustainable. This applies in every sector of business and especially in the fisheries sector where the call for sustainable practices of exploitation are a result of the very essence of this specific business activity; from two perspectives, at least.

In the first place, from the perspective of marine capture fisheries and aquaculture, despite national and international mechanisms to improve the sustainability of fish stocks, the state of most of the world's fisheries remains fragile. Disappointment with the effectiveness of regulatory measures aimed at curbing overfishing and improving fisheries sustainability has led to the development of alternative market-based strategies for protecting marine life and promoting sustainability. Such private market mechanisms are designed to influence the purchasing decisions of consumers and the procurement policies of retailers and food services selling fish and seafood products, as well as to reward fisheries engaging in responsible fishing practices. Ecolabels and similar certification schemes fall within this category. Indeed, a range of ecolabelling and certification schemes exists in the fisheries sector, each with its own criteria, assessment processes, levels of transparency and sponsors. What is covered by the schemes can vary considerably: by-catch issues, fishing methods and gear, sustainability of stocks, conservation of ecosystems and even social and economic development. Similarly, developers of standards and certification schemes for fisheries sustainability also vary – private companies, industry groups, non-governmental organizations (NGOs), and even some combinations of stakeholders. In the second place, and from the perspective of standards for food safety and quality in fisheries and aquaculture practices, there are more and more pressures on producers (fish farmers) and on processors (of both wild capture and farmed fish) to comply with private standards ensuring food safety and quality: the demand for private standards relating to food safety reflects, even in the fish industry, the need of buyers to be assured that good practices have been implemented properly throughout the supply chain.

Both such standards and mechanisms may be included in that broader category labelled as industry 'self-regulation' instruments. This term is used to include any industry's environmental (or social) initiative which is 'voluntary', meaning not required by law. This may include, *inter alia*, codes of conduct,[3] policies, management systems, audits, reports, third-party certification schemes, environmental labels. The aim of this essay is to review the main private sector self-regulation instruments addressing corporate responsibility in the fisheries:

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[2] European Commission, ibid.

[3] See H. Baade, "Codes of Conduct for Multinational Enterprises: An Introductory Survey", in N. Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Antwerp (1980), 3-38.

the essay will focus in particular on those instruments which address the environmental sustainability of fisheries, such as codes of conduct, ecolabels and other private standards or certifications related to the sustainability of fish stocks. On the other hand, private standards and certification addressing food safety and quality, relating to the circulation in the international market of fish and seafood from either marine capture or farmed sources, will not be reviewed in the present essay: the analysis and review of these areas, deserving much more space than the available, will be postponed to future essays.

The present paper, therefore, will review the main private self-regulation mechanisms which have emerged within the fisheries management practice for safeguarding the marine environment and fisheries sustainability.

II. The problem of fisheries sustainability and the origins of private sector self-regulation in fisheries management

Fisheries and aquaculture are vital for global food security. While fish supply from wild capture fisheries has stagnated over the years, the demand for fish and fish products continues to rise. Consumption has more than doubled since 1973. The perceived health benefits of fish, and technological developments enabling its increased availability in the form of convenience products suited to more modern and affluent lifestyles are key reasons for this rise in consumption. The increasing demand for fish and seafood has been met by a robust increase in aquaculture production, with an estimated average annual growth rate of 8.5 percent in volume in the period 1990–2005. As a result, the contribution of aquaculture to the fish food supply has increased significantly, reaching almost half (47 percent) in 2008 from a mere 8 percent in 1970. This trend is expected to continue, with the contribution of aquaculture to fish food supply estimated to reach 60 percent by 2020.[4] Fish utilization has also changed significantly in the last few decades. Advances in technology and logistics, in particular improvements in storage and processing capacity, together with major innovations in refrigeration, transportation, food-packaging and fish-processing equipment have enabled product diversification. Vessels incorporating processing facilities are able to stay at sea for extended periods, and permit the distribution of more fish in fresh or frozen forms as well as higher yields from the available raw material. The proportion of fish marketed in live or fresh form increased from 25 percent in 1980 to more than 39.7 percent in 2008. The proportions represented by frozen, canned and cured products have remained relatively static over that period, although frozen fish still represents about half of the total fish processed for human consumption.

[4] See FAO, *The State of Word Fisheries and Aquaculture*, 2010, at 197, available at www.fao.org/docrep/013/i1820e/i1 820e.pdf.

However, the rapid increase of exploitation of fish stocks[5] in the world's oceans for commercial purposes is jeopardizing global main marine fish stocks, under the increasing pressure from overfishing and environmental degradation. In effect, since the second half of the 1940s the necessity of facing the problem of over-fishing has become a matter of concern for the international community.[6] International fisheries law well into the 20th century focused mainly on conservation and on fishing rights. The notion of fisheries' conservation in terms of this body of law was interpreted as 'the aggregate of measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food'[7] with no recognition of the environmental consequences of fishing activities. During the latter part of the 20th century it became abundantly clear that international fisheries policy and law had not been particularly successful in the conservation of fish stocks, and evidence emerged that fishing activities were negatively impacting the environment.[8] It is well-known, too, that it is under this scenario that international instruments, during the 1990s, started to address issues related to fisheries management and, as a result, international fisheries law, if not the practice of over-fishing, has changed considerably. The introduction of the precautionary principle and, related thereto, ecosystem based management approaches are amongst the most important substantive changes of this framework. Also, and from a different perspective, the most important development is probably the introduction of a general international normative framework regulating high seas fisheries and thereby curtailing the traditional freedom of fishing. This principle, indeed, has been adjusted to accord with the exhaustible nature of its very subject matter ,and this in two major areas, at the very least. It has been 'emasculated for almost the entire stock of commercially exploited species, moved from a regime of *res communis* to one where these resources were placed under the sovereign rights of the coastal State through the creation of the exclusive economic zone […]'. Also, 'its field of application has

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[5] As to the notion of fish stock and on related international regimes and regulation see K. Bangert, "Fish Stocks", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law,* Oxford University Press (2008), online edition.

[6] In 1946 the International Fisheries Conference was convened in London for the purpose of examining the problem of the overfishing in the North Sea and in other areas adjacent to the British Isles and if possible drawing up some forms of regulatory agreement among nations concerned (see the Final Act and Convention of the International Overfishing Conference, Cmd 6791 (1946)). On this issue see D.M. Johnston, *The International Law of Fisheries*, New Haven (1987), at 361 ff.

[7] See Article 2 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. The Convention is available at www.untreaty.un.org/ilc/texts/instruments/english/conventions/ 8_1_1958_fishing.pdf.

[8] See E. Hey, "A Healthy North Sea Ecosystem and a Healthy North Sea Fishery: Two Sides of the Same Regulation?", in 23 *Ocean Development and International Law* (1992), 217-238.

been seriously restricted, for the bottom of the oceans as well as the superjacent waters within the 200 nautical mile zone measured from any land or island have been excluded. Today these zones form part of the continental shelf or the Area, and the EEZ respectively'.[9]

Despite these developments marine fisheries resources, both in areas subject to coastal state jurisdiction and on the high seas, remain overexploited and are becoming increasingly depleted; moreover marine biodiversity as a whole is in ever-greater danger.[10] This situation has amplified the calls for the development of sustainable fishing activities and for the setting forth of principles of fisheries management both at public and at private level. What is noteworthy here is the circumstance that in addition to governmental bodies and other public authorities, typical addressees of such instances,[11] also corporate entities performing their business in the fisheries sector have begun to be addressees of calls requiring them to contribute to the development of a multilateral level of decision-making and to sustainable fisheries management practices, and this by the implementation of responsible business and trade policies.[12] Indeed increased stakeholder participation and devolution of management functions is a growing trend in fisheries management strategies[13], in recognition of the fact that the top-down management approach with management authority heavily concentrated in the central government administration and agencies has often been ineffective. Indeed, the duty of fisheries management and development in many jurisdictions has been the principal responsibility of governments. This responsibility is often exercised through a central government authority which initiates government fisheries plans and policies, controls, monitors and undertakes surveillance of fishing and related activities, conducts research and enforces the laws and regulations concerning fisheries. In this command-and-control approach to management, the authority usually dictates the terms and conditions of involvement of principal actors in a given activity or group of activities. Therefore, this approach

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[9] See E. Franckx, "Fisheries in the South China Sea: A Centrifugal or Centripetal Force?", 11 *Chinese Journal of International Law* (2012), at 3.

[10] The Food and Agriculture Organization of the United Nations (FAO) estimates that in 2008 50% of marine fish stocks were fully exploited and between 25 and 30 % of the marine fish stocks were over-exploited or depleted. See FAO, *The State of World Fisheries and Aquaculture*, 2008 (2009), at 30.

[11] See A. Serdy, "Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?", in 15 *Ocean and Coastal Law Journal*, 2010, at 23 ff.

[12] See M. Campins-Eritja, J. Gupta, "The Role of 'Sustainability Labelling' in the International law of Sustainable Development", in N. Schrijver and F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice*, Leiden (2004), 251-270, at 264 ff.

[13] FAO, *Law and sustainable development since Rio legal issues and trends in agriculture and natural resources management*, FAO Legislative Study 73, 2002, Rome, para. 3.1.6, available at www.fao.org/docrep/005/Y3872E/Y3872E00.HTM, last accessed July 2013.

to management of fisheries is effective only to the extent where the central authority has the full capacity to fulfil its mandate.

However, the expansion of globalization processes has been accompanied by a growing critique of the inefficacy of the command-and-control approach[14] and by the trend toward an increasing use of market-based instruments.[15] The inefficacy of command-and-control methods is usually attributed to two circumstances: in the first place they are not the cheapest means to achieve societal objectives and, in the second place, and more importantly, command-and-control methods do not take into account the specific conditions of the regulated. Indeed, the command-and-control approach to management pays little attention to the advice of stakeholders, which often creates a lack of understanding between the regulator and the regulated, and often frustrates the effort of the central authority to achieve effective management. As for instance, in the management of inland, near shore or coastal fisheries resources of many jurisdictions, a lot of interests are concerned, and there is a broad consensus that the command and control approach to management should give way to wider participation by stakeholders in fisheries management through implementation of community-based fisheries management, whereby stakeholders are involved directly or indirectly in the policy formulation and decision making processes or some technical aspects of the functions of the central authority.[16] This approach provides for consultation of the stakeholders or for the stakeholders to have some form of representation in the decision making process. It promotes a more transparent and accountable management authority on the one hand and creates a more responsive stakeholder in terms of implementation of the management programmes and objectives, and greater respect for, and compliance with, the directives of the relevant government authority on the other. Within this broader policy framework, the evolution of self-regulation instruments for ensuring sustainable fisheries management may be assessed.

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[14] As for the command and control approach see R.B. Stewart, "Economics, environment and the limits of legal control", in 9 *Harvard Environmental Law Review* (1985), at 1 ff.; C.R. Sunstein, "Paradoxes of Regulatory State," in *University of Chicago Law Review* (1990), at 407 ff.

[15] Certification schemes in particular have emerged in recent years as particularly active sources of standard setting and governance in the fisheries sector see T. Ward, B. Phillips (eds.) *Seafood labelling: Principles and practice*, Oxford (2008), for a general framework on this issue .

[16] See B. Kuemlangan, H. Teingenem, "An Overview of Legal Issues and Broad Legislative Considerations for Community-based Fisheries Management", in R. Welcomme R. and T. Petr, (eds.), *Proceedings of the second international symposium on the management of large rivers for fisheries Volume II*, FAO Regional Office for Asia and the Pacific, Bangkok, Thailand. RAP Publication 2004/17, 151-162.

III. Codes of conduct, ecolabelling schemes and other private self-regulation instruments for fisheries sustainability

As far as their content is concerned, self-regulation standards, also in the fisheries sector, can relate to the products themselves (specifications or criteria for product attributes) or to processing (outlining criteria and practices for the way products are made). Food safety standards, for instance, typically focus on the processing aspects with the overall goal of improving the safety of final products. However, they can also define product standards in relation to residues of additives, contaminants or in terms of microbiological criteria. Ecolabels, on the other hand, focus on where fish and seafood come from and how they are harvested or farmed (and/or the impact of that harvest on related fauna and flora) rather than on aspects of the products themselves. Processing standards might relate to performance criteria that establish verifiable requirements for the production process, or management criteria relating to documentation and monitoring. In the fish and seafood area, some schemes are concerned with marine capture fisheries, some with aquaculture, some with both; however, standards schemes have also been developed for dealing exclusively with fishmeal: in these situations they include both safety and environmental considerations[17]. Private standards in fisheries and aquaculture are usually underpinned by certification schemes. Certification is a process by which a certification body or certifier gives written or equivalent assurance that a product, process or service conforms to certain standards. There are three main types of certification: a) first-party certification: by which a single company or stakeholder group develops its own standards, analyses its own performance, and reports on its compliance, which is therefore self-declared; b) second-party certification: where an industry or trade association or NGO develops standards. Compliance is verified through internal audit procedures or by engaging external certifiers to audit and report on compliance; and c) third-party certification: where an accredited external, independent certification body, which is not involved in standards setting and has no other conflict of interest, analyses the performance of involved parties, and reports on compliance. Where standards are established by individual companies and based on their own product specifications, compliance is typically verified by internal audit procedures. However, leaving aside this situation, third-party verification of compliance, by bodies independent of the standard setter and of the organization to be audited, is the norm. These rules apply both with regard to the monitoring of the correct implementation of guidelines laid down in corporate codes of conduct and to the main ecolabelling schemes.

[17] See the *International Fishmeal and Fish Oil Organisation's Global Standard for Responsible Supply*, available at www.iffo.net.

A. Codes of conduct

Codes of conduct do not have any authorized definition. At a very basic level, they all aim to define standards and principles that are to guide the behaviour of the addressee in a particular way. As such, they are regulatory-like instruments. Codes of conduct are not of recent vintage, yet it was not until the second half of the twentieth century, i.e. in the context of, globalization that they rose to prominence as regulatory responses to the challenges posed by the globalization of the world economy.[18] Codes of conduct may respond to a broad range of regulatory concerns and be established at the initiative of governments, international organizations, individuals, or private organizations (NGOs, business entities). A distinguishing feature of such instruments is that they are voluntary in nature[19] rather than legally binding, and thus not legally enforceable. To the extent that they are issued by states, international organizations, non-governmental organizations (NGOs) and the International Chamber of Commerce, codes of conduct fall into the broad normative realm of soft law.[20] It is also worth noting that while codes may be directed at states, a salient feature is their aim to regulate the transnational activities of non-state actors.[21] From this perspective, codes of conduct are usually regarded as instruments for effectively enhancing the accountability of corporations in the international marketplace. Indeed, codes of (corporate) conduct can be broadly defined as 'commitments voluntarily made by companies, associations or other entities, which lay down standards and principles for the conduct of business activities in the marketplace'. They purport to shape corporate conduct in a certain way – through a catalogue of principles that define a set of relationships between the company and its stakeholders on a range of topics. Also, the introduction of private voluntary codes of (corporate)

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[18] Historically, codes of conduct "have been formulated with a view to guiding the behaviour of individuals, groups, organizations, governments, societies, and, most, recently, corporations." See W. Cragg, "Multinational Corporation, Globalisation, and the Challenge of Self-Regulation", in J. Kirton, M. Trebilcock (eds.), *Hard Choices, Soft Law*, 2004, at 213 ff.

[19] However, some trade and industry organizations make adoption of a code a precondition for company membership.

[20] For a detailed and extensive discussion on the phenomenon of soft law, see D. Shelton (ed.), *Commitment and Compliance*. *The Role of Non-Binding Norms in the International Legal System* (2000); D. Thürer, "Soft Law", in R. Wolfrum (ed.), n. 5 above.

[21] As for the literature on non-state actors see D. Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State", in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law*, Berlin (1998), at 37 ff.; C. Okeke, *Controversial subjects of contemporary international law. An examination of the new entities of international law and their treaty-making capacity*, Rotterdam (1974), at 68-69; R. Higgins, *Problems and Processes. International Law and How We Use it*, Oxford (1995); A. Clapham, Human Rights Obligations of Non-State Actors, Oxford (2006), at 237 ff.

conduct can be seen as corporate and civil society attempts to fill in some of the international regulatory voids that opened up in the wake of neoliberalism. Since the application of voluntary codes may transcend territorial confines, they have the advantage of extending the application of prescriptive standards to the behaviour of socially accountable corporations overseas, to the operations of suppliers, subcontractors and other business partners where standards may be non-existent, incomplete, unenforced or ignored. In this sense, codes of conduct may be regarded as forming part of an emerging transnational normative regime. Since private codes of corporate conduct are developed not by the national legislative in its formal position as lawmaker but by private, non-state actors, they constitute informal instruments, which, nevertheless, perform a public function, i.e. the protection and enhancement of social and ecological values. In this sense, they are hybrid norms.[22] As far as the fisheries sector is concerned, in response to public pressures concerning environmental and social concerns in the fisheries supply chain, a multitude of codes of conduct at sectoral and company level committed to, *inter alia*, environmental compliance and to a sustainable use of natural resources, have been created. Furthermore, as there are no generally accepted standards or model codes of conduct to comply with, a wide variety of codes of conduct with different level of standards and protection have been developed.[23] Besides the different content of codes of conduct, the actual implementation and monitoring of these codes of conduct are key challenges. In this regard, one of the major problems in the field of codes of conduct implementation is to ensure compliance with the principles of the code at all levels of the supply chain. The common instrument for securing compliance is the audit, conducted either internally by the company or through third-party organizations.

B. Ecolabelling and fisheries certification schemes in capture fisheries and aquaculture

Since the 1970s several actors (NGOs, industry, and government) have started to develop labelling and certification schemes for products and services that are claimed to be preferable from an environmental and/or social point of view,

[22] See D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", in 115 *Yale Law Journal* (2006), 7, 1490–1563; J. Dine, "Multinational enterprises: international codes and the challenge of `sustainable development'", in *Non-State Actors and International Law* (2001), 81-106.

[23] See D. Shelton, "The Utility and Limits of Codes of Conduct for the Protection of the Environment", in A. Kiss, D. Shelton , K. Ishibashi (eds.), *Economic globalization and compliance with international environmental agreements*, 211-227; R.W. Parker, "Choosing Norms to Promote Compliance and Effectiveness: The Case for International Environmental Benchmark Standards", in E. B. Weiss (ed.), *International Compliance with Non-binding Accords* (1997), at 145 ff.

particularly since such schemes are compatible with a free-market approach, as opposed to a command-and-control approach. As far as the fisheries sector is concerned, ecolabels and certification schemes are increasingly being used in the global trade and marketing of fish and fish products.[24] Such instruments have emerged in the broader context of growing concerns about the state of the world's fish stocks, increased demand for fish and seafood, and a perception that many governments are failing to manage the sustainability of marine resources adequately. The visible signs of these schemes are labels that those adhering to the schemes may place on the products they offer for sale. The label guarantees that the product originates in capture fisheries and/or aquaculture enterprises that are sustainably managed and/or that adhere to criteria reflecting social and cultural values deemed important by the originators of the scheme. In this way, consumers can promote sustainable resource use through the purchase of labelled products; or, as they are sometimes called, ecolabels, and certification schemes use market forces to incentivize more a responsible use of physical and human resources. Large-scale retailers and food services now drive the demand for certification of both aquaculture and capture fishery products in relation to food safety and quality, sustainability and social criteria.[25] The presence of an ecolabel, for example, helps retailers and brand owners by meeting the growing consumer demand for products originating from sustainably managed fisheries. In some markets, retailers look for niche products that are certified as organic fish, or for a certain degree of corporate social responsibility in the production systems and practices. In addition, ecolabels and certification help retailers by ensuring that the products delivered by a range of certified international suppliers, at times operating in different continents, are standardized in terms of sustainability, food safety, quality and traceability, depending on the specific ecolabel or certification. The first fisheries ecolabelling initiatives appeared in the early 1990s; such schemes, mainly promoted by non-governmental organizations, were largely concerned with incidental catch, or by-catch, during fishing. Since then, several ecolabel and certification schemes have been implemented in both the public and the private sector: these schemes may vary in terms of scope, sponsorship, assessment criteria and levels of transparency, and according to the nature of the organization behind the initiative.

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[24] See G. Auld, L. H. Gulbrandsen, "Transparency in Non-state Certification: Consequences for Accountability and Legitimacy", in 10 *Global Environmental Politics* (2010), 3, 97-119 ; M. Hatanaka, C. Bain, L. Busch, "Third-party certification in the global agrifood system", in 30 *Food Policy* (2005), 3, 354-369.

[25] S. Washington, L. Ababouch, *Private standards and certification in fisheries and aquaculture: current practice and emerging issues*, FAO Fisheries and Aquaculture Technical Paper No. 553, Rome, 2011.

1. Non-profit or non-governamental organization-driven ecolabels

As far as the non-governmental organization level is concerned, such entities have been the front-runners in developing private schemes for certifying fisheries sustainability. The first example is represented by the *Dolphin Safe*[26] label which was based on standards developed during the 1990s by the United States NGO Earth Island Institute. This label focuses on dolphin by-catch in the tuna industry (rather than on the sustainability of the tuna stocks). It maintains agreements with tuna companies worldwide, and monitors them in order to 'ensure the tuna is caught by methods that do not harm dolphins and protect the marine ecosystem'.[27] It is unclear what proportion of global tuna sales the label accounts for, but it is likely to be significant when we consider that, as the Earth Island Institute claims, the standards are adhered to 'by more than 90 percent of the world's tuna companies'. However, the Dolphin Safe label has been criticized by other NGOs (notably by Greenpeace) for not taking into account other sustainability factors, such as the sustainability of tuna stocks or the other environmental impacts of tuna fishing.[28]

In the second place, in 1997 a step forward in the development of sustainability self-regulation instruments in fisheries was marked by the launch of the *Marine Stewardship Council (MSC)* scheme. The scheme was developed by Unilever and the WWF, but it has operated independently since 1999. It is worth noting that this certification applies further upstream in the supply chain, covering also fisheries and fisheries management: from this perspective it is not only the most comprehensive fisheries certification scheme but also a pivotal player in the ecolabel trend thanks to its stimulation of the development of other schemes. MSC certification, which is consistent with the United Nations FAO guidelines for fisheries certification[29], relies upon two standards: the first covering 'sustain-

[26] See the website www.earthisland.org/dolphinSafeTuna describing the label and its implementation mechanisms.

[27] See www.earthisland.org/dolphinSafeTuna/consumer/.

[28] Other examples of, mainly NGO sponsored, mechanisms adopted since the nineties are: a) publicity campaigns or organized boycotts of certain species deemed to be threatened, such as the "Give Swordfish a Break" campaign in the United States in the late 1990s; b) consumer guides which aim to influence the consumer's choice at the moment of purchase (such as "wallet cards", or text messages) giving information about which species to avoid (referring to "red lists") and which are deemed environmentally safe to purchase; c) putting pressure on retailers to introduce sustainable procurement policies for fish and seafood. Mostly developed in the United Kingdom (where in 2006 Greenpeace initiated its league table, "Ranking of the sustainability of supermarkets' seafood) "naming and shaming" strategies are commonly adopted by NGOs for protesting against retailers deemed to be selling unsustainable products.

[29] See *Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries - Revision 1*, 2009.

able fishing'[30], the second covering 'seafood traceability'.[31] The MSC holds the standards against which independent third-party certifiers assess conformance. The assessment methodology of fisheries under this scheme focuses on three pillars: a) an independent scientific verification of the sustainability of the stock; b) the ecosystem impact of the fishery; and c) the effective management of the fishery. All three pillars are assessed on the basis of a range of indicators which include but are not limited to: aspects relating to the species; the type of fishing gear used, and the concerned geographical area. Today 321 fisheries around the world are engaged in some stage of the MSC assessment process and 205 fisheries have so far been certified as sustainable.[32] A third example of non-governmental organization schemes is represented by the *Friend of the Sea* certification for products originating from both sustainable fisheries and aquaculture[33]. This certification scheme therefore, set up in 2006, covers both wild and farmed fish and, remarkably, its standards also include requirements relating to carbon footprint and to social accountability. The *Friend of the Sea* certification scheme is based on the sustainability of the stock, rather than on whether the fishery is sustainably managed. Its certification methodology is based on existing official data in terms of stock assessment. *Friend of the Sea* maintains that it does not certify stocks that are overexploited (based on FAO definitions of levels of exploitation), or fisheries using methods that affect the seabed, including those that generate more than 8 percent discards. The certification process is performed by independent third-party certifiers.

Even if other minor NGO-driven schemes exist, such as *KRAV*, a label created by a Swedish NGO that specializes in organic farming but which has recently developed a standard for sustainable fishing[34] and, in Germany, *Naturland,* orig-

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[30] See Marine Stewardship Council, *MSC Fishery Standard Principles and Criteria for Sustainable Fishing*, available at www.msc.org/about-us/standards/standards/msc-environmental-standard; last accessed on July 2013.

[31] Marine Stewardship Council, *MSC Chain of Custody Standard*, available at www.msc.org/about-us/standards/standards/chain-of-custody; last accessed on July 2013.

[32] See www.msc.org/business-support/key-facts-about-msc; last accessed on July 2013. As far as the presence in the global markets of MSC certified products is concerned, as of late 2009, more than 2,500 MSC-labelled products were available on the market; this is double the number (1,200) on sale at the beginning of 2008, and more than four times the number (600) available in early 2007, showing just how dynamic the market for certified fish and seafood is (see FAO, *Private Standards and Certification in Fisheries and Acquaculture*, Rome, 2011, p. 25). As to the MSC certification scheme see L. H. Gulbrandsen, "The emergence and effectiveness of the Marine Stewardship Council", in 33 *Marine Policy* (2009), 654-660.

[33] It is worth noting is that Friend of the Sea, a non-profit non-governmental organization, was founded by the European Director of the Earth Island Institute's Dolphin-Safe Project. The official mission of Friend of the Sea is to conserve the marine habitat (see www.friendofthesea.org/about-us.asp).

[34] See www.krav.se/about-krav.

inally set up to certify organically farmed seafood, but at present running a certification scheme for capture fishery, which includes social, economic and ecological sustainability criteria,[35] MSC and *Friend of the Sea* schemes, thanks to their international scope, the number of fisheries certified and the claimed volumes of certified fish and seafood products entering international markets, stand out as the most internationally significant private voluntary ecolabelling schemes.

2. Industry-driven ecolabel and certification schemes

Ecolabels and certification schemes have also been developed by national and regional industry bodies. These schemes are not ecolabels in the strictest sense as they provide rather a certification of good fishing practices based on self-regulation and voluntarism. This category includes, for instance, the voluntary scheme launched in 1998 by the Canadian fishing industry which covers all commercially harvested marine and freshwater species and certifies the good practices used on board fishing vessels. The same applies to the scheme launched in 2006, in the United Kingdom, by the Seafish Industry Authority. Interestingly, this scheme,[36] which was developed in conjunction with the British Standards Institute, covers all aspects of vessel operations, including environmental considerations and traceability; moreover the conformity to its standards is assessed by an accredited independent certification body, Moody Marine.[37] Industry driven schemes may be divided into two major categories: ecolabels adopted in-house by fishing companies and ecolabels adopted by fishing industry associations. As far as fishing company in-house ecolabels are concerned, few individual fishing companies have created their own ecolabels. This applies, for instance, to the scheme adopted by the Spanish group Pescanova, one of Europe's largest fishing companies, which fishes globally and has interests in the processing sector. The Pescanova in-house scheme consists in a corporate social responsibility policy grounded, in the first place, on principles and rules provided by FAO's Conduct Code for Responsible Fishing, and in particular on three major principles namely the preservation of the ecosystem, the promotion of sustainable development, and the rationalization of fishing activity, and in the second place, on the release of a logo to appear on a limited range of its packaged products. The logo is aimed at assuring customers that the fish concerned has been captured in a way that 'preserves the aquatic and marine ecosystem in order to maintain the quality, diversity and availability of fish resources for today's and for future generations'.[38] As regards as the ecolabels adopted by fishing industry associations, the Japan

[35] See the "Scheme for the Certification of Capture Fishery Project" at www.naturland.de/naturland_ fish.html.

[36] rfs.seafish.org.

[37] It is worth noting that, under the Responsible Fishing Scheme, certified vessels are listed online and can be searched for on the website of the initiative.

[38] See www.pescanova.com/EN/content/Corporate-Social-Responsibility.

Fisheries Association and Fiskifelag Iceland association are worth mentioning here; both of them are national level umbrella organizations composed of fishing companies. The Japan Fisheries Association, composed of some 400 Japanese fishing companies, founded the *Marine EcoLabel-Japan (MEL)* in December 2007 as a response to the increasing interest in ecolabelled fish and seafood within the Japanese market. Indeed, the label declares itself to be inspired the FAO guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries and is aimed at facilitating the adoption of informed decisions by purchasers 'whose choice can be relied upon to promote and stimulate the sustainable use of fishery resources'.[39] In Iceland Fiskifelag, a body for the Icelandic fishing industry, developed a plan to promote the sustainability of Icelandic fisheries to international markets. This initiative gained public sector support and was behind the decision to identify Icelandic seafood products, produced from catches in Icelandic waters, with an Icelandic logo for responsible fisheries. Therefore in 2008 the *Icelandic Logo for Responsible Fisheries* was officially launched. The logo, which can be used in all markets for seafood products, indicates products originating in Iceland from responsible fisheries and can also be used to identify the catch of Icelandic vessels from straddling stocks which are under integrated management. Hence, the logo is in essence a label of origin based on Iceland's fisheries sustainability credentials. The certification process is conducted by independent accredited certifiers and consists, substantially, in a third-party certification of Iceland's fisheries management, these last in consistency with the standards included in the FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries.[40] While neither of the abovementioned initiatives may be expected to have a strong significance within international markets, being mainly confined to a domestic market level, a wider scope may be assigned to those industry-driven ecolabel schemes adopted within the framework of international industry sector groups. This is the case, for instance, of the International Fishmeal and Fish Oil Organisation (IFFO), an international non-profit organization representing fishmeal and fish-oil producers and related trades throughout the world. IFFO, in effect, has a corporate social responsibility policy aimed at promoting responsible and sustainable fisheries which is integrated with a third-party certification scheme and the label 'IFFO Assured'. The IFFO scheme is based upon a sustainability commitment to ensure the responsible sourcing of raw materials for fishmeal and fish oil, as well as on safety and quality commitments aimed at ensuring the safe production of ingredients for aquaculture, agriculture and directly in the production of consumer products.[41]

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[39] See www.melj.jp/eng/index.cfm.

[40] Despite its origin as an industry-driven initiative, the Icelandic label on responsible fisheries nowadays may be best described as a public-private partnership between industry and public authorities, as a result of the endorsement made at governmental level of the label.

[41] Interestingly, the IFFO considers MSC certification as being compliant with its standards and therefore recognizes equivalency.

3. Retailer-driven ecolabels

Some retailers operating in the fisheries sector have also developed their own sustainability labels. This is the case, for instance, of the large French retail chain Carrefour, the second largest retailer in the world, which in 2005 set up its own ecolabel *Pêche responsable*. [42] Carrefour also stocks MSC-labelled products, both frozen products under its 'Agir Eco Planete' label and fresh fish at its fish counters. However, retailers are usually hesitant to create their own ecolabel as it might not be cost-efficient given the existence of other accessible schemes, and one may consider that setting up an in-house ecolabel could be risky: if a scheme were to be discredited, it would be difficult to contract out from it. In contrast, associating with a credible independent ecolabelling scheme offers benefits with marginal risks. This is the main reason for the fact that many of the world's largest retailers have endorsed the MSC. Hence, in February 2006, Wal-Mart, the largest retailer in the world, set a goal to procure all its wild-caught seafood for North America from MSC-certified fisheries within three to five years. Asda, the UK subsidiary of the Wal-Mart Group, has also pledged support to the MSC and has a target of buying wild-caught fish only from MSC certified sources.

4. Public or governmental ecolabelling schemes

Within the fisheries sector, labels have been discussed and adopted also at public authority and at government level. This category also includes labels and other schemes promoted and originated within *ratione materiae* concerned International governmental organizations. Several examples of this kind of label might be described,[43] however, in the light of the purposes of this essay, the most relevant to review are labels and label-like mechanisms implemented within the framework of the activities of the Committee on Fisheries (COFI) of Food and Agricultural Organization (FAO). FAO labels, indeed, represent the main benchmark for industry and for other private-driven ecolabelling schemes adopted within the fisheries sector.

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[42] See www.carrefour.fr/developpement-durable/carrefour-encourage-une-peche-durable.

[43] For instance, the Government of France adopted its own national ecolabel and related certification scheme for fisheries in 2008; the European Union has also adopted a generic ecolabel, the *Flower* label, that is also applicable to fish and aquaculture: the label identifies products and services that have a reduced environmental impact throughout their life cycle, from the extraction of raw material through to production, use and disposal. The EU is also developing minimum criteria for voluntary ecolabelling schemes in fisheries based on the FAO guidelines (see the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: *Launching a debate on a Community approach towards eco-labelling schemes for fisheries products*, COM(2005)275 adopted on 29 June 2005; see also the European Parliament resolution on: *Launching a debate on a Community approach towards ecolabelling schemes for fisheries products* (2005/2189(INI) adopted on 7th September 2006.

(a). FAO labels in the fisheries sector

As regards fisheries, FAO Members first discussed ecolabels in 1996 during a meeting of the Committee on Fisheries. On that occasion, indeed, several Members expressed their concern over the possibility that the setting up of ecolabelling schemes might operate as non-tariff barriers to trade. However, in 1996, there was no consensus that FAO should become substantively involved; in any case, in keeping with its mandate to monitor developments in world fisheries and aquaculture, FAO continued to assemble information on ecolabelling and certification schemes focusing particular attention on the following issues: environmental sustainability; food safety and quality; human well-being and animal welfare. In 1998, drawing on information collected, FAO organized a first technical consultation in order to investigate the possibility of developing guidelines on the ecolabelling of fish and fish products. The technical consultation did not reach agreement on FAO's role in developing such guidelines, except on the fact that any future guidelines should be consistent with the 1995 FAO Code of Conduct for Responsible Fisheries, and that FAO should not be directly involved in the actual implementation of any ecolabelling scheme[44]. This notwithstanding, in the absence of global initiatives aimed at harmonizing the development of the use of ecolabelling and certification schemes in fisheries and aquaculture and as a result of the growing number of such schemes, COFI agreed in 2003 that FAO should develop guidelines on ecolabelling.[45] Since then, FAO has developed several guidelines which represent the source of inspiration and the benchmark of all the major private ecolabelling and certification schemes. The FAO guidelines include: the *Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries* (the so-called *Marine Guidelines*);[46] the *Guidelines for the Ecolabelling of Fish and Fishery Products from Inland Capture Fisheries* (the so-called *Inland Guidelines*);[47] the *Guidelines on Aquaculture Certification* (the so-called *Aquaculture Guidelines*).[48] The FAO COFI Sub-Committee on Fish Trade has also been discussing since 2012 a draft 'Framework for assessment of ecolabelling schemes in inland and marine capture fisheries'.

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[44] See FAO, *Report of the Technical Consultation on the Feasibility of Developing Non-Discriminatory Technical Guidelines for Eco-Labelling of Products from Marine Capture Fisheries*, Rome, Italy, 21–23 October 1998. FAO Fisheries Report No. 594.

[45] FAO has concentrated on ISO Type I environmental labels, which are voluntary and based on third-party assessment of the environmental impact of the production system. ISO Type II and Type III ecolabels are self-declared statements of compliance with previously established indices, i.e. no independent confirmation of product claims. Although ISO Type II and Type III are not the subject of FAO guidelines, they are often high-profile types of labels and are becoming increasingly widespread.

[46] FAO, *Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries*, 2005, Rome.

[47] FAO, *Guidelines for the Ecolabelling of Fish and Fishery Products from Inland Capture Fisheries*, 2011, Rome.

[48] FAO, *Technical Guidelines on Aquaculture Certification.* 2011, Rome.

(b). The FAO guidelines for the ecolabelling of fish and fishery products from marine capture fisheries

The *Marine Guidelines*, adopted by COFI in 2005 and revised in 2009[49] pursue the general objective of promoting a more sustainable use of fisheries resources. Their specific goal is to provide guidance to governments and other organizations, including private sector organizations, that already maintain, or are considering establishing labelling schemes for certifying fish from well managed fisheries. The *Guidelines* are of a voluntary nature and hence applicable to all those ecolabelling schemes designed to certify and promote labels for products from well-managed marine capture fisheries. The *Guidelines* contain six main sections: scope, principles, general considerations, terms and definitions, minimum substantive requirements and criteria, and procedural and institutional aspects. As far as the *Guidelines*' general principles are concerned, they require that any ecolabelling scheme should be consistent with relevant international law and agreements, namely: the 1982 United Nations Convention on the Law of the Sea; the United Nation Fish Stocks Agreement;[50] the FAO Code of Conduct for Responsible Fisheries; the WTO rules and mechanisms and other relevant international instruments. They also require that ecolabelling schemes should be market-driven, transparent and non-discriminatory, including by recognizing the special conditions applying to developing countries. The 2009 revision concerned the Minimum substantive requirements and criteria section of the *Guidelines,* with the aim of allowing FAO to review and provide more guidance on the general criteria in relation to the 'stock under consideration' criterion and to serious impacts of fishery on the ecosystem. Ultimately, the revised guidelines call for the minimum substantive requirements and criteria of ecolabelling schemes to include the following elements: a) that the fishery is conducted under a management system that is based on good practice, including the collection of adequate data on the current state and trends of the stocks and based on the best scientific evidence; b) that the stock under consideration is not overfished; c) that the adverse impacts of the fishery on the ecosystem are properly assessed and effectively addressed. Furthermore, the procedural and institutional aspects of ecolabelling schemes should encompass: the setting of certification standards; the accreditation of independent certifying bodies; the certification that a fishery and the chain of custody of its products are in conformity with the required standards and procedures. In the light of improved capacity to farm marine fish and the need for increased food from aquatic ecosystems, stock enhancement and the

[49] See FAO, *Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries, Revision 1*, Rome, 2009.

[50] See the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, adopted on 4 August 1995 and in force as from 11 December 2001.

use of introduced species may become more common management interventions also in the marine environment.

(c). The FAO guidelines for the ecolabelling of fish and fishery products from inland capture fisheries

When adopting the Marine Guidelines in 2005, the Twenty-sixth Session of COFI requested that FAO also prepare a guidelines text on the ecolabelling of fish and fishery products from inland capture fisheries. The *Inland Guidelines* are akin to the *Marine Guidelines*. Indeed they are largely based on these last except for some differences in their scope, as special considerations have been reserved to fisheries enhancement and stocking. In effect, during the development of the *Inland Guidelines*, it became clear that the use of enhancement is common in inland fisheries. However, there are several different forms of enhancement, and some may be more appropriately considered forms of aquaculture than forms of capture fisheries.[51] It became evident, therefore, that not all enhanced fisheries could be subject to the Inland Guidelines. Enhancement practices range from minor interventions either in the flow of water and/or in a flora or fauna, to highly controlled aquaculture systems that release animals into semi-natural environments. Thus it was necessary to define carefully the scope of fisheries eligible for an ecolabel in consideration of, *inter alia*, the relationship between the type of enhancement activities or production system and the intent of management with respect to the 'stock under consideration'. FAO was of the opinion that the characteristics and management of the 'stock under consideration' would decide whether or not the enhanced fisheries would fall within the scope of the *Inland Guidelines*. It also declared that to be within the scope of the *Inland Guidelines*, enhanced fisheries must meet the following criteria: a) the species are native to the fishery's geographic area or were introduced far back in time and have subsequently become established as part of the 'natural' ecosystem; b) there are natural reproductive components of the 'stock under consideration'; c) the growth during the post-release phase is based upon food supply from the natural environment, and the production system operates without supplemental feeding. Lastly, according to the *inland guidelines*, enhanced fisheries may comprise nat-

[51] "Enhanced fisheries, including culture-based fisheries, are activities aimed at supplementing or sustaining the recruitment of one or more aquatic organisms and raising the total production of selected elements of a fishery beyond a level which is sustainable by natural processes" (see FAO, *Consultation on the application of Article 9 of the FAO code of conduct for responsible fisheries in the Mediterranean region: Synthesis of the National Report*s, 1999, Rome, Annex I – Glossary, available at www.fao.org/docrep/x2410e/x2410e07.htm). Enhancement may entail stocking with material originating from aquaculture installations, translocations from the wild and habitat modification. Ultimately, between pure wild-capture fisheries and pure aquaculture, there is a broad spectrum of fisheries that involve human intervention. Some enhanced fisheries lie more towards the aquaculture end of the spectrum; others are closer to pure wild-capture.

urally reproductive components and components maintained by stocking. The overall enhanced fishery, hence, should be managed in such a way that the naturally reproductive components be managed in conformity with the provisions of Article 7 of the Code of conduct for responsible fisheries. The management system of enhanced fisheries should permit a verification that proves that stocking material originating from aquaculture facilities meets the provisions of Article 9 of the Code itself. FAO concluded that culture-based fisheries, specifically those supported solely by stocking (i.e. with no associated management intent to sustain the natural reproduction components and capacity of the 'stock under consideration'), would not fall within the scope of the *Inland Guidelines*. In 2010, a FAO Expert Consultation[52] recommended that guidelines on culture-based fisheries could be developed either by using the aquaculture certification guidelines or by establishing a separate set of certification guidelines for this category of enhanced fisheries. Differences between the scope of the *Marine Guidelines* and that of the *Inland Guidelines* concern the approach to ecolabelling fisheries based on introduced species. There are circumstances in which countries with depauperate inland fauna or modified aquatic ecosystems may wish to introduce new species to increase production and value from these systems. Although international guidelines and risk assessment exist to help make responsible introductions, FAO felt that the application of guidelines, risk assessment and subsequent monitoring and enforcement were not sufficiently established to ensure adequate protection of inland aquatic ecosystems. Therefore, inland fisheries based on new species introductions would fall outside the scope of the *Inland Guidelines* and only inland fisheries involving species introduced 'historically' would be eligible for ecolabelling.

(d). The FAO technical guidelines on aquaculture certification

In 2011, the twenty-ninth Session of COFI approved the FAO *Technical Guidelines on Aquaculture Certification* (so-called *Aquaculture Guidelines*).[53] While endorsing the guidelines, COFI recognized the existing standards and guidelines set by international organizations such as the World Organisation for Animal Health for aquatic animal health and welfare, the Codex Alimen-

[52] FAO, *Report of the Expert Consultation on the Development of Guidelines for the Ecolabelling of Fish and Fishery Products from Inland Capture Fisheries*, Rome, 25–27 May 2010 available in *FAO Fisheries and Aquaculture Report*, No. 943.

[53] FAO, *Technical Guidelines on Aquaculture Certification*, 2011, Rome. It was the FAO Sub-Committee on Aquaculture during its 3rd Session held in 2006 in New Delhi, India, to express concern over the emergence of a wide range of certification schemes and their cost/benefit value and to recognize the need for globally accepted norms for aquaculture production serving as a basis for improved harmonization and to facilitate mutual recognition and equivalence of such certification schemes. Accordingly, the Sub-Committee decided to request FAO to convene an Expert Workshop (s) and start playing a lead role in facilitating the development of guidelines for certification in the aquaculture sector.

tarius Commission for food safety, and the International Labour Organization for socio-economic aspects. However, in the absence of a precise international reference framework for the implementation of some of the specific minimum criteria contained in the *Aquaculture Guidelines*, COFI recognized the importance of developing appropriate standards in order to ensure that aquaculture certification systems do not become unnecessary barriers to trade. It noted the necessity for the certification systems to remain consistent with and to comply with the provisions contained in the SPS Agreement and the TBT Agreement of the WTO. In addition, COFI also recommended that FAO develop an evaluation framework to assess the conformity of public and private certification schemes with the *Aquaculture Guidelines*. The *Aquaculture Guidelines* provide guidance for the development, organization and implementation of credible aquaculture certification schemes. Minimum substantive criteria for developing aquaculture certification standards are provided for: (i) animal health and welfare; (ii) food safety; (iii) environmental integrity; and (iv) socio-economic aspects. The extent to which a certification scheme seeks to address the issues depends on its objectives. Therefore, according to the *Guidelines* the scheme should explicitly and transparently state its objectives. The *Aquaculture Guidelines* are applicable to voluntary certification schemes and must be interpreted and implemented in a manner consistent with their objectives, with national laws and regulations, and with international agreements, if applicable. It is worth noting that the *Guidelines* stress the fact that effective and credible aquaculture certification schemes must be configured according to three main components: standards, accreditation and certification. Accordingly, the *Guidelines* discipline: a) standard-setting processes, which are needed to develop and review certification standards; d) accreditation systems, which are needed to provide formal recognition to a qualified body to carry out certification; and c) certification bodies, which are needed to verify compliance with certification standards. It is extremely interesting that the *Aquaculture Guidelines* underpin the fact that the responsible development of aquaculture depends also on social and economic components of sustainability, which have to be addressed complementarily with environmental components. The *Guidelines* also recognize that there is an extensive national and international legal framework in place for various aspects of aquaculture and its value chain, covering issues such as aquatic animal disease control, food safety and conservation of biodiversity.

(e). The FAO Draft Evaluation framework to Assess the Conformity of Public and Private Ecolabelling Schemes with the FAO Guidelines

In 2009, COFI asked FAO to develop an evaluation framework to assess whether private or public ecolabelling schemes were in conformity with the FAO *Marine Guidelines*. This followed earlier discussions in both COFI and the COFI Sub-Committee on Fish Trade regarding whether FAO could, or should,

verify the truthfulness of statements made by ecolabelling schemes as to their compliance with the *Marine Guidelines*. The advice that issued from COFI was that FAO should not address itself to monitoring compliance, rather it was suggested that FAO should develop an evaluation framework for assessing whether private or public ecolabelling schemes for marine fisheries were in conformity with the *Marine Guidelines*. Such a framework would provide a transparent tool that would allow national ecolabelling schemes to be assessed against the *Marine Guidelines*. Schemes found to be consistent with the *Guidelines* could then be considered equivalent to any other scheme consistent with the *Guidelines*. In 2010, FAO convened an Expert Consultation that produced an evaluation framework.[54] The evaluation framework identified a list of indicators to be used for realizing an assessment of conformity with the *Marine Guidelines* and the *Inland Guidelines*. A total of 115 indicators were identified, 6 of which apply only to inland fisheries. The assessment procedure enables the evaluator to determine whether a scheme conforms with the indicators identified in the evaluation framework, but only on a pass or fail basis. Complete conformity is possible only where all indicators have been included in the scheme being assessed. The evaluation framework was submitted to the COFI Sub-Committee on Fish Trade in February 2012 for discussion and subsequent forwarding to the Thirtieth Session of COFI. During this Session some Members supported the adoption of the evaluation framework to assess the conformity of public and private ecolabelling schemes with the FAO Guidelines, other Members opposed the adoption of such a framework and still others called for a swift progress towards the evaluation of ecolabelling and certification in the light of the FAO Guidelines. The draft of an evaluation framework is still pending.

IV. The effectiveness of certification and of ecolabelling schemes: Concluding remarks

Ecolabels and certification schemes have been set up in response to two complementary driving-forces operating in the contemporary globalized international arena: the concerns for environmental sustainability and the perceived decline in the abundance of many of the world's major fish stocks, in the first place, and the perceived failure in public governance aimed at protecting natural resources, including the sustainability of world fisheries, in the second place. This perception has led towards the idea of the need to share such responsibilities according to which, while governments have the primary responsibility for fisheries sustainability, private business actors of fisheries and other stakeholders from the

[54] FAO, *Report of the Expert Consultation to Develop a FAO Evaluation Framework to Assess the Conformity of Public and Private Ecolabelling Schemes with the FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries*, Rome, 24–26 November 2010.

supply chain also bear some responsibilities in this field. As a result of intensified consumer awareness and interest in environmental issues, it has become clear that ecolabels and certification schemes could improve access to certain markets, and result in an increased market share and price for the fisheries industry, retailers and commercial brand owners while helping these last in discharging their responsibilities as to the sustainable exploitation of fisheries. Moreover, after several years of experience, there is some evidence of improvements resulting from ecolabelling and certification,. Fisheries certification does appear to result in peer pressure for competitors to seek certification themselves. Positive environmental impacts, such as significant reductions in by-catch and fewer impacts on ecosystems, have also been documented, as well as management adjustments in certified fisheries, such as improved surveillance of by-catch and changes in data management. Similarly, certification methodologies are also being used as self-assessment tools for the fisheries industry, as a means of defining gaps in performance and to implement strategies for improvements.[55] However, from the perspective of the overall status of fisheries stocks, it is difficult to document evidence of improvements resulting from private self-regulation mechanisms. Most of the fisheries certified to date were already well managed prior to certification; on this side further empirical evidence is required.[56] Furthermore, the development of such market-driven instruments for improving environmental performance in the supply chain has shown several limitations as to their effectiveness. The main issues highlighted by a growing body of literature[57] include: a) inefficiencies in multiple audits for the same supplier by each buyer; b) false evidence and double-book-keeping by suppliers; c) limited capabilities of third parties and of in-house auditors to understand and detect violations; d) a focus on policing and finding faults, rather than on preventing and fixing problems; e) misalignments within firms between environmental responsibility objectives and economic imperatives. Indeed, the ability of certification programmes to modify fisheries practices to create better environmental outcomes ultimately depends on the effectiveness and reliability of assessment and certification processes: unfortunately, from this perspective the evaluation of environmental achievements by the main certification schemes have yielded mixed results.[58]

It follows that codes of conduct, certification, ecolabels and other self-regulation schemes are not a panacea. The main question, still unanswered, is whether

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[55] S. Washington, L. Ababouch, n. 25 above, at 124.

[56] Ibid.

[57] See among others R. Mares, "The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments", 79 *Nordic Journal of International Law* (2010), 193-244.

[58] A general survey with a specific focus on MCS certification is available in L. H. Gulbrandsen, "The emergence and effectiveness of the Marine Stewardship Council", n. 32 above.

such market forces in practice help to safeguard aquatic resources. Indeed as market-based mechanisms, they are designed to incentivize good management with potential market rewards and as such, they can complement public measures for responsible and sustainable fisheries management. However, voluntary certification schemes must not be seen as a substitute for good public management. In effect, the idea-force at the basis of the non-state market-driven governance schemes is that their 'authority' would emanate from the market's supply chain itself. Producers and consumers along the supply chain make their own evaluations about whether or not to grant authority to these schemes. The market's supply chain provides the incentives through which evaluations of support occurs. Compliance incentives in the form of a promise of price premiums, market access or prevention of boycott campaigns are created up and down the commodity supply chain. To the extent that greater market shares or price premiums flow from labelling, the schemes would probably attract more producers, resulting in an ever-wider diffusion of sustainable management practices. In this way, non-state market-driven governance systems would ameliorate social and environmental problems through the 'reconfiguration' of markets.[59] Unfortunately, this system relies on the self-assumed willingness and capability of consumers to adopt conscious purchasing choices selecting ethical and environmental friendly products rather than products without such 'qualities'. In our opinion this assumption cannot be regarded as valid as consumers may be, for several different reasons, unwilling to make or incapable of making this kind of choice .[60] From this perspective even if private sector self-regulation may be a good starting point it is unlikely to resolve the dire problems of overfishing and depleted fish stocks. Ultimately it may not be regarded as being *per se* an exhaustive remedy since it needs to be complemented with: strict normative counterbalances to be enforced at national and international level disciplining government-sanctioned marine reserves; rules restricting access to fish resources; stringent distributive schemes; and the curtailment of illegal, unregulated, and unreported fishing.

[59] S. Bernstein, B. Cashore, "Can non-state governance be legitimate? An analytical framework", in 1 *Regulation and Governance* (2007), 4, 347-371, at 350.

[60] As for instance, it seems difficult to deny that consumers' ethical choices may not be affected in presence of situations of economic and financial crisis, curtailing salaries and public expenditures.

Protecting the last ocean: the proposed Ross Sea MPA. Prospects and progress

Karen N. Scott[*]

I. Introduction; II. The proposed Ross Sea MPA; III. MPAs and the 1982 CCAMLR; IV. MPAs in areas beyond national jurisdiction; V. Concluding remarks.

I. Introduction

In an article published in the journal *Science* in 2008 the Ross Sea in the Antarctic was identified as the ocean least impacted by human activities.[1] Subsequently and compelling described as the 'last ocean' in a campaign supporting its strict protection,[2] the Ross Sea region is nevertheless not pristine. Over exploitation of marine resources – notably seals, penguins, great whales and fish – in the nineteenth and twentieth centuries[3] continue today in the form of the Patagonian toothfish fishery. Stocks of toothfish have been in serious decline since 2000[4] and, as currently regulated, it is estimated that by 2031 toothfish biomass will be reduced by over fifty percent compared to pre-exploitation levels.[5] A decrease in fish biomass is likely to impact negatively on the long-term overall ecology of the Southern Ocean,[6] adding to other environmental pressures in the region such as

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[1] B.S.S. Halpern et al. "A global map of human impact on marine ecosystems" in *319 Science* (2008), at 948. See also D.G. Ainley "A history of the exploitation of the Ross Sea, Antarctica", in *46 Polar Record* (2010), at 233.

[2] J. Weller, *The Last Ocean. Antarctica's Ross Project. Saving the Most Pristine Ecosytem on Earth* (2013).

[3] T. Tin et al. "Impacts of local human activities on the Antarctic environment" in *21 Antarctic Science* (2009), 3, 3 and 18-22. See also S. L. Chown et al. "Challenges to the Future Conservation of the Antarctic", in *337 Science* (2012), at 158.

[4] D.G. Ainley and D.B. Siniff "The importance of Antarctic toothfish as prey of Weddell seals in the Ross Sea", in *21 Antarctic Science* (2009), 317- 323.

[5] Ibid.

[6] D.G. Ainley and L.K. Blight "Ecological repercussions of historical fish extraction

pollution,[7] tourism,[8] invasive species,[9] climate change and ocean acidification.[10] Against this background it is unsurprising that states, scientists and non-governmental organisations have come together in a high profile campaign to designate the Ross Sea region a marine protected area (MPA).

Spatial management and, more particularly, the designation of MPAs are increasingly regarded as central to oceans conservation, providing a tool for the management of multiple activities through a process of planning. There is no one definition of an MPA although broadly the concept refers to a defined area within the marine and/ or coastal environment that benefits from a higher level of protection than its surroundings as a consequence of legislative or administrative action.[11] In 2002 states meeting at the World Summit on Sustainable Development agreed to establish a network of representative MPAs by 2012.[12] Two years later, the parties to the 1992 Convention on Biological Diversity (CBD)[13] endorsed this target, and further specified that the 2012 network of representative MPAs should cover ten percent of the world's ecological regions.[14] As of 2014, less than three percent of the world's oceans are protected,[15] and the 2012 target has been extended to 2020 as part of the Aichi Biodiversity Targets[16] adoted by the CBD in 2010.

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from the Southern Ocean", in *10 Fish and Fisheries* (2009), at 13.

[7] The oil spill from the *Bahia Paraiso* in 1989 off the coast of Western Antarctica covered an area of more than 3 km^2 and is the largest recorded spill to date. See Tin et al., note 3 at 5.

[8] The most serious incident to date is the sinking of the *MS Explorer* south of King George's Island in November 2007. However, there have been a series of accidents involving tourist ships, fishing vessels and protest vessels in the Antarctic over the last five years. See further K.N. Scott "Safety of shipping in the Southern Ocean", in *16 Journal of International Maritime Law* (2010), at 21.

[9] See Y. Frenot et al. "Biological Invasions in the Antarctic: extent, impact and implications", in *80 Biological Reviews* (2005), at 45.

[10] See P. Convey et al. "Antarctic Climate Change and the Environment", in *21 Antarctic Science* (2009), at 541.

[11] See for example the definition of an MPA provided for the purposes of the 1992 Convention on Biological Diversity. *Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas*, of 13 February 2003 (doc. UNEP/CBD/SBSTTA/8/INF/7), para. 30.

[12] WSSD, Johannesburg Plan of Implementation of 4 September 2002 (available at <www.unep.org>), at para. 31(c).

[13] Convention on Biological Diversity (5 June 1992; in force 29 December 1993).

[14] See CBD COP 7 Decision VII/28 'Protected Areas (Articles 8(a) to (e)', para. 18; CBD COP 7 Decision VII/5 'Marine and coastal biodiversity', paras. 18-31; CBD COP 7 Decision VII/30 'Strategic Plan: future evaluation of progress', Annex II, Goal 1.1.

[15] M. Spalding et al, "Protecting Marine Spaces: Global Targets and Changing Approaches" 27 Ocean Yearbook (2013) 213, 229 – 230.

[16] CBD COP 10 Decision. X/2 'The strategic plan for biodiversity 2011- 2020 and the Aichi Biodiversity Targets', Target 11. This target was subsequently endorsed in UNGA Res. 66/288, 'The Future We Want', of 11 September 2012, at para. 177.

The proposed Ross Sea MPA is intended to be part of the global network of representative MPAs. Its progress however, has not been smooth and clearly illustrates the challenges associated with designating MPAs in areas beyond national jurisidiction (ABNJ) more generally. This chapter will explore the progress of the Ross Sea MPA proposal to date, and identify and respond to key legal objections to its designation. It will conclude with an assessment as to its prospects as a key conservation tool within the Southern Ocean, and its wider signficance with respect to other regions and developments at the international level more generally.

II. The proposed Ross Sea MPA

An MPA for the Ross Sea region was first formally proposed[17] at the thirty-first meeting of the Commission for the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)[18] in 2012.[19] The Ross Sea MPA was in fact one of three proposed protected areas discussed at that meeting, the others relating to Eastern Antarctica[20] and areas exposed by collapsing ice shelves on the Antarctic Peninsula.[21]

Diplomatically, the Ross Sea MPA proponents – New Zealand and the United States – erred in failing to agree on a unified proposal to be submitted to the meeting. The boundaries originally proposed by New Zealand at the 2012 CCAMLR meeting deliberately excluded a small but commercially lucrative toothfish fishery, known as the 'wedge'. By contrast, the United States proposal for the Ross Sea MPA sought to include the toothfish fishing grounds within the MPA boundaries.[22] Both states nevertheless managed to agree a compromise

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[17] Scenarios for MPA protection in the Ross Sea, Eastern Antarctica and in areas exposed by collapsed ice-shelves were presented by New Zealand and the US, Australia and France and the EU respectively at the previous Commission meeting held in 2011. See *Report of the Thirtieth Meeting of the Commission*, Hobart, Australia, 24 October – 4 November 2011 at 7.10 – 7.36.

[18] Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) (20 May 1980; in force 7 April 1982).

[19] Doc. CCAMLR – XXXI/16, New Zealand, *A proposal for the establishment of a Ross Sea region Marine Protected Area* (2012); Doc. CCAMLR – XXXI 40, USA, *A Proposal for the Ross Sea region Marine Protected Area* (2012). See also *Report of the Thirty-First Meeting of the Commission*, Hobart, Australia, 23 October – 1 November 2012 at 7.69 – 7.77.

[20] Doc. CCAMLR-XXXI/36, Australia, France and the European Union, *Proposal for a conservation measure establishing a representative system of marine protected areas in the East Antarctica planning domain* (2012).

[21] Doc. CCAMLR-XXXI/30, European Union, *EU Proposal for spatial protection of marine habitats and communities following shelf retreat or collapse in Subarea 88.3, Subarea 48.1 and Subarea 48.5* (2012).

[22] See B.R. Sharp and G.M. Watters "Marine Protected Area planning by New Zealand

position during the second half of the meeting,[23] and the jointly proposed MPA would have constituted the largest MPA to date, covering 2.27 million km^2 of the Southern Ocean.[24] The objective of the Ross Sea MPA as expressed at the 2012 meeting was 'to conserve ecological structure and function throughout the Ross Sea region at all levels of biological organisation, by prohibiting fishing in habitats that are important to native mammals, birds, fishes and invertebrates.'[25] Structurally, the MPA would have comprised a general protection zone, a special research zone and a spawning protection zone.[26] Nevertheless, the compromise between New Zealand and the US was arguably brokered too late in the proceedings, and the Ross Sea MPA proposal – together with the proposals in respect of the Eastern Antarctic and areas exposed by collapsing ice-shelves – was rejected by the Commission in 2012.[27] The Commission did however, agree to convene a special meeting to be devoted to the discussion of MPA proposals in Bremerhaven in Germany in July 2013.[28]

At the Second Special Meeting of the CCAMLR Commission held in 2013 the proposal submitted by New Zealand and the US, which comprised a revised version of the unified proposal developed during the 2012 Commission meeting, received strong support from the majority of Commission members.[29] Nevertheless, it was unable to secure approval from states such as Russia and Ukraine,[30] despite including a so-called 'sunset clause', which would have required a positive vote to reaffirm or modify the MPA after a fifty year period in order to prevent the MPA from lapsing.[31] More significant revisions were made to the Ross Sea MPA proposal before its presentation at the Thirty-Second meeting of the CCAMLR Commission in October 2013.[32] In particular, the revised proposal reduced its coverage by almost 40 percent to 1.34 million km^2 through the removal

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and the United States in the Ross Sea region" (2011; CCAMLR doc. WS-MPA-11/25*)*.

[23] See Doc. CCAMLR – XXXI/16 Rev. 1 New Zealand and USA, *A proposal for the establishment of a Ross Sea region Marine Protected Area* (2012).

[24] *Report of the Thirty-First Meeting of the Commission* (2012) at 7.70

[25] Ibid at 7.69.

[26] Ibid at 7.70.

[27] Ibid at 7.82.

[28] Ibid at 7.105.

[29] Report of the Second Special Meeting of the Commission, Bremerhaven, Germany, 15 – 16 July 2013, at paras. 3.15 – 3.39.

[30] Ibid at paras. 3.18 and 3.26.

[31] Ibid at 3.11.

[32] Doc. CCAMLR XXXII/27, New Zealand and USA, *A proposal for the establishment of the Ross Sea Region Marine Protected Area* (2013). See also Doc. CCAMLR XXXII/BG/40 Rev. 1, New Zealand and USA, *Ross Sea Region Marine Protected Area: Explanation of Objectives supporting component areas* (2013) and Doc. CCAMLR XXXII/BG/38 Rev. 1, New Zealand and USA, *Reporting, review and period of designation in the Ross Sea Region MPA Proposal* (2013).

of the spawning protection zone and the reduction in the area covering the Scott and north-eastern seamounts.[33] Despite these concessions however, consensus could not be achieved in the Commission and the proposed Ross Sea MPA was not adopted.[34]

The concerns expressed by a minority of Commission members, notably Russia and Ukraine, related to both procedural and substantive, more fundamental, issues. In raising technical concerns, some states expressed disapproval over the role played by the CCAMLR Scientific Committee in reviewing the proposal,[35] and noted the lack of simultaneous translation during the MPA discussion within the Committee.[36] More significantly, some states – including several which supported the Ross Sea MPA proposal – questioned the quality of the scientific information on which the proposal was founded.[37] Notably, New Zealand and the United States attempted to respond to these concerns at the 2013 CCAMLR Commission meeting by removing certain areas from the proposed MPA, including the spawning protection zone, in response to specific reservations as to the sufficiency of scientific evidence supporting their inclusion within the MPA.[38] More generally, both Russia and Ukraine challenged CCAMLR's mandate to designate MPAs, noting the absence of a definition of a MPA within CCAMLR or associated conservation measures.[39] Other members questioned whether a new approach to ecosystem management – through the designation of MPAs – was needed given that CCAMLR fisheries had been (in their opinion) effectively managed by the Commission over the last thirty years.[40] Ukraine went as far as to suggest that CCAMLR should delegate responsibility for MPAs to the Antarctic Treaty Consultative Meeting (ATCM) and protected areas should be designated under the 1991 Environmental Protocol[41] to the 1959 Antarctic Treaty[42] only.[43]

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[33] *Report of the Thirty-Second Meeting of the Commission,* Hobart, Australia, 23 October – 1 November 2013 at para. 7.4.

[34] Ibid at para. 7.32. The proposed Eastern Antarctic MPA, which was also discussed at the same meeting, was similarly not adopted.

[35] *Report of the Thirty-First Meeting of the Commission* (2012) at 7.65 (i) and 7.96; Report of the Second Special Meeting of the Commission (2013) at para. 3.17.

[36] Report of the Second Special Meeting of the Commission (2013) at paras. 3.17 and 3.26.

[37] *Report of the Thirty-First Meeting of the Commission* (2012) at 7.65 (ii) and 7.97; Report of the Second Special Meeting of the Commission (2013) at para. 3.23.

[38] *Report of the Thirty-Second Meeting of the Commission* (2013) at para. 7.4.

[39] Report of the Second Special Meeting of the Commission (2013) at paras. 3.18 and 3.26.

[40] Ibid at para. 3.57.

[41] Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991; in force 14 January 1998).

[42] Antartic Treaty (Washington, 1 December 1959; in force 23 June 1961).

[43] *Report of the Thirty-Second Meeting of the Commission* (2013) at para. 7.22.

More fundamentally, and reflecting an increasingly entrenched position in respect of MPAs more generally, Ukraine challenged the legal basis of designating MPAs on the high seas. At the Second Special Meeting of the CCAMLR Commission held in Bremerhaven in July 2013 Ukraine stated:[44]

> The UN Convention on the Law of the Sea (ratified by Ukraine) provides the opportunity for establishing MPAs only within the coastal waters in the areas of jurisdiction of those countries. Therefore, at this stage we cannot see any legal possibility for establishing MPAs in the high seas of the World Ocean containing areas for which CCAMLR is responsible. This matter requires further consideration.

III. MPAs and the 1982 CCAMLR

The Russian and Ukrainian reservations as to the CCAMLR Commission's legal mandate to designate MPAs within the CCAMLR area[45] are surprising and arguably unfounded in light of Articles IX(2) (f) and (g) of the Convention, which permit the designation of open and closed seasons for harvesting and open and closed areas 'for the purpose of scientific study or conservation, including special areas for protection and scientific study.' Whilst Article IX does not explicitly use the term 'marine protected area', the aims and objectives of paragraphs (f) and (g) clearly provide a basis for the designation of zones within which fishing activities are prohibited or more strictly regulated. Moreover, in 2007, the CCAMLR Commission published a study on the bioregionalisation of the Southern Ocean, which sought to 'classify marine areas from a range of data on environmental attributes'[46] and to provide a basis for establishing a network of representative MPAs. As a result of this study, eleven priority areas for protection were identified[47] and, in 2011, these eleven areas were rationalised into nine planning domains.[48]

More significantly, at the same meeting, the CCAMLR Commission adopted a general framework measure for the designation of MPAs within the CAM-

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[44] Report of the Second Special Meeting of the Commission (2013) at para. 3.26.

[45] The scope of CCAMLR extends to all marine living resources south of 60° South Latitude and between that latitude and the Antarctic convergence, which lies between 60° and 45° South (1982 CCAMLR, Article 1).

[46] *Report of the 2007 Workshop on Bioregionalisation of the Southern Ocean* reproduced in Annex 9 of the *Report of the Twenty-Sixth Meeting of the CCAMLR Scientific Committee* Hobart Australia, 22 – 26 October 2007.

[47] *Report of the Twenty-Seventh Meeting of the Commission, Hobart, Australia, 27 October – 7 November 2008,* at para. 7.2(vi).

[48] *Report of the Thirtieth Meeting of the Commission, Hobart, Australia, 24 October – 4 November* 2011, at para. 7.4.

LR Convention area.[49] The general framework measure sets out key criteria for the designation of MPAs including: the protection of representative marine ecosystems, species and habitats; the establishment of scientific reference areas for long term monitoring; the protection of vulnerable ecosystems; and the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.[50] It is a requirement for each MPA to have an associated plan for their management as well as for research and monitoring.[51] These management plans as well as the conservation measures establishing MPAs must also be made available to interested international organisations and non-party states.[52] Finally, it is worth noting that the general framework measure requires the Commission to identify other complementary measures that could be taken by other institutions such as the Committee on Environmental Protection, established under the 1991 Environmental Protocol to the 1959 Antarctic Treaty or the International Maritime Organisation in order to support the objectives of the MPA.[53]

Furthermore, the first CCAMLR MPA, supported by all Commission members, including Russia and Ukraine, was established in 2009.[54] The South Orkney Islands southern shelf MPA covers just less than 94,000 km^2 of the high seas within the CCAMLR area, and provides for additional controls on fishing, scientific research relating to fishing and discharges and dumping from fishing vessels.[55] The precedent for establishing CCAMLR MPAs has thus been established and, until 2012, was accepted by *all* members of the Commission.

Ukraine's suggestion that the task of designating MPAs should be delegated to the ATCM and confined to the implementation of the 1991 Environmental Protocol would also appear to be misplaced. Whilst the Antarctic Treaty Area comprises that part of the Southern Ocean south of 60° S,[56] for the most part, the CCAMLR area lies beyond the scope of the 1991 Environmental Protocol.[57] Moreover, although the ATCM may designate Antarctic Specially Protected Areas (ASPAs) and Antarctic Specially Managed Areas (ASMAs) under Annex V of the 1991 Environmental Protocol in order to protect environmental, scientific,

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[49] CCAMLR CM 91-04 (2011) *General Framework for the establishment of CCAMLR Marine Protected Areas*.

[50] Ibid, para. 2(i)-(vi).

[51] Ibid, paras. 3-5.

[52] Ibid, para. 9.

[53] CCAMLR CM 91-04 (2011), para. 10.

[54] CCAMLR Conservation Measure (CM) 91-03 (2009) *Protection of the South Orkney Islands southern shelf.*

[55] Ibid.

[56] 1959 Antarctic Treaty, Article VI; 1991 Environmental Protocol, Article 1(b).

[57] The 1991 Environmental Protocol refers in several places to the importance of 'dependent and associated ecosystems' (see for example, Article 2) but the practice of parties thus far has been to confine substantive measures for the protection of the Antarctic environment to the area south of 60° South.

historic, aesthetic or wilderness values,[58] its capacity to address fisheries management under the Protocol is limited and its actual designation of protected areas in the marine environment, in contrast to the terrestrial environment, has been slow.[59] Furthermore, within the ATS hierarchy, the CCAMLR Commission arguably has primary responsibility for the protection of marine areas. The Protocol stipulates that the Commission and the ATCM must cooperate and coordinate their activities with respect to ASPAs and ASMAs that include a marine component[60] and, where the creation of an ASPA or ASMA is likely to impact on CCAMLR harvesting or other activities, the Commission must approve its designation.[61] Moreover, further efforts to strengthen the coordination of activities between CCAMLR and the ATCM were taken in 2012 with the former institution calling on members to bring to the attention of their fishing vessels ASPAs and ASMAs established by the latter.[62] Ultimately however, whilst there is significant overlap between the members of the CCAMLR Commission and the parties to the 1991 Environmental Protocol, the scope of political adherence to both instruments is by no means identical. Delegating the designation of MPAs in the Southern Ocean to the ATCM consequently neither supports the goal of conservation under the CAMLR Convention nor the global target of establishing a representative network of MPAs by 2012/ 2020.

IV. MPAs in areas beyond national jurisdiction

A key challenge to establishing a network of representative MPAs is their designation on the high seas or in areas beyond national jurisdiction (ABNJ). Almost three percent of the oceans benefits from MPA status – far short of the ten percent target by 2012 agreed to in 2002 at the World Summit on Sustainable Development[63] – but only 0.17 percent of the seas beyond national jurisdiction is

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[58] 1991 Environmental Protocol, Annex V, Article 2.

[59] Thus far of the 73 ASPAs established only 10 comprise a marine component. Similarly, of the 7 ASMAs designated only 3 include a marine component. See CCAMLR Conservation Measure 91-02 (2012) *Protection of the values of Antarctic Specially Managed and Protected Areas* (Annex).

[60] 1991 Environmental Protocol, Annex V, Article 6.

[61] 1991 Environmental Protocol, Annex V, Article 6(2) and ATCM Decision 9 (2005) *Marine Protected Areas and Other Areas of Interest to CCAMLR*. See also ATCM Resolution 1 (2006) *CCAMLR in the Antarctic Treaty System*.

[62] CCAMLR Conservation Measure 91-02 (2012) *Protection of the values of Antarctic Specially Managed and Protected Areas*. The adoption of this conservation measure responded to incidents in 2010 and 2012 involving Japanese and Korean fishing vessels fishing for krill in ASPA No. 153 (Eastern Dallman Bay) contrary to the ASPA management plan. See *Report of the Thirty-First Meeting of the Commission* (2012) at 5.66 – 5.69.

[63] WSSD, Johannesburg Plan of Implementation of 4 September 2002 (available at <www.unep.org>), at para. 31(c).

subject to multifunctional MPA protection.[64] Marine Protected Areas as spatial or area-based management tools have, consequently, been largely designated within areas under state control. Moreover, outside of regional or single-mandate regimes such as those focused on marine pollution or fisheries management, there is no multilateral basis that explicitly supports their designation. It is this lacuna that has been relied on by states such as Ukraine to challenge the legitimacy of MPAs in ABNJ.

Nevertheless, despite the absence of an express right there is no rule under treaty or custom *prohibiting* the creation of high seas MPAs. Arguably, the absence of a rule prohibiting such MPAs can be interpreted as creating a permissive right in respect of their designation.[65] Moreover, the creation of high seas MPAs is arguably consistent with the aims and objectives of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[66] and a teleological approach to treaty interpretation. Implicit support for the designation of MPAs to further the Convention's aims of marine environmental protection can be found in a number of its articles, notably, Articles 194(5), 123, 197 and 237. Furthermore, the designation of MPAs both within and beyond national jurisdiction has been endorsed in numerous other instruments such as Agenda 21,[67] the 1992 CBD,[68] as well as many regional instruments of application to the marine environment.[69]

Recent state practice also increasingly supports the designation of high seas MPAs. With respect to vessel pollution for example, special areas have been established under the 1973/78 MARPOL Convention[70] in the Southern Ocean and

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[64] M. Spalding et al, n. 15.

[65] Although a controversial principle of international law originally thought to be derived from *The Lotus Case*, it has since been relied on by the ICJ, most notably in the 2010 *Kosovo Advisory Opinion*, where the Court concluded that the absence of any rule prohibiting the issue of declarations of independence meant that such declarations were not unlawful. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, para. 84.

[66] United Nations Convention on the Law of the Sea (10 December 1982; in force 16 November 1994).

[67] Adopted on 14 June 1992 (available at <www.unep.org>).

[68] 1992 CBD, Article 8.

[69] On the evolution of high seas MPAs see J. Ardron "Marine spatial planning on the high seas", in *32 Marine Policy* (2008), at 832; P. Drankier "Marine Protected Areas in Areas beyond National Jurisdiction", in *27 International Journal of Marine and Coastal Law* (2012), at 291; K.N. Scott "Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Area", in *27 International Journal of Marine and Coastal Law* (2012), at 849; T. Scovazzi "Marine Protected Areas on the High Seas: Some Legal and Policy Considerations", in *19 International Journal of Marine and Coastal Law* (2004), at 1.

[70] International Convention for the Prevention of Pollution by Ships of 2 November 1973, as modified by the Protocol of 1 June 1978 and the Protocol of 26 September 1997; as regularly amended.

the Mediterranean limiting operational discharges of oil and other substances. In terms of biodiversity conservation, over thirty percent of the oceans have been granted sanctuary status under the 1946 International Convention on the Regulation of Whaling[71] and increasingly, areas of the high seas are closed to fishing or particular types of fishing activities (such as bottom trawling) under the auspices of several regional fisheries management organisations (RFMOs).[72] A particularly important recent precedent is the creation of a high seas network of seven multi-functional MPAs established between 2010 and 2012[73] in the North-East Atlantic by the OSPAR Commission.[74] The network covers over 386,200 km^2 of the North-East Atlantic[75] and each MPA is supported by a management plan, which is ecosystem-based and designed to integrate the management of multiple activities.[76]

At the international level, the designation of MPAs in ABNJ is under active consideration by states party to the CBD[77] and by the United Nations General Assembly (UNGA) as part of a broader effort to protect and manage biological resources located beyond national jurisdiction. The UNGA, which is taking the lead on this issue, established in 2004, the UN Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction (BBNJ Working

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[71] International Convention for the Regulation of Whaling (2 December 1946; in force 10 November 1948). Sanctuaries have been established in the Southern and the Indian Oceans.

[72] Illustrative examples of RFMOs adopting such measures include the: North-East Atlantic Fisheries Commission (NEAFC); the Northwest Atlantic Fisheries Organization; the South East Atlantic Fisheries Organization; the General Fisheries Commission for the Mediterranean; and CCAMLR. Further information can be found at <www.fao.org/fishery/topic/16204/en>.

[73] See Decisions 2010/1 to 2010/6 and Recommendations 2010/12 to 2010/17 adopted by the OSPAR Commission at its 2010 meeting. The initial network of six MPAs was increased to seven in 2012 with the designation Charlie-Gibbs North High Seas MPA in 2012 (see OSPAR Decision 2012/1). All OSPAR documents and acts are available at <www.ospar.org>.

[74] The OSPAR Commission operates under the authority of the OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992, in force 25 March 1998).

[75] B. O'Leary et al. "The first network of marine protected areas (MPAs) in the high seas: The process, the challenges and where next", in *36 Marine Policy* (2012), 598, 598.

[76] See generally, O'Leary et al., ibid and E.J. Molenaar and A.G. Oude Elferink "Marine protected areas in areas beyond national jurisdiction. The pioneering efforts under the OSPAR Convention", in *5 Utrecht Law Review* (2009), at 5.

[77] See CBD COP 7 Decision VII/5 'Marine and coastal biodiversity', paras. 29-31. The parties to the CBD have effectively deferred to the UNGA with respect to the creation of a regulatory framework for regulating activities beyond national jurisdiction. However, the CBD is still engaged in this process, in particular, in connection with the provision of technical or scientific advice. For example, in 2008, the CBD developed a set of scientific criteria for identifying ecologically or biologically significant areas in open-ocean and waters and deep-sea habitats. See CBD COP 9 Decision IX/20 'Marine and Coastal Biodiversity'.

Group).[78] The Working Group, which completed its mandate in 2011, recommended that the UNGA initiate a process for the purpose of developing a regulatory regime designed to be of application to ABNJ.[79] The Working Group identified MPAs, in particular, as a key conservation tool for environmental protection within ABNJ.[80] The report of the Working Group was adopted by the UNGA in December 2011, and the Assembly renewed the Group's mandate charging it with the task of initiating the process of developing a legal regime of application to ABNJ.[81] The conclusions of the Group were subsequently endorsed in *The Future we Want*, the outcome document of the Rio+20 conference held in 2012, which noted, in particular, the urgent need to consider 'the issue of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction including by taking a decision on the development of an international instrument under UNCLOS.'[82]

V. Concluding remarks

Progress in relation to the Ross Sea MPA largely mirrors the progress more generally with respect to the designation of MPAs beyond national jurisdiction: support in principle, undermined by pragmatic considerations relating to complex jurisdictional issues and tension between fisheries management and marine conservation.

This notwithstanding, the prospects for the Ross Sea MPA are not entirely bleak. The overwhelming majority of CCAMLR Commission members support the Ross Sea MPA, including states previously sceptical to the proposal such as China and Korea. Whilst the Commission operates on the basis of consensus[83] one pragmatic way forward would be to persuade Ukraine and Russia to support the MPA proposal on the understanding that they be permitted to subsequently lodge an objection to the measure pursuant to Article IX(6)(c) of the 1982 CCAMLR. The risk of this pragmatic solution is that not only would Ukraine and Russia not be bound by the relevant conservation measure, but invoking the Article XI(6)(c) procedure would effectively permit any other Commission member

[78] UNGA Res. 59/24 'Oceans and the Law of the Sea', of 17 November 2004, para. 73.

[79] See doc. A/66/119, of 30 June 2011, at para. I.(1)(a).

[80] Ibid.

[81] UNGA Res. 66/231 'Oceans and the Law of the Sea', of 24 December 2011, paras. 165 – 168. The first meeting of the Working Group took place in May 2012 and the importance of area-based management tools to support ecosystem based management was noted (see doc. A/67/95, of 13 June 2012, at para. 20).

[82] UNGA Res. 66/288, note 16 at para. 162. See also para. 177 in which the importance of area based conservation measures, including MPAs were endorsed.

[83] 1982 CCAMLR, Article XII.

to call for a review of the measure and to lodge their own objection.[84] As with any reservation to a treaty provision or other measure the price of pragmatism could ultimately be effectiveness. On the other hand, a more flexible approach, which avoids the constraints of consensus, would allow the Commission to move forward with this and perhaps other MPA proposals.

The significance of the Ross Sea MPA proposal extends well beyond its regional impact. The CAMLR Convention was notable when it was adopted for endorsing an ecosystem and precautionary approach to fisheries management: concepts almost entirely unknown in the lexicon of international environmental law in 1982. It is entirely appropriate that that the Commission should be similarly leading the vanguard in developing new approaches to ocean management, utilising spatial and MPA tools. Moreover, the CCAMLR Commission enjoys a close institutional relationship with the ATCM under the auspices of the Antarctic Treaty System and is therefore well placed to collaborate in the creation of multifunctional Southern Ocean MPAs. The potential for such cooperation extends far beyond the options currently available for most regional fisheries management organisations and regional seas conventions that share a geographical jurisdictional mandate. At the international level there are signs that initial support for high seas MPAs may be eroding as states within the BBNJ Working Group turn their attention to more challenging issues such as access to genetic resources in ABNJ.[85] By designating the Ross Sea MPA and taking an unequivocal position on both the legality and desirability of high seas MPAs, CCAMLR has an opportunity to not only create an important precedent to be followed in other regions but also to push progress at the international level. In short, CCAMLR and the Ross Sea MPA proposal in particular, are ideally placed to contribute to the continued development of the lexicon of the law of the sea and international environmental law.

[84] 1982 CCAMLR, Article XI(6)(d).

[85] See the *Summary of the Seventh Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction 1 – 4 April 2014* published by the International Institute for Sustainable Development at: http://www.iisd.ca/oceans/marinebiodiv7/.

Jurisdiction and control of the Tyrrhenian Waters of the Pelagos Sanctuary

Claudia Cinelli[*]

I. Introduction; II. Maritime delimitation and environmental cooperation in the Tyrrhenian waters; A. legal status of Tyrrhenian waters; 1. Baseline and internal waters; 2. Territorial sea and contiguous zone; 3. The ecological protection zone; B. International cooperation in the Tyrrhenian waters: the Pelagos Sanctuary; 1. Environmental cooperation; 2. The Pelagos Sanctuary and surveillance activities; III. Italian laws and regulations: the case study of the 'FSRU Toscana'; A. Environmental impact assessment; B. Actions for annulment; C. Control measures; IV. Conclusion.

I. Introduction

The Mediterranean sea is the largest semi-enclosed sea in the world with 46,000 km of coastline, and includes 23 countries and territories from Europe, Africa and the Middle East. The Tyrrhenian Sea is part of the Mediterranean Sea, off the western Italian coast. Its triangular shape extends from the north-west (Ligurian Sea) through the Tuscan Archipelago to the southeast (Ionian Sea) through the Strait of Messina (Sicily). From north to south, it includes three major islands (Corsica, Sardinia and Sicily) and other populated smaller islands (e.g. Eolie Islands). [1]

This paper focuses on the Tyrrhenian waters which are included in one of the largest special protected marine areas, i.e. the Pelagos Sanctuary.[2] In particular, it raises questions about jurisdiction and control effectiveness in the face of new economic offshore operations, i.e. those related to the Floating Storage and Re-gasification Unit (hereinafter the 'FSRU Toscana' or 'Terminal') which has been moored off the Tyrrhenian port city of Livorno since July 2013.[3]

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[1] International Hydrographic Organization, *Limits of Oceans and Seas* (1953) 17.

[2] *International Agreement on the creation of a marine mammal sanctuary in the Mediterranean* (generally known as Pelagos Agreement or Pelagos Sanctuary), 2176 UNTS 247(Date signed: 25 November 1999; entered into force: 21 February 2002).

[3] <http://www.oltoffshore.it/en/ >.

The FSRU Toscana is the first floating 'gas plant' in the world and has a regasification capacity that corresponds to 4% of Italy's total requirement.[4] It was realized by a private investment project aimed at providing an essential infrastructure for the launching and development of liquefied natural gas (LNG) to be used as clean fuel for maritime and land transport in Italy and in the Mediterranean maritime area.

Given that Italy is a peninsula with about 7,500 km of coasts on the Mediterranean Sea, it is legitimate to ask why the Terminal was moored in one of the most sensitive and fragile Mediterranean areas. Economic interests, rather than environmental considerations, seems to explain the choice of this location: firstly, Livorno is a port able to support the activities of the Terminal, and an investment of this kind represents a potential for economic development at local level; and secondly, it is located in a strategic central area for gas supply in Italy and in the Mediterranean area.

After an analysis of the Italian jurisdiction and control through the maritime zone delimitation and environmental cooperation instruments in the Tyrrhenian waters of the Pelagos Sanctuary (II), this paper will analyze Italian laws and regulations applicable to offshore operations within the Sanctuary, taking the FSRU Toscana as a case study (III). Finally, it will present critical remarks on the effectiveness of existing legal instruments for ensuring environmental marine protection through State jurisdiction and control, when facing economic private interests (IV).

II. Maritime delimitation and environmental cooperation in the Tyrrhenian waters

The FSRU Toscana terminal is located at about 14,5 nautical miles off the Livorno port in Tyrrhenian territorial waters, beyond the straight baselines which enclose the internal waters surrounding the Tuscan Archipelago.[5] This section analyzes the legal regime applicable, starting from the legal status of the Tyrrhenian waters – without addressing the continental shelf delimitation, as it is not relevant for the aim of this study – (A), and the legal framework applying to the protection of the Tyrrhenian marine environment, with focus on the specific area in which the FSRU Toscana is located (B).

A. Legal status of Tyrrhenian waters

The Convention of the United Nations on the Law of the Sea (hereinafter 'UNCLOS'), signed in Montego Bay on 10 December 1982,[6] was ratified and

[4] <http://www.naturalgaseurope.com/first-floating-gas-plant-moored-offshore-tuscany>

[5] A map of the Terminal location is available at: <http://www.oltoffshore.it/en/il-terminale/dove-si-trova/>.

[6] UNCLOS entered into force on 16 November 1994, 1833 UNTS 3. See, also, Agreement relating to the Implementation of Part XI of the United Nations Convention of the Law of

enforced by Italy through Law no. 689 of 2 December 1994. Consequently, the legal status of the Tyrrhenian waters is determined in accordance with the UNCLOS, and their boundaries are delimited as follows. [7]

1. Baselines and internal waters

The western Italian coast is deeply indented, and a fringe of islands is located in its immediate vicinity. By drawing the baseline, the Presidential Decree no. 816 of 1977 – in line with the subsequent codification of the law of the sea, i.e. the UNCLOS –[8] employed the straight baselines system. The baselines are articulated in 21 segments on the Adriatic, Ionic and Tyrrhenian seas, in addition to 10 and 7 segments around the Sicily and Sardinia islands respectively.[9]

As concerns the Tyrrhenian Sea, appropriate points enclose internal waters areas surrounding the Tuscan Archipelago. Straight lines start from the mouth of the river Arno (city of Pisa),[10] join the Livorno's islands of Gorgona, Capraria, Elba, Montecristo, Pianosa, Scoglio d'Africa and the more southern islands of Giannutri and Giglio – which fall within the province of Grosseto – and then touch the coast again in correspondence with the port of Civitavecchia (Lazio Region). In this way, the outer islands of the Tuscan Archipelago have all been included within the straight baselines, thus enclosing internal waters which had not previously been considered as such. As a consequence, foreign vessels have the right of innocent passage through the waters of the Archipelago .[11]

2. Territorial sea and contiguous zone

The establishment of the straight baseline in 1977 produced a significant simplification of the outer limits of the Italian territorial sea, whose 12 nautical miles

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the Sea of 10 December 1982 (adopted on 28 July 1994 and entered into force 28 July 1996; 1836 UNTS 4); and the Agreement for the Implementation of the Provision of the United Nations Convention of the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 88).

[7] See, T. Treves, *Il Diritto del mare e l'Italia* (1995), 29 ff.; Ministero dello Sviluppo Economico. Dipartimento per l'Energia. Direzione Generale per le Risorse Minerarie ed Energetiche, *Il Mare- Supplementi al bollettino ufficiale degli idrocarburi e delle georisorse*, (2013), 7 ff.

[8] Presidential Decree no. 816 of 26 April 1977. This contains provisions regulating the application of Law no. 1658 of 8 December 1962, authorizing adherence to the *Convention of territorial sea and the contiguous zone* adopted in Geneva on 29 April 1958, and enforcing such Convention. Further information are available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm

[9] The baselines through which the breadth of Italian territorial waters can be measured are obtained by joining appropriate points ex Article 7 UNCLOS.

[10] Article 9 UNCLOS.

[11] Article 8 (2) UNCLOS.

breadth had already been established three years before the adoption of the aforementioned baselines system, namely with Law no. 359 of 14 August 1974.

It should be noted that in the area between Corsica and Capraia, an island of the Tuscan Archipelago, the full extent of 12 nautical miles of the Italian and French territorial seas results in an overlapping area, as the shortest distance between the coasts of the two islands is about 14 miles.[12] No bilateral agreement of maritime delimitation has been signed in the zone, while an international strait has been established, and the regime of passage in transit is applied.[13] Regarding the side of Corsica facing Sardinia, in the Strait of Bonifacio, a France-Italy Maritime Boundary Agreement was signed in 1986.[14]

As is well-known, Italy has full sovereignty over its territorial sea, the air space over it, and its bed and subsoil.[15] There is just one limitation: the right of innocent passage of foreign vessels.[16]

From a historical perspective, Italy has always been in favour of a broad interpretation of the right of innocent passage, which applies also to warships. As was stated at the 6th session of the First Commission of UNCLOS by the then Italian representative Mr. Monaco, 'the territorial sea might be considered as a kind of exception to the high seas, for which the principle that the latter constituted *res communis omnium* was limited to the advantage of the coastal State.'[17]

From a contemporary perspective, the traditional position of Italy as guaranteeing classical freedoms of the sea has been formally maintained, to some extent, until today: Italy has neither changed its position about the right of innocent passage through its territorial waters, nor fully extended its jurisdiction and control beyond the territorial sea by proclaiming a whole contiguous zone and/or economic exclusive zone (EEZ) in line with the UNCLOS. However, three developments show a different State practice in the Italian north-western territorial sea and beyond it. The two most recent took place in 2012 – that is, the proclamation of a *sui generis* EEZ, i.e. the Italian ecological protection zone –; and in 2013 – that is, the prohibition or limitation of the right of innocent passage within the waters surrounding the FSRU Toscana. Both developments are analyzed below.[18]

The third development, regarding the contiguous zone, began even before the proclamation of the 12-nautical mile territorial sea. The Italian Customs Law of 1940 established a 'customs surveillance zone' which, according to the afore-

[12] Treves, n. 7 above, at 50.

[13] Ibid., at 52.

[14] See, n. 7 above.

[15] Article 2 UNCLOS.

[16] Articles 17 ff UNCLOS.

[17] Found at: http://legal.un.org/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html, especially at 68.

[18] Respectively, below, Sections II.3 and III.3

mentioned Presidential Decree no 43 of 23 January 1973, coincided with the territorial sea.[19] More than twenty years later, on 14 July 1998, draft law no. 5102 on the institution of a contiguous zone was presented to the Italian Parliament, but was rejected.[20] However, the Italian law on immigration refers explicitly to the contiguous zone, supposing that the Italian authorities control the effective application of such legislation in the territorial sea and in the contiguous zone.[21] Nothing prevents the consideration of such a law as proclaiming, in practice, not a full contiguous zone *ex* art. 33 UNCLOS, but a reduced one which is related only to immigration issues and is not inconsistent with art. 33 UNCLOS.

The Italian judiciary has not always agreed with this argument.[22] However, one reflection deserves attention: the absence of a formal proclamation of the contiguous zone has not been an obstacle against the Italian legislator providing national authorities with the power of control necessary to prevent and punish infringement of national immigration law in the territorial sea and in the contiguous zone. It is also in line with art. 33 UNCLOS, which also reflects customary law.[23] Nevertheless, it is important to specify that this aspect is not so relevant for the Pelagos Sanctuary as it is for the coasts in the south - eastern section of the Tyrrhenian sea, where 'boat migrants' try to reach the Sicilian islands (in particular, Lampedusa) from African countries.

Finally, Article 303 UNCLOS, which regulates State power to protect archaeological and historical objects found at sea, recalls art. 33 UNCLOS in order to control trafficking in such objects, and states that the coastal State may presume that their removal from the seabed in the contiguous zone without its approval amounts to an infringement of laws and regulations. In 2004, Italy also established a 12-nautical miles contiguous archaeological zone adjacent to its territorial sea for the protection of underwater cultural heritage.[24] Since 2006, with the

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[19] Article 33 of Customs Law No. 1424 of 25 September 1940.

[20] Found at: http://www.camera.it/_dati/leg13/lavori/stampati/pdf/5102.pdf

[21] Law no. 189 of 30 July 2002, especially its Article 12 (9)*bis*.

[22] See, for example, *Corte di Cassazione Penale, Judgment no. 32960, 5 May 2010 (filed 5 September 2010)*. For a commentary, see: G. Andreone, "Immigrazione clandestina, zona contigua e Cassazione italiana: il mistero si infittisce", in *Diritti Umani e Diritto Internazionale* (2011) 183-188; "Commento alla sentenza della Corte di Cassazione penale del 5 maggio 2010 n. 32960, sull'immigrazione clandestina nella zona contigua italiana" in *Italian Yearbook of International Law* (2011), 470-471.

[23] See, Andreone n. 19 above. See also: the presentation of Rocco Fabiani at the MARSAFENET Conference (IS 1105 Cost Action)*"State Environmental Compliance and Enforcement in the Mediterranean Sea"* (Rome, March 2014), found at: http://www.marsafenet.org/marsafenet/wp-content/uploads/2013/06/Rocco_Fabbiani.pdf . For opponents, in doctrine, see, Natalino Ronzitti, *Introduzione al diritto Internazionale* (2009), 116.

[24] Article 94 of *Codice dei beni culturali e del paesaggio* [Legislative Decree no. 42, 22 January 2004]. See, also Article 8 UNESCO Convention on the protection of underwater cultural heritage adopted in Paris on 2 November 2001, ratified by Italy through Law no. 157

proclamation of the ecological protection zone, the protection of the archaeological heritage has also been ensured within such zone.

3. The ecological protection zone

Italy has claimed a reduced application of the EEZ legal regime. It recently established an Ecological Protection Zone (EPZ) beyond its territorial waters with Law no. 61 of 8 February 2006 which was implemented by Presidential Decree no. 209 of 27 October 2011 (entered into force on 1 January 2012).[25] The EPZ is a reduced - i.e. *sui generis zone*,[26] in the sense that its legal regime is applicable *ratione loci* only to selected maritime areas off the Italian coast, including part of the Pelagos Sanctuary waters: the north-western Mediterranean, the Ligurian Sea and the Tyrrhenian Sea.

The EPZ is subject to Italian regulations, European Union law and in-force International Conventions which Italy adheres to. The EPZ legal status includes not only the protection regime of the marine environment, but also the protection of marine mammals and the conservation of marine biodiversity, as well as of archaeological heritage.[27] Within the EPZ, Italian authorities have jurisdiction in terms of controls, investigation into possible infringements and the application of the provided penalties.

Italy's declaration of an EPZ is one of the latest in a process whereby the Mediterranean coastal states are progressively extending their jurisdiction into the high seas, reflecting the phenomenon commonly known as *creeping jurisdiction*. The recent development of the Italian EPZ, together with the adjacent French EEZ,[28] might bear potentially significant consequences for the Pelagos Sanctuary in terms of protection effectiveness. Most of the marine surface of the Pelagos Sanctuary , indeed, lies within the jurisdiction of either France or Italy, thereby facilitating the implementation of control measures in the Sanctuary, as well as the elimination of behaviour prioritizing the traditional freedoms at sea, and making the Pelagos Sanctuary a real and effective special marine protected zone, instead of a 'virtual' one.

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of 23 October 2009.

[25] See, *inter alia*, Gemma Andreone, "The Exclusive Economic Zone" in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (2015 forthcoming); G. Andreone and G. Cataldi, "Sui generis zones" in D Attard, M Fitzmaurice and N Martinez (eds.), *The IMLI Manual on International Maritime Law Volume I: The Law of the Sea* (2014).

[26] Ibid.

[27] More specifically, protection measures target pollution from all ships , offshore platforms ,ballast waters; pollution from waste incineration, prospection, exploration and exploitation of sea bottoms, and atmospheric pollution [Art. 3(2) of the aforementioned Presidential Decree of 2011].

[28] Andreone, n. 25 above.

B. Environmental cooperation in the Tyrrhenian waters: the Pelagos Sanctuary

As this study will show, there is no lack of international instruments for the protection of the Mediterranean Sea, but there are gaps in the implementation of existing regulatory frameworks at national level. After an overview of environmental cooperation legal frameworks (1), attention will be paid to the implementation gaps in the environmental protection of the Pelagos Sanctuary with a focus on surveillance activities (2).

1. Environmental cooperation

Starting with relevant norms at international level, Part IX UNCLOS, relating to enclosed or semi-enclosed seas, is applicable to the Mediterranean Sea. Italy, therefore, as a State boarding the Mediterranean Sea, cooperates directly, or through a appropriate regional organizations – including the European Union –on issues related to living resources of the sea, the marine environment and scientific research policies.[29] On the other hand, Part XII of the UNCLOS is dedicated to the protection and preservation of the marine environment from any pollution source. According to it, States have the obligation to protect and preserve the marine environment,[30] while having, at the same time, the sovereign right to exploit their natural resources pursuant to their environmental policies.[31] States' individual or joint measures are indeed a *conditio sine qua non* to prevent, reduce and control pollution of the marine environment, and must pay particular attention when dealing with rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. That is precisely the *ratio* behind the establishment of the Pelagos Sanctuary.[32]

Adopting a regional approach to ocean governance, States bordering the Mediterranean Sea, under the auspices of the United Nations Environmental Programme (UNEP), have concluded the first-ever plan adopted as a Regional Seas Programme for the protection of the marine environment, i.e. the 1975 Mediterranean Action Plan, replaced by a new Plan in 1995,[33] following the developments in environmental regulation which derived from the 1992 Rio Conference.

Irrespective of the legal status of the waters, the Mediterranean Action Plan extends to all Mediterranean waters and basically aims at assisting Mediterranean States in assessing and controlling marine pollution, as well as in formulating adequate national environment policies. By improving the governments' ability to identify better options for alternative patterns of development, integrated coastal zone planning and management has become one of the essential tools

[29] Article 123 UNCLOS.
[30] Article 192 UNCLOS.
[31] Article 193 UNCLOS.
[32] Article 194 (5) UNCLOS.
[33] <http://195.97.36.231/dbases/webdocs/BCP/MAPPhaseII_eng.pdf>.

through which solutions for environmental problems are being sought.[34] In order to provide general principles and an institutional framework for the protection of the marine environment at regional level, the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (hereinafter 'Barcelona Convention') was originally adopted in 1976 and modified and renamed in 1995.[35]

Further implementation of the Barcelona Convention was promoted through Protocols on specific types of pollution and other tools to protect and preserve the marine environment, [36] as well as through other, different – although interdependent – legal instruments,[37] including those of the EU.[38]

In particular, the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (hereinafter 'SPA/BD Protocol') promotes cooperation in the management and conservation of natural areas, as well as in

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[34] *Guidelines for Integrated Management of Coastal and Marine Areas - With Special Reference to the Mediterranean Basin* (1995) and Good Practices Guidelines for Integrated Coastal Area Management in the Mediterranean (2001), available at http://www.unep.org/regionalseas/issues/management/mngt/default.asp .

[35] Date signed: 16 February 1976; entered into force: 2 December 1978, 1102 UNTS 27. There are 21 Contracting States and the European Union: Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, the European Community, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia, Turkey. The main objectives of the Barcelona Convention are established by its Article 4 (1) (2) (3). Further details are available at: http://www.unepmap.org/index.php?module=content2&catid=001001004.

[36] Seven protocols have been adopted which deal with several issues: dumping (1976 and amended 1995); prevention of marine pollution from ships and management of emergencies (1976, replaced in 2002 with 'Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea'); land-based pollution (1980 and amended 1996); specially protected areas and biodiversity (1982 and replaced in 1995, n. 39 below); offshore activities (1994, not yet in force); hazardous wastes (1996); integrated coastal zone management (2008, not yet in force).

[37] See, in particular*, Agreement on the Conservation of Cetaceans in the Black Sea and the Mediterranean* (ACCOBAMS), Date signed: 24 November 1996; entered into force: 1 June 2000, 2286 UNTS 327.

[38] *Inter alia*: «Habitat» Directive 92/43/CEE, 21 May 1992 *on the conservation of natural and semi-natural habitats and of wild flora and fauna*, implemented by Presidential Decree no. 357 of 8 September 1997, amended and integrated by Presidential Decree no. 120 of 12 March 2003; Directive 2002/59/CE, *Establishing a Community vessel traffic monitoring and information system* and related implementation Law Decree no. 196 of 19 August 2005; Directive 2005/35/CE of the European Parliament and of the Council of 7 September 2005, on *ship-source pollution and on the introduction of penalties for infringements*, enacted through Law Decree no. 202 of 6 November 2007; Directive 2008/56/CE of the European Parliament and of the Council of 17 June 2008, *establishing a framework for Community action in the field of marine environmental policy*; Directive 2009/123/CE, which amends Directive 2005/35/CE.

the protection of threatened species and their habitat. To this aim, in 2001 it created a List of Specially Protected Areas of Mediterranean Importance (hereinafter 'SPAMI List').[39] Parties adhering to the Convention are required to respect the protection measures established within each individual SPAMI.[40]

During the last decades, the concept of 'Marine Protected Area' (hereinafter 'MPAs') has gained considerable favour within the international community, and has led to the establishment of large-scale sanctuaries encompassing the entire territorial waters and economic exclusive zones of States,[41] extending also to the high seas.[42] Regional plans aim at establishing MPAs networks which extend beyond national jurisdictions, and also include sanctuaries regulatory frameworks.[43] These are tools for the implementation of protective measures encompassing both internal, territorial waters and the high seas, as required from all Parties adhering to the Barcelona Convention.

2. The Pelagos Sanctuary and surveillance activities

The Pelagos Sanctuary is the biggest protected area in the Mediterranean Sea. A trilateral declaration was signed on 22 March 1993, and six years later, on 25 November 1999, France, Italy and the Principality of Monaco signed an Agreement on the creation of the Pelagos Sanctuary for marine mammals in the Mediterranean Sea (hereinafter 'Agreement' or 'Pelagos Agreement'). It encompasses about 87,500 square kilometres of the north-western portion of Mediterranean Sea which is located between south-eastern France, Monaco, the northern Tyrrhenian Sea and northern Sardinia, and which surrounds Corsica and the Tuscan Archipelago. It includes the internal waters (15%) and the territorial waters of France, Monaco and Italy and adjacent waters (53%), i.e. the EEZ, the *sui generis* zone and the high seas. Italy ratified the Agreement with Law no. 391 of 11 October 2001.[44]

Since 2002, the year the Agreement came into force, important events have taken place: a management plan was approved in 2004, which also takes into

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[39] Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA and Biodiversity Protocol), Date signed: 10 June 1995, entered into force: 19 December 1999, 2102 UNTS 181.

[40] Areas eligible for inclusion in the SPAMI List are all areas situated in a zone already delimited over which a State Party exercises sovereignty or jurisdiction and they must be awarded a legal status guaranteeing their effective long-term protection. Found at: http://rac-spa.org/sites/default/files/annex/annex_1_en.pdf.

[41] For example, *Whale and Dolphin* Sanctuary (Ireland, 1991).

[42] For example, *Indian Sanctuary Ocean* (India, 1979) and the *Southern Ocean Sanctuary* (Antarctica, 1994).

[43] UNEP-WCMC, *National and Regional Networks of Marine Protected Areas: A Review of Progress* (2008).

[44] T. Scovazzi, "The Mediterranean Marine Mammals Sanctuary" 16:1 *The International Journal of Marine and Coastal Law* (2001), 132-141.

account actions implemented as part of other agreements and international programmes (i.e. SPAMI list);[45] the Permanent Secretariat in Genoa was established in 2006,[46] and working groups were formed in 2007.[47] The development of this institutional framework serves as support to the work of the Meeting of the Parties (hereinafter 'MOP'), the decision-making authority within the Agreement which adopts the recommendations issued by the Scientific and Technical Committee (hereinafter 'STC').[48] The synergy between the aforementioned entities should lead to the realization of the Pelagos Sanctuary aims, which basically consist in the protection of marine mammals in the Mediterranean Sea by safeguarding the three main aspects of biodiversity necessary to their survival: the marine ecosystems and habitats on which marine mammals depend ,the various cetacean species , and the genetic diversity of these different species must be protected by limiting the direct and indirect environmental impacts of human activities. To achieve these aims, the Signatory States are committed to identifying the threats posed to cetacean populations by human activities and to taking *all appropriate measures* in order to avoid deliberate catches or any disturbance of mammals.[49]

Neither specific measures nor specific threats are listed in the Agreement. At the time that it was adopted, the main threats envisaged for cetaceans came primarily from high-sea fishing, and particularly from tuna driftnet fishing, but no absolute ban was introduced against this technique.

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[45] <http://www.sanctuaire-pelagos.org >.

[46] Ibid. This is composed of an Executive Secretary and who else? and receives administrative support from the *Istituto Superiore per la Protezione e la Ricerca Ambientale* (ISPRA). It main aims are: a) to coordinate the different working groups within the Agreement, while assisting the Scientific and Technical Committee (STC) and the Meeting of the Parties (MOP); b) to ensure that the Agreement's aims and resolutions are implemented; c) to manage the Agreement's budget according to the decisions made by the meeting of the Parties; d) to represent the Pelagos Sanctuary when dealing with local, regional and international bodies.

[47] Ibid. The working groups are ten: 1. Human activities; 2. Fishing; 3. High-speed vehicle racing; 4. Marine traffic; 5. Whale watching; 6. Standardizing marine monitoring; 7. Research and monitoring; 8. Marine pollution; 9. Communication and awareness; 10. Databases. All of these a) examine the situation and study problems and challenges, explore the degree of urgency for measure implementation; b) propose concrete measures and set out clear recommendations that include a summary of the aims, the forecasted cost, financing, schedule and evaluation criteria.

[48] Ibid. The Scientific and Technical Committee (STC) consists of a delegation from each country composed of a delegation leader and experts on the field. STC gives the Parties scientific proposals and advice on priority measures for implementing the Agreement. It works alongside the Permanent Secretariat and the National Focal Points (France, Italy and Monaco) for preparing resolutions, recommendations, strategy decisions, work programs and international priorities. The first meeting of the Pelagos Agreement STC took place at Monaco's Ministry of State in 2006.

[49] Article 4 of the Pelagos Agreement.

Today, new economic offshore activities are sources of new multiple threats that should be taken into consideration when interpreting the Agreement and therefore added to bycatch events. Examples include offshore platforms and related underwater noises, greenhouse gas emissions, chemical pollution and disturbances, and stress associated to the maritime transport of hydrocarbons . The Agreement does not contain any provision expressly prohibiting or limiting new economic activities at sea, which remain, nevertheless, subject to compliance with the Agreement objectives of protection and, possibly, with the more stringent internal standards that a State may adopt.[50] Italy has not adopted, so far, any stringent measures related to new economic activities at sea and has allowed, as will be analyzed below, offshore FSRU Toscana operations which are carried out within the Sanctuary in its territorial waters.

The Agreement makes a very vague reference to surveillance activities in the Sanctuary area, mentioning the intensification of the fight against *all types of pollution*, whether of land or maritime origin, likely to have a direct or indirect effect on the conservation status of marine mammals.[51] This vagueness might be justified by the fact that the Sanctuary's surface area is too large to coordinate surveillance and control measures under the Agreement, also because it includes different maritime zones under and beyond State sovereignty and/or jurisdiction.

As far as Italy is concerned, the aforementioned Law no. 391 of 2001 that ratified the Agreement also established the National Steering Committee, assigning its Presidency to the Ministry of Environment and Protection of Land and Sea. The mandate of the National Steering Committee is to define national implementation instruments and to identify, in agreement with other States Parties, measures to be proposed in the framework of international fora to give effectiveness to the Agreement.

At this point, looking at State practice on new economic activities in the Sanctuary, it is interesting to analyze the role played by the National Steering Committee in relation to the FSRU Toscana operations located in the territorial waters of the Sanctuary. The National Steering Committee has not proposed or defined any national control measures for fighting the direct and/or indirect negative impacts of the FSRU Toscana, expressing, instead, a favourable opinion on its compatibility with the Sanctuary. Even though Law no. 391 of 2001 does not explicitly attribute to it the competence to express opinions, nothing seems to prevent the National Steering Committee from expressing itself unilaterally, especially in relation to maritime zones under Italy's own sovereignty. However, it seems that the National Steering Committee has never explicitly approved the FSRU project, limiting itself to acknowledging the positive opinion expressed by the report on the FSRU oper-

[50] Article 11 of the Pelagos Agreement.

[51] Article 6 of the Pelagos Agreement.

ations prepared by Italian expert, Prof. Relini, which was commissioned by the OLT itself. It is hard to imagine that OLT would report something against its own interest.The records show that there has been no discussion or evaluation by the National Steering Committee, which has simply called back the positive opinion given by the professor hired by OLT.[52] No alternative technical studies seem to have been conducted, nor were Parties to the Agreement ever formally informed about the FSRU Toscana project. That is because of the Italian sovereignty over the waters where it is located, only monitored by National Steering Committee.

At this point, it seems reasonable to hypothesize that the FSRU Toscana operations and related activities will, at least, have no less negative effects than high-speed vehicle competitions within the Sanctuary, which instead have been banned by Italy in the same waters.[53]

III. Italian laws and regulations: the case study of 'FSRU Toscana'

The Italian Constitution does not directly protect the environment, but only the landscape.[54] The concept of 'landscape' has undergone a profound evolution over time. While in the past this term indicated only 'natural beauty,' today the concept is interpreted as having a much wider meaning related to the natural environment. Both practice and doctrine recognize the protection of the environment at Constitutional level. Its legal basis is identified in connection with Article 9(2) and Article 32(1) of the Italian Constitution, which put the protection of landscape in relation to the protection of individual health. On the one hand, environmental protection is indeed considered as a means to achieve the full implementation of some fundamental rights; while, on the other, it becomes a balancing criterion in the pursuit of economic rights guaranteed by the Constitution.[55]

The jurisprudence of the Constitutional Court requires that the provisions in force concerning environmental protection indicate how business activities must be managed in such a way as to ensure, through the protection of the environment, the respect of human rights, with special attention to the nexus between the right to health and the right to the landscape.[56] These must be balanced with other rights and freedoms, including the freedom of corporations.

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[52] Greenpeace, *Falso: la vera storia del parere sulla compatibilità del Santuario dei Cetacei con il rigassificatore OLT* (2007). Found at: http://www.greenpeace.org/italy/it/ufficiostampa/rapporti/falso-rigassificatore-olt/

[53] Article 5 of Law no. 391 of 11 October 2001.

[54] Article 9 (2) of the Italian Constitution.

[55] From the economic perspective, the relevant articles are: 41, 42 and 44 of the Italian Constitution, while from the social perspective, the relevant articles are: 4 and 35 of the Italian Constitution. See, N. Lugarese, N., *Diritto dell'Ambiente*, (2012), 23-28.

[56] See, inter alia, *Italian Constitutional Court, Judgment n. 225, 22 July 2009*.

At the level of ordinary law, the Italian Environmental Code is a Consolidated Act *(Testo Unico)* that brings together the leading sectoral rules on environmental protection.[57] Their main objective is to promote a high level of quality of human life, to be achieved through the preservation and improvement of the environment and the prudent and rational use of natural resources. [58] For our purposes, the most relevant part is the Second Part of the Environmental Code which governs the procedures for the Strategic Environmental Assessment (SEA), the Environmental Impact Assessment (EIA) and the Integrated Environmental Authorization (IEA), which have different but complementary purposes. The main objective of SEA is to ensure the compatibility of the impact of general industrial plans and programmes with environmental protection,[59] while the EIA concerns the more specific assessment of the compatibility of a single industrial project, with focus on its localization and structural profiles.[60] On the other hand, the IEA is a measure that affects specifically the management aspects of the system.[61] These procedures, which implement the main European Directives in the field,[62] also provide for individual procedural rights through the consultation process.

The following sections will take the FSRU Toscana as a case study analyzing, firstly, the environmental assessment and authorization procedures (A); secondly, the related unsuccessful actions for annulment before national courts (B); and, thirdly, the control measures on navigation adopted by local authorities within the Pelagos waters surrounding the FSRU Toscana (C).

A. Environmental impact assessment

The FSRU Toscana was built by converting a former LNG tanker[63] into a permanently anchored floating unit, which transforms the LNG back to its normal gaseous state. The Terminal is located offshore, thus ensuring the protection of the landscape, and it is connected to the national network by a 36.5 km pipeline (about 29.5 km under water and 7 km on land) constructed and operated by the company Snam Rete Gas.[64]

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[57] The Italian Environmental Code was approved by Legislative Decree no. 152, 3 April 2006 and modified in 2008 and 2010.

[58] Article 2 of the Italian Environmental Code.

[59] Articles 11-18 of the Italian Environmental Code.

[60] Articles 19-29 of the Italian Environmental Code.

[61] Articles 29*bis*-29*quaterdecies* of the Italian Environmental Code.

[62] See, *inter alia*, European Directives 2001/42/CE and 85/337/CEE modified and integrated by subsequent Directives 2003/35/CE and Directive 2008/1/CE.

[63] This was the *Golar Frost LNG* tanker, purchased by the company 'OLT Offshore LNG Toscana,' on 2 July 2008. More information are available at: http://www.golarlng.com.

[64] The gas pipeline is buried at a minimum depth of 2 meters. It follows the route of the floodway of the River Arno to join a small regulation and metering station built at Seuse, in the territory of the Municipality of Collesalvetti, from where the gas will be introduced into

Before the entry into force of the Environmental Code, the private investment project, led by the Italian registered company 'OLT Offshore LNG Toscana' (hereinafter 'OLT'), that owns the FSRU Toscana,[65] obtained all necessary authorizations under national laws and regulations, in particular those related to the SEA and EIA, in 2004 and 2006.[66] Later, in 2009, the OLT presented an instance for a subjectability verification to the EIA ex Article 20 of the Environmental Code, and the Ministry of Environment excluded the FSRU Toscana from the application of such verification.[67] Finally, the Terminal obtained the IEA in March 2013.[68]

From the analysis of the relevant documents, it seems that all aspects related to environmental safety and potential accident hazards have been assessed as part of the national authorization processes, considering different environmental aspects relating to the regasification activities, with particular reference to four different types of emission into sea water and air. The first risk to be assessed and to be declared irrelevant was that of sea water pollution resulting from accidental spills of LNG. Secondly, the risk of chemical pollution by chlorine discharge

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the existing national distribution system. The maritime land concession for the occupation of the area in the sea where the Terminal was moored and for the area occupied by the subsea pipeline connecting the unit to the arrival point of the pipeline on the coast was obtained on 10 December 2008. More information available at: http://www.snamretegas.it/en/ as well as at: http://www.oltoffshore.it/en/.

[65] See, n. 3 above. Briefly, the project consists of the acquisition of an existing LNG carrier and its conversion into the FSRU with a storage capacity of 137,000 m^3 and an annual throughput capacity of 3.75 Gm^3/year. Total cost estimated at EUR 550 to 600 million, and up to EUR 200 million is the proposed European Investment Bank finance amount. Found at: http://www.eib.org/projects/pipeline/2006/20060560.htm. OLT was set up by some of the major industrial companies that hold the shares of the company. They are: E.ON GROUP (46,79%); IREN GROUP (46,79%); OLT Energy Toscana spa (3,73%); GOLAR LNG (2,68%).

[66] Ibid. The main legal steps are the following: *Feasibility Permit* pursuant to *D. Lgs. 334/99* – regarding the safety of the Terminal issued by the Ministry of Interior (5 November 2003); *Strategic Environmental Assessment* (SEA) of 20 July 2004; *Ministerial Decree on Environmental Impact Assessment* (EIA) n. 1256 of 4 December 2004; *Ministerial Decree authorizing the construction and operation of an LNG regasification unit and a submarine pipeline* issued by the Ministry of the Environment of 23 February 2006 in line with article 8 of Law no. 340/2000, then transferred to Snam Rete Gas with a Decree of the Ministry of Economic development on 23 April 2010 for the part of the project related to the construction and the operation of the pipeline (see n. 64 above). The FSRU Toscana also obtained four important international certifications: ISO 9001 on quality management system; ISO 14001 on environment management system; OHSAS 18001 on health and safety of workers; and finally, SA 8000 on social accountability.

[67] Protocol DSA-VIA-IE-00 [20090136], 15 September 2009 [Found at: www.miniambiente.it]. Finally, the compliance with the prescription of EIA decree n. 1256 of 2004 was approved by the Tuscany Region on 24 September 2009.

[68] On 15 March 2013, OLT obtained the *Decreto di Autorizzazione Integrata Ambientale* (IEA), Protocol n. 93.

was found to be low, as the discharge levels are, according to the EIA, significantly lower than those allowed by general national laws on maritime discharges. A third assessment was made in relation to the LNG heating and gasification process, in which sea water is used and then released into the sea, potentially provoking temperature variations. The assessment found no significant risk of such alterations. Finally, the sound emissions generated by the activity on the re-gasification plant was declared to be lower than those produced by similar ships moving through the area. [69]

The findings emerging from the EIA have been critically reviewed by opponents. These are mainly represented by the local civil society[70] and international NGOs, particularly Greenpeace.[71]They have made strong objections to the offshore FSRU Toscana operations, pointing out the specificity of the project as the first floating gas plant in the world, which presents peculiar characteristics. Concerned about environmental disasters, the local civil society recalled that during the last 50 years several serious incidents have been recorded by various American, French, Mexican and Spanish sources. The incidents have involved liquefaction and re-gasification terminals and subsea pipelines and have taken place in the chain of natural gas.[72]

At the same time, Greenpeace has published two relevant reports setting out the political, legal and technical aspects which justify its opposition to the construction and operation of the Terminal.[73] Greenpeace does not question the fact that the project will increase EU and Italian gas import capacity and will contribute to bridging the gap resulting from growing demand and declining indigenous gas production in Italy. Greenpeace argues that the FSRU Toscana requires a more accurate environmental impact assessment than the one realized by the Italian authorities, above all because of its localization in the Pelagos Sanctuary. One of its main arguments is that authorizing the FSRU Toscana operations in the Pelagos Sanctuary waters is contrary to the *ratio* of the establishment of the Sanctuary itself.[74]

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[69] This analysis is derived from a synthesis of the most relevant documents (see n. 65 above).

[70] < http://www.offshorenograzie.it/ >.

[71] < http://www.greenpeace.org/italy/it/ >.

[72] See n. 70 above.

[73] Geenpeace, *Un rigassificatore off-shore nel Santuario dei cetacei* (2007). Found at: http://www.greenpeace.org/italy/it/ufficiostampa/rapporti/gas-pisa/; *Falso: la vera storia del parere sulla compatibilità del Santuario dei Cetacei con il rigassificatore OLT* (2007), n. 52 above.

[74] Greenpeace, *Un rigassificatore off-shore nel Santuario dei cetacei* (see n. 73 above), at 2 ff.

Greenpeace is convinced that the EIA for the LNG terminal was conducted in a superficial and incomplete manner[75], presenting inconsistencies with the requirements of the Italian legal framework for environmental impact assessment procedures. Therefore, it appealed for the promotion of actions for the annulment of the EIA before national courts.

B. Actions for annulment

In 2007 Greenpeace decided to appeal for the annulment of the ministerial decree of 23 February 2006 by which the OLT Offshore had been authorized to build and operate the FSRU.

The competent administrative court (*Tribunale Amministrativo Regionale della Toscana,* hereinafter 'TAR') accepted part of the action of annulment and annulled the EIA authorization, [76] finding reasonable grounds for two of the six illegitimacies raised, i.e., those related to State concession of the use of the maritime area and to non-compliance with the Aarhus Convention.[77]

The appeal based its complaint on six grounds. Firstly, as already said, Greenpeace pointed out the contrast between the FSRU operations and the logic of the Sanctuary, and noted that the only positive opinion on the compatibility of the project with the existing Sanctuary was given by the project's leading investor, OLT.[78] Secondly, Greenpeace underlined that the application of a simplified model of EIA was illegitimate in the case of the FSRU Toscana, which should fall under the more complex ordinary procedure. This is related to the third ground which concerns the division of competences between the State and the Tuscan Region. Fourthly, Greenpeace contested the lack of an emergency risk plan, and included an appropriate evaluation of the real need for the FSRU Toscana within the overall framework of the national energy measures and strategies, as well as financial records relative to the costs of construction and operation. Fifthly, the State concession for the creation of an industrial site for the FSRU Toscana in the maritime area was issued prior to the final decree of authorization, contrary to the normal procedure. Finally, the whole procedure was stated to be non-compliant with the Aarhus Convention on Access to Information, Public Participa-

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[75] Ibid. Summing up, its concerns are devoted to the following risk components: movement of sediments; replanting of sea grass Posidonia; the quality and dispersion of discharges into the sea of the gas plant; and noise emissions from the plant.

[76] *TAR*, *Judgment no. 1870, 30 July 2008.* It has to be underlined that there is not much divergence from the *TAR Judgment no. 1869*, *30 July 2008* on the same case. In the latter case, the appeal was presented by the associations 'Medicina Democratica' and 'Forum Ambientalista' which,unlike Greenpeace, do not pay particular and direct attention to the localization of the FSRU Toscana within the Pelagos Sanctuary.

[77] Ibid., paragraphs 5 and 6.

[78] See, above, Section II. B (2).

tion in Decision-making and Access to Justice in Environmental Matters of 25 June1998, ratified by Italy with Law no. 108 of 16 March 2001, which establishes a number of rights of the public (individuals and their associations) with regard to the environment.[79]

In line with the purpose of this study, it seems appropriate to dwell particularly on the rejection of the first ground of appeal by Greenpeace concerning the location of the FSRU Toscana in the Pelagos Sanctuary. The TAR underlines that the Agreement does not contain any provisions that directly prohibit the use of the waters of the Pelagos Sanctuary for industrial purposes, provided that the relevant activities comply with the objectives of the Agreement. It also argues that such objectives have been taken into account in the EIA.[80] Indeed, according to the TAR, the Ministry of Environment, the body responsible for issuing the EIA, has maintained an attitude of due and appropriate caution with respect to the problem of preservation and conservation of the environment by opting for an appropriate model of empirical verification. Therefore, on this point, the tribunal concludes that, beyond statements of principle, Greenpeace has not provided evidence, and its arguments are not based on objective data.[81] It indeed states that even apart from the favourable opinion issued by the National Steering Committee, the complaints made by the applicant are not supported by sufficient evidence of illegitimacy, especially in light of the wide range of evidential elements produced by OLT, and must be, therefore, rejected.[82] Continuing with the judgment, the TAR considers to be consistent with the law the second, third and fourth grounds of appeal: briefly, the environmental impact assessment process adopted - i.e., the simplified model -, the risk analysis and the financial records issued.[83]

On the other hand, the TAR recognizes that the State concession regulation for the utilization of the marine area on which the FSRU Toscana is moored has been violated. [84] The tribunal also finds that the principle of public participation in environmental decision-making processes – allowing the public to express their views on issues which have potentially significant impacts on environmental, health and safety - has been violated. The TAR specifies

[79] Entered into force: 30 October 2001, 2161 UNTS 447. The Aarhus Convention was signed by most countries of the pan-European and European Union under the auspices of UNECE (UN Economic Commission for Europe) and recognizes specific procedural rights in environmental matters. It is an important step towards recognizing the vital role of public administration in fulfilling the obligation of information and disclosure, and to ensure the participation of civil society in decision-making concerning this subject matter.

[80] *TAR*, *Judgment no. 1870,* n. 71 above*,* paragraph 2.

[81] Ibid.

[82] Ibid.

[83] Ibid., paragraphs 2-4.

[84] Ibid., paragraph 5.

that in view of the Aarhus Convention, the aspects related to environmental protection are inextricably linked with those concerning the state of health, safety and living conditions of the people.[85] At the same time, it underlined that Italy had ratified the European Directive 96/82/EC on the major-accident hazards of certain industrial activities, including those related to regasification operations, the so-called Seveso Directive,[86] which required Member States to adopt a common framework for the prevention of accidents with the use of hazardous substances. The Italian legislator had implemented the Directive with Legislative Decree no. 334, 17 August 1999 ,whose Article 23 requires the consultation of the affected population. The TAR considers that the announcement of successful communication given by the OLT, is as an instrument for acquaintanceship and not knowledge, while the short period of 30 days does not fulfil the requirement of putting people in a position to comment in an informed way, with the result that the opinion of the people concerned on the implementation of hazardous installations cannot in any case be considered to be in compliance with the applicable law.[87]

The TAR concluded that the annulment action must be accepted and the EIA authorization under appeal must be annulled.[88]

After the TAR judgment, both OLT and Greenpeace have made appeals to the *Consiglio di Stato.* Greenpeace asked the *Consiglio di Stato* to reconsider the complaints rejected in the first instance,[89] while OLT asked the same court to reject the TAR sentence since the Greenpeace appeal was inadmissible.[90] The *Consiglio di Stato* joined the cases together. It considered that the Greenpeace appeal to the TAR was inadmissible for late filing, i.e. more than sixty days from the notification of the EIA authorization.[91] In that way, it avoided entering into the merits and resolving the legal questions.

After 5 years, in March 2013, the FSRU Toscana obtained the AIA and was, therefore, definitively authorized to be located and to carry out its operation within the territorial waters of the Pelagos Sanctuary. The FSRU Toscana

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[85] Ibid., paragraph 6.1.

[86] The Seveso Directive (currently The Seveso II Directive) is the main piece of EU legislation that deals specifically with the control of major accident hazards involving dangerous substances. The Seveso II Directive will be replaced by the Seveso III Directive on 1 June 2015.

[87] *TAR*, *Judgment no. 1870,*n. 76 above, paragraph 6.1.

[88] Ibid., paragraph 7.

[89] N. 1429/2009-*Consiglio di Stato*.

[90] N. 6927/2008-*Consiglio di Stato*.

[91] *Consiglio di Stato*, Sezione Sesta, 1 February 2010. Regarding the case of the appeal presented by the associations *Medicina Democratica* and *Forum Ambientalista* (n. 98 above), the *Consiglio di Stato* considered that they have not the right of plaintiff since an appeal cannot be presented by, to use the Latin expression, *quisque de populo*.

was moored off the Livorno coast at the end of July 2013, where it was tested for few months more before being declared operational in December 2013. [92]

At this point, it seems difficult to envisage other potential judicial and/or non-judicial remedies: the FSRU Toscana is within waters under full the sovereignty of Italy and the Agreement Pelagos does not provide for any international compliance mechanisms.

Currently, the Ministry of Economic Development attributes to the FSRU Toscana the status of a strategic national infrastructure, which gives it the right to the recognition of a 'safe tariff' even in case of storage failure.[93] Taking into account that until now the FSRU Toscana has been or rather inactive as a result of a lack of supply contracts,[94] it has been argued that the recognition of a safe tariff for OLT will have a negative effect in terms of increasing taxation on the supply price at local level. All things considered, one can say that a private investment, recognized as a national strategic infrastructure and, therefore, financially supported by the State, seems to be undermining the *ratio* of the Pelagos Sanctuary as well as the interests of local population, a majority of whom were explicitly against the authorization of the FSRU Toscana: in effect, the right of local consultation was violated and, depending on the market, the local price of gas supply will probably increase for in order to ensure a safe tariff to the OLT corporate.

C. Control measures

The Italian control measures applicable within the Pelagos Sanctuary are limited to navigation issues. In line with the UNCLOS and without making any direct reference to the Pelagos Sanctuary,[95] on 9 July 2013, the Coast Guard

[92] The Minister of Infrastructure issued the *Authorization for the Provisional Exercise* on 29 January 2014. The Coast Guard of Livorno issued Ordinance n. 6 which approved and made operative the Regulations on the activities of the Terminal (2 April 2014). The approval of the compliance with the prescriptions related to the *Final Safety Report* was issued. Furthermore, the Ministry for the Environment requested, for the whole operative life of the Terminal (20 years), a *Monitoring Plan of the Marine Environment* around the Terminal, in order to keep under observation the potential environmental effects of the plant. The Plan – carried out by the Interuniversity Centre of Marine Biology and Applied Ecology 'G. Bacci' of Livorno – provides for the realization of four physical-chemical, biological and eco-toxicological monitoring campaigns per year focused on: the water column, the sediments, the biological environment, the measurement of undersea noise, the morphology of the seabed.

[93] Ministry of Economic Development, Act of 3 September 2014. The Act is available at: http://www.ilsole24ore.com/pdf2010/Editrice/ILSOLE24ORE/ILSOLE24ORE/Online/_Oggetti_Correlati/Documenti/Tecnologie/2014/09/Decreto%20esenzione%20OLT.pdf?uuid=ABo62wuB

[94] <http://www.ilsole24ore.com/art/notizie/2014-01-28/rigassificatore-livorno-nessun-contratto-fornitura-064445.shtml?uuid=ABuRci >

[95] Article 18, 21 and 24 UNCLOS.

of Livorno adopted ordinance no. 137/2013 by which it set important limits to navigation, in particular, the right of inoffensive passage in the territorial waters around the FSRU Toscana.[96] In order to control maritime traffic and to ensure the safety of navigation, the ordinance has designated concentric areas on the Terminal: i.e. three circular areas having their centre where the terminal is positioned.

The first is a 'total exclusion zone' in the circular area with a radius of two nautical miles where navigation, stopping, anchoring, fishing and other surface or underwater activities are prohibited.[97]

Second, a 'limitation zone' in the area between two and four nautical miles from the terminal, where all activities are prohibited except passage in transit with a speed of no more than ten knots.[98]

Finally, a 'notice zone' in the area between four and eight nautical miles, where stopping is allowed only in case of emergency and only after duly communicating to the Coast Guard the justification of such conduct in line with Article 18 (2) UNCLOS.[99]

The *ratio* behind this is similar to that behind the establishment of a 'safety zone' around artificial islands, installations and structures in which the State may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures within the EEZ ex article 60 UNCLOS. Certainly, the safety zone is smaller than the aforementioned zones because of its location in the EEZ.

The point to be stressed here is that the ordinance is in line with the UNCLOS framework relating to innocent passage through the territorial sea with a focus on, *inter alia*, the safety of navigation and the regulation of maritime traffic and the protection of navigational installations. No direct reference to the Pelagos Sanctuary is made and, therefore, the rules considered are those generally applicable *ratione loci* under the Italian sovereignty and jurisdiction without taking into account the specificity of the Sanctuary. It shows indeed how vague surveillance activities at the multilateral level within the Agreement and the lack of associated national control measures undermine the effectiveness of the Pelagos Sanctuary. This is why measures should, first of all, be integrated into the Parties' national laws and regulations and, secondly, implemented in a harmonised way under international cooperation and coordination instruments, so that their effective enforcement can be guaranteed by the competent surveillance authorities.[100]

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[96] Coast Guard-Livorno, Ordinance n. 137, 19 July 2013. Found at: http://www.guardiacostiera.it/en/

[97] Ibid., Article 1.

[98] Ibid., Article 2.

[99] Ibid., Article 3.

[100] Articles 13 and 14 of Pelagos Agreement.

VI. Conclusion

The FSRU Toscana constitutes a crucial example of a gap in Pelagos Agreement implementation, in terms of State surveillance activities and control at national level. It is located within one of the most sensitive and fragile protected marine areas of the European seas, regulated by overlapping regulatory frameworks and thus practically effectively flying in the face of relevant environmental and planning constraints.

Italy's powers at sea should protect biodiversity and living resources in areas within and beyond its national jurisdiction, while assessing environmental impacts and threats to marine resources and biodiversity posed by private companies when operating at sea. As part of this obligation, Italy should also contrast pressure and impacts on the marine environment such as those deriving from marine litter and underwater noise (e.g. from shipping, underwater acoustic equipment) causing harm to the marine and coastal zone.

The question at stake is: to what extent does the State effectively exercise jurisdiction and control at sea by balancing public environmental concerns and private economic interests? The balancing of benefits and risks, does not always lead to a positive outcome: while private sector participation is essential to meet supply goals, the growing need for private energy investment does not always take into due account the related environmental concerns.

It is indeed difficult to reconcile Italy's obligations deriving from adherence to the Pelagos Agreement with its decision to authorize the FSRU Toscana offshore operations within the territorial waters of the Sanctuary. No specific measures to ensure a favourable conservation status for marine mammals, protecting them and their habitats from direct and/or indirect negative effects, has been adopted.[101] Nor has Italy adopted any national strategy aimed at gradually eliminating the discharge of toxic substances.[102] On the contrary, the FSRU Toscana operations were authorized to have a low level of negative impact. In this sense, temperature variations, chemical and noise pollution have not been found to be absent by the EIA, but just lower than those allowed by general national law and regulations on discharges into the sea.

The rules considered by EIA procedures and their implementation by the judiciary do not take into consideration the fragility of the waters within the Pelagos Sanctuary for which, not by chance, a special international regime has been adopted. Arguably, the *ratio* behind the attribution of a special status to a fragile ecosystem is to confer it special protection. This aim is nullified if Italy continues to apply to the Sanctuary waters of its territorial sea the same law generally applicable to any other marine area under its sovereignty.

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[101] Article 4 of the Pelagos Agreement.

[102] Article 6(2) Pelagos Agreement.

In order to effectively protect the Pelagos Sanctuary, Italy must change its behaviour and start by enforcing environmental measures, while exercising its sovereignty. If effectiveness is not guaranteed even within waters subject to its sovereignty, what are the chances that the establishment of the Italian EPZ and of environmental cooperation instruments within and beyond national jurisdiction (i.e. the Pelagos Sanctuary) will become real and effective?

Strengthening jurisdiction and control at sea and enhancing laws and regulations for the preservation and conservation of marine areas – which are shared by the coastal States and, in particular, by the EU Member States – are crucial steps in towards ensuring environmental protection in the Mediterranean Sea. Italy cannot, therefore, disregard the strengthening of international cooperation and the revival of national laws and regulations of preservation and conservation of marine areas. The promotion of joint solutions is indeed consistent both with the EU Integrated Maritime Policy (hereinafter 'IMP') and its pillar, i.e. the Marine Strategy Framework Directive, and with the maritime strategies launched by Neighbouring Countries.[103]

As final remarks, from the case study of the FSRU Toscana to more general consideration, the Pelagos Sanctuary illustrates a failed attempt of effective MPA conservation. Aware of this situation, in July 2014, the EU Commissioner Damanaki took the initiative to reenergize the Pelagos Sanctuary, providing for the possibility of financial support from the European Maritime and Fisheries Fund. The aim is to open a discussion with interested States – Italy, France and Monaco – and stakeholders, on how the EU Common Fisheries Policy and the IMP can contribute to the effective conservation of the Pelagos Sanctuary and support blue growth in the region.[104]

[103] <http://ec.europa.eu/maritimeaffairs/policy/index_en.htm>

[104] <http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2014/07/20140729_en.htm>.

II

Individual rights protection in State enforcement and control at sea

The first experience of prosecution under the Japanese Anti-Piracy Act of 2009

*Mariko Kawano**

I. Introduction; II. Anti-Piracy Act of Japan, 2009; A. Enactment of the Anti-Piracy Act; 1. Principal purposes of the Act; 2. Crimes and punishment under the Act; 3. Operations undertaken by Japanese officers; 4. Apprehension and the transfer of suspects; III. First criminal proceedings pursuant to the Anti-Piracy Act; IV. Judgment of 1 February 2013; A. Salient arguments of the Counsels relating the rights of the individuals and the view of the Court; 1. Constitutionality of the Anti-piracy Act; 2. Legality of the criminal jurisdiction by Japanese Courts; 3. Legality of the public prosecution in Japan; B. Factor to be considered in the determination of the punishments; 1. Seriousness of the crime; 2. Role played by accused; 3. Social factors; V. Judgment of 25 February 2013; VI. Prosecution as the exercise of universal jurisdiction and the rights of individuals; A. The importance of the protection of free and safe navigation and international cooperation for the purpose; B. Rights of individuals prosecuted; VII. Concluding remarks.

I. Introduction

In 2009, Japan enacted the Act on the Punishment of and Measures against Acts of Piracy, hereinafter referred to as the Anti-Piracy Act.1 Since its enactment, operations of Japanese officers and public vessels have been undertaken in the waters off the coast of Somalia and the Gulf of Aden in accordance with the Act. In 2013, judgments were rendered in the first criminal proceedings pursuant to this act, in which four Somali pirates were prosecuted. The arguments in these cases appear to highlight the significance of, and problems in, criminal proceedings based on universal jurisdiction. Therefore, this article describes the salient features of the Anti-Piracy Act and then examines the judgments.

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1 For a provisional English translation of this Act, please see the *Japanese Yearbook of International Law*, Vol. 53 (2010), 838-843. Extracts from the minutes of the discussions in the Diet can be found in A. Kanehara, "Japanese Legal Regime Combating Piracy: The Act on Punishment of and Measures against Act of Piracy", ibid., 469-489. The background of the enactment of this Act and related legal issues are explained in M. Okano, "Is International Law Effective in the Fight against Piracy?" ibid., 178-201.

II. Anti-Piracy Act of Japan, 2009

A. Enactment of the Anti-Piracy Act

The direct immediate motive for the enactment of the Anti-Piracy Act was the need for legal grounds that would enable Japanese officers to contribute to international cooperative operations against piracy, particularly those operations combating piracy in the waters off the coast of Somalia and the Gulf of Aden in accordance with the resolutions of the Security Council of the United Nations.2 This Act, however, does not provide legal grounds specific to operations of the Self Defence Forces, hereinafter referred to as SDF, in the vicinity of Somalia. Instead, it provides a general legal framework to enable Japanese officers to take measures against piracy in accordance with international law, particularly the UN Convention on the Law of the Sea, hereinafter referred to as the UNCLOS. This Act reflects both special situations in the vicinity of Somalia and the contribution to the fight against piracy in the international community in general.3

When Japan ratified UNCLOS in 1996, the Government took several legislative measures to comply with its obligations. However, at the time of ratification, it was not found necessary to enact a new law that would enable Japanese officers to take measures against piracy or to punish the act of piracy, in accordance with the provisions of UNCLOS.4

Despite this decision, arguments continued about the necessity of maintaining maritime security and enhancing the competence of Japanese officers in waters abroad, because of the seriousness of piracy or armed robbery at sea and the particular importance, in the light of the maritime transport of energy resources to Japan, of the sea areas where those problems are serious. Reflecting these arguments, the Basic Act on Ocean Policy, which was enacted in 2005, emphasized the importance of maritime transportation and the maintenance of security and order at sea. The Basic Plan on Ocean Policy, which was formulated in 2005 pursuant to this Basic Act5, states that necessary steps should be taken to ensure the peace and security of Japan and ensure maritime order. It also states the need

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[2] On 2 June 2008, the Security Council adopted the first resolution, resolution 1816 (2008), which authorized the interested members to take enforcement measures in this sea area (S/RES.1816 (2008).

[3] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No 4 (17 April 2009), 2-3, No. 6 (22 April 2009), at 2, and No. 7 (23 April 2009), at 2.

[4] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), at 2 and No. 7 (23 April 2009), at 2.

[5] Article 16 of the Basic Act on Ocean Policy provides that the Government is under the obligation to formulate the Basic Plan on Ocean Policy every five years. The second plan was adopted in 2013.

for a regime to suppress and regulate offending acts, such as piracy on the high seas in accordance with international law.[6]

In fact, even in the absence of the Anti-Piracy Act, it was possible for Japan to send SDF officers pursuant to Article 82 of the SDF Act, under which SDF is accorded the competence to protect vessels related to Japan. Vessels related to Japan cover the following: vessels flying the Japanese flag, vessels flying a foreign flag with a Japanese crew, vessels flying a foreign flag operated by Japanese companies, and vessels flying a foreign flag carrying Japanese cargo that has an important role in the Japanese economy.7 For the purposes of the contribution to the international operations in the vicinity of Somalia, the competence of SDF pursuant to Article 82 was not sufficient because the protection of vessels, regardless of their nationality, was required to be able to contribute to those operations in an effective and appropriate way.

The seriousness of piracy in the waters off the coast of Somalia and the resolutions adopted by the Security Council have made the Japanese government consider even more seriously its contribution to international operations in the area concerned. Therefore, in 2008 it established a committee to examine a new act to combat piracy, which was finally enacted in 2009.

Under these circumstances, there were four points in the drafting process of the Anti-Piracy Act: first, cooperation with anti-piracy operations under international law, particularly UNCLOS; second, protection of the vessels regardless of the flag; third, criminalization of acts of piracy and formulization of legal grounds required for an appropriate and effective response to acts of piracy; and finally, maintenance of public safety and order at sea.

As already stated, the most important role of this Act is to provide legal grounds to enable Japanese officers to contribute to international cooperative operations against piracy, regardless of the nationality of the victims, in particular, operations combating piracy in the waters off the coast of Somalia and the Gulf of Aden, in accordance with the resolutions of the Security Council of the UN.

B. Salient provisions of the Anti-Piracy Act

1. Principal purposes of the Act

The Anti-Piracy Act contains thirteen provisions and six supplementary provisions. In this section, the salient provisions will be explained. Article 1 of the Anti-Piracy Act concerns its two principal purposes: the punishment of acts of piracy under Japanese law and the legal grounds for appropriate and effective

[6] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), at 13.

[7] According to data of the Ministry of Land, Infrastructure, Transport and Tourism, 2013, Japanese shipping companies operate 2, 840 vessels in international transportation, of which only 150 vessels fly the flag of Japan.

measures to be taken by Japanese officers to contribute to the fight against piracy and to maintain public safety and order at sea. As far as the first purpose is concerned, the Act prescribes the punishment for acts of piracy under Japanese law.

2. Crimes and punishments under the Act

The act of piracy to be punished under this Act is defined in Article 2. The definition in this provision is formulated pursuant to Article 100 of the UNCLOS. There are, however, three distinct features. The first feature of Article 2 is that it provides a more detailed and specified definition than does Article 100 in order to satisfy the strict requirement of the principle of *nulla poena sine lege* in the Japanese criminal law system. The definition in Article 2 strictly concretizes the modalities of the acts that constitute the crime and the punishment responding to each modality. The second feature is that this Act is designed to encompass acts of piracy undertaken in Japanese territorial waters and internal waters. The third feature is that Article 2 excludes the acts of piracy by aircraft.

The punishments of the acts of piracy are provided for in Articles 3 and 4. Under these provisions, not only the commission of acts of piracy but also the attempt to commit that act constitute the crime of piracy. A person who commits an act of piracy shall be punished by imprisonment, and the punishment is heavier than those for crimes under the Penal Code of Japan that are committed in the course of acts of piracy.

3. Operations undertaken by Japanese officers

The second purpose can be fulfilled by the operations of Japanese officers, and Articles 5 to 8 define the competence of the Japanese officers. According to Article 5, the Japan Coast Guard, hereafter referred to as JCG, has the primary role in the operations against acts of piracy. Moreover, Article 6 permits a coast guard official and an assistant coast guard official to use their weapons, provided that the perpetrator disobeys the coast guard's commands to stop and continues the act of piracy by navigating the ship, and there are sufficient grounds to believe that there are no other means to stop the navigation of that ship, to the extent that it is reasonably required in the circumstances.

In addition to the operations undertaken by JCG officers, Articles 7 and 8 define the competence of SDF, which is permitted to take necessary actions against acts of piracy in exceptional cases where the situation requires more forceful measures. Because the function of SDF is considered complementary to the operations of JCG, Article 7 lays down strict conditions for the operations of SDF. First, an order by the Minister of Defence, with the approval of the Prime Minister, is required. The second condition is the extraordinary necessity of the operations. Upon obtaining the approval of the Prime Minister, the Minister of Defence shall, after consultation with the heads of the relevant administrative organs, draw up and submit to the Prime Minister the guidelines for the response

operations. Article 8 defines the competence of the Maritime Self-Defence officials at the rank of petty officer 3rd class or higher, who are ordered to take the Anti-Piracy Response Operations. The relevant provisions of the JCG Act (Article 16, paragraph 1 of Article 17 and Article 18) shall apply *mutatis mutandis* to the execution of these duties. Paragraph 3 of Article 8 establishes the obligation of the Prime Minister to report to the Diet without delay the required information about the Antipiracy Operations undertaken with his/her approval.

In fact, in the drafting process of this Act, the most highly debated issue was the possibility or appropriateness of operations undertaken by SDF abroad.8 Generally, there is a fairly strong objection to sending SDF officers abroad because of the experience of World War II and Article 9 of the Constitution. Consequently, the Anti-Piracy Act confers the primary role on JCG, which is mainly in charge of the operations for the prevention of crimes and law enforcement within Japan. However, another important element is that the primary, immediate motive for the legislation of this Act was the need for Japan to contribute to the international operations against piracy off the coast of Somalia. In operations responding to the extraordinary situations in Somalia, fleets and aircraft would have to be able to undertake long navigations and be sufficiently equipped to do so. Because JCG has so far mainly operated in the vicinity of Japan, it was expected that it would not be able to respond adequately to the operations required. Therefore, the Anti-Piracy Act paved the way for SDF to be deployed in exceptional circumstances where additional back-up is required.

It should be emphasized that the operations provided for in the Anti-Piracy Act are considered as policing operations, to be clearly distinguished from military operations. The designation as policing operation is an important element in the justification of the operations of SDF abroad and even of JCG. Moreover, it influences the scope of the use of arms by the officers in the course of operations pursuant to this Act.

4. Apprehension and the transfer of suspects

Under Article 31 of the JCG Act, JCG officials are, as decided by the Commandant of JCG, permitted to perform the duties of judicial police officials under the Code of Criminal Procedure. By contrast, the SDF Act does not contain such a provision. Consequently, only JCG officers have the authority to apprehend, arrest or detain a suspect, whereas SDF officers lack such authority. As far as the operations under the Anti-Piracy Act are concerned, JCG officers may apprehend, arrest or detain offenders.

In the operations off the coast of Somalia, Maritime SDF fleets are sent to combat acts of piracy. JCG officials are on board to exercise their authority to

[8] For the detailed arguments in the Diet, please see, M. Kawano, "Legal Problems of Fighting Piracy: The Japanese Perspective," in H. Baum (ed.), *Germany and Japan: A Legal Dialogue between Two Economies* (Carl Heymanns Verlag, 2012), 135-141.

apprehend, arrest, or detain the suspects, should it be necessary. The issue of apprehension or arrest and the decision to hand the suspects over to another interested State or to prosecute them in Japan was debated in the Diet, where it was explained that the treatment of suspects apprehended by JCG officials depended upon the gravity of the acts committed and the situations in which those acts were committed.9

In cases where a suspect committed a serious crime, such as killing or causing the deaths of Japanese nationals, the person is transferred to Japan via Djibouti for prosecution in Japan. The transit of the person arrested and the escorting personnel are provided for in 15 (e) of the Exchange of Notes between the Government of Japan and the Government of Djibouti concerning the status of the Self-Defence Forces of Japan in the Republic of Djibouti.10 In situations where the suspect has committed other less serious crimes, the government may decide to extradite that person to another interested State. In such cases, the Government takes into consideration issues such as the seriousness of the injuries to lives and property, the nature of the crime, the operations of SDF and their impact on acts of piracy, and so on.11

III. First criminal proceedings pursuant to the Anti-Piracy Act

After the enactment of the Anti-Piracy Act, the vessels of the Maritime Self-Defence Forces and the officers of JCG and of SDF were sent to areas of the sea in the vicinity of Somalia. It might be judged that the anti-piracy operations pursuant to the Act have been successfully undertaken.

On 5 March 2011, pirates attempted to hijack the crude-oil tanker, M/V Guanabara, which was flying the flag of the Bahamas and was operated by a Japanese company. Because the crew sought shelter in the citadel, no person was injured. On 6 March, the US Navy boat, USS Bulkeley, with support from the Turkish warship TGC Giresum of NATO's counter-piracy Task Force 508, was sent to the vessel under attack, and the criminals were captured by the US Navy. The government of the Bahamas, the flag State of the Guanabara, expressed the view

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[9] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April 2009), at 19 and Minutes of the House of Councilors, 171st Session, No. 16 (4 June 2009), at 21.

[10] 15 (e) of the Exchange of Notes between Japan and Djibouti provides as follows:

"The Personnel of the Forces and the Personnel of the Coast Guard transiting through the territory of the Republic of Djibouti to escort persons arrested by them shall be authorized to apply the necessary measures of restraint with respect to these persons. Such transit shall be carried out in close cooperation with the competent authorities of the Republic of Djibouti," *Japanese Yearbook of International Law*, Vol. 53 (2010), at 717.

[11] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), at 8 and No. 6 (22 April 2009).

that it had no intention to prosecute the pirates because the Bahamas lacked the national law necessary to prosecute them. Therefore, as the national State of the operator, Japan agreed to receive the criminals. They were handed over to Japanese officials on 9 March. On 11 March, the criminals were arrested by Japanese officials sent from Tokyo and were then transferred to Japan on the following day. On 1 April, the public prosecutor decided to prosecute them pursuant to the Anti-Piracy Act. With regard to two of the four accused, it was debated whether their cases should be referred to the family court, because they were legally juveniles. However, finally the public prosecutors decided to deal with the cases.

On 1 February 2013, the District Court of Tokyo rendered the first judgment regarding two of the accused, who were sentenced to ten years' imprisonment without a stay of execution. On 25 February, one of the accused, aged eighteen, was sentenced to not less than five years and not more than nine years' imprisonment without a stay of execution. On 12 April 2013, the other, who was aged twenty one and the principal actor in the acts of piracy concerned, was sentenced to eleven years' imprisonment without stay of execution. After these judgments, all four of the accused appealed against their sentences. Their appeals were dismissed by the Tokyo High Court.12 Two of the convicted made further appeals, while the remaining two decided not to appeal.

The author has obtained the text of the Judgment of 1 February 2013 and the summary of the Judgment of 25 February 2013. These Judgments will be introduced in the following section.

IV. Judgment of 1 February 2013

A. Salient arguments of the Counsels relating to the rights of individuals and the view of the Court

In this judgment, the Court examined two of the accused. The counsels for the accused raised several interesting points because this was the first prosecution proceedings pursuant to the Anti-Piracy Act. The discussions were related to the legality and appropriateness of the prosecution in Japan and the elements to be considered in the determination of the punishments.

1. Constitutionality of the Anti-Piracy Act

The counsels argued first of all that the prosecution should be dismissed in this case. The first argument of the counsels related to the fundamental nature of the Anti-Piracy Act, that is to say the constitutionality of this Act. In response to

[12] With regard to the Judgment of 1 February 2013, the appeal was dismissed on 18 December 2014. In the case of the Judgment of 25 February 2013, the appeal was dismissed on 25 December 2014. As far as the Judgment of 12 April 2013 is concerned, the appeal was dismissed on 25 January 2014.

this argument, the District Court pointed out that the issue in this case was the punishment of the accused pursuant to Articles 2 and 3 of the Anti-Piracy Act. It concluded that constitutionality could not be questioned in this case since the SDF had not undertaken any operation in relation to the acts of piracy committed by the accused.

2. Legality of the criminal jurisdiction by Japanese Courts

The other arguments were closely concerned with the rights of individuals. One argument stated the lack of a legal basis for the exercise of criminal jurisdiction by Japan. The counsels argued that the Japanese courts had criminal jurisdiction in this case neither under international law nor under national law. According to the counsels, as far as international legal rules were concerned, only the US courts were competent to decide upon the punishments to be imposed under Article 105 of UNCLOS, which allows the courts of the State that carried out the seizure of a pirate ship to decide upon the penalties.

Regarding the national laws of Japan, the counsels argued that the Anti-Piracy Act does not concretely provide for the punishment of criminals who committed the crime of piracy outside Japanese territory.

The District Court dismissed these arguments. Regarding the legality of the exercise of criminal jurisdiction by Japan in this case, the Court found that it was legal under both international and national law. With regard to international law, the Court referred to the universal jurisdiction laid down in Article 100 of UNCLOS, and found that Article 105 did not prevent a State other than the State that seized the vessel from the exercise of criminal jurisdiction.

With regard to national law, the Court considered that Articles 2 to 4 of the Anti-Piracy Act constituted a *lex specialis* of the Penal Code, and that Article 8 of the Penal Code admitted the application of such *lex specialis*. It further pointed out that in consideration of the basic nature of universal jurisdiction concerning acts of piracy, the Anti-Piracy Act should be understood to apply to every criminal who committed those acts on the high seas.

3. Legality of public prosecution in Japan

The counsels also took up issues relating to the legality of public prosecution in Japan. They contended that the accused were not sufficiently informed of the reasons why they would be prosecuted in Japan. Moreover, they had been denied due process because their counsels were appointed thirteen days after they were captured. In addition, the counsels also argued that the right of defence of the accused was infringed because of languages difficulties. For these reasons, the counsels contended that the procedures for the prosecution were null and void, or, alternatively, the court was not competent to exercise its jurisdiction because of the infringement of the right of defence.

The District Court also dismissed these arguments. First, the Court considered that the reasons for the custody and arrest were sufficiently furnished to the accused and the right of defence was properly notified at the time of their arrest. Second, as far as the infringement of the right of defence was concerned, the Court noted that interpreters had been provided on 12 March, and counsels had been appointed on 14 March 2011. In particular, with regard to the consideration of the difficulties of language, the Court confirmed the following facts: At the time of the arrest, the Japanese officials prepared cards on which the reasons for the arrest and the procedures to be taken were furnished in the Somali language, and these cards were shown to the accused. When the officials realized that the accused were illiterate, they provided the interpreter on 12 March, who explained in the Somali language the reasons for their arrest and their right of defence, the Court ruled that the exercise of criminal jurisdiction was legal.

B. Factors to be considered in the determination of the punishments

In the determination of the punishments, the Court took into consideration several factors of the personal situations and the social circumstances which the accused faced in their home country.

1. Seriousness of the Crime

The Court noted two features of the criminal activities committed by the two accused. First, they did not complete the intention of their act, which was to take the crew hostage, and did not demand the delivery of any property from a third party. Therefore, this was the case of an attempted crime. At the same time, the Court noted that the accused had broken into a ship under navigation. They carried arms, caused damage to the equipment, took control of the operation of the ship, and sought the crew in the ship. Although the crew took shelter inside the citadel, in accordance with the instructions given in the manuals provided by their company, they were seriously frightened for twenty- two hours. The fact that the ship's master left the company after this case shows how terrifying the attacks had been.

2. Role played by the accused

The Court examined the roles played by the accused in the commission of the acts of piracy. It confirmed that the accused had cooperated in the commission of those acts in order to obtain large amounts of money, while sufficiently knowing the illegality of said acts. However, the Court also noted that it was the first time they had taken part in acts of piracy and that they had worked diligently for their family before participating in the acts of piracy. The Court also recognized that they sincerely repented of their crime.

3. Social factors

The counsels further argued that the punishments should be mitigated because of social and economic factors in Somalia. In response to this argument, the Court admitted the importance of social and economic assistance in the fight against piracy in Somalia, but it considered that those elements did not influence the necessity for the punishment of the acts of piracy and did not justify the mitigation of the punishments.

V. Judgment of 25 February 2013

In this case, the counsels mainly argued that the accused was not an accomplice in the crime of piracy but served only as a watch or an assistant in the commission of the acts concerned. The Court did not admit these arguments. The Court examined the details of the conduct of the accused and concluded that his contribution to the act of piracy was not restricted to the role of assistant. In particular, it noted that the accused was the only one who could speak English. When the criminals searched the crew on board, the accused spoke to them in English. It was considered that with his linguistic ability, the accused was expected to play an important role in the commission of the crime and that he contributed to it in a substantial way. Therefore, the Court concluded that the accused acted with other accomplices throughout the commission of the act of piracy.

The counsels also contested the appropriateness of the prosecution in Japan, as in the case discussed in the previous section. The court did not admit these arguments for the same reasons as in the judgment of 1 February 2013.

Regarding the punishment, the Court first of all noted that the role played by the accused in the crime of piracy was expected to be substantial. However, it also considered that it was not appropriate to sentence the accused to a heavier punishment than those given to his accomplices in the Judgment of 1 February. The Court took into consideration the following elements: First, the act of piracy was an attempted crime, and the accused did not fulfil his role; second, he was aged sixteen when the crime was attempted; third, he had been raised in Somalia during the civil war in that country. Consequently, the Court sentenced the accused to from five to nine years of imprisonment.

VI. Prosecution as the exercise of universal jurisdiction and the rights of individuals

The first experience of Japan in prosecuting the Somali pirates pursuant to the Anti-Piracy Act reflects some problems in the exercise of universal jurisdiction in the case of acts of piracy.

A. The importance of the protection of free and safe navigation and of international cooperation for that purpose

It might be suggested that the enactment of the Anti-Piracy Act in Japan was required to ensure the effectiveness of operations carried out to counter acts of piracy and to provide a basis for the exercise of universal jurisdiction to prosecute the accused. Because Japan relies heavily on maritime transport, it is important for it to participate in international operations to ensure free and safe navigation. It is also important to note that in so far as the Somali government is not capable of taking effective measures to prevent and punish acts of piracy committed in its vicinity, other States should conduct operations to prevent those crimes and exercise criminal jurisdiction in appropriate cases. However, problems regarding the rights of the accused emerged from this first experience of the public prosecution of the accused.

B. Rights of individuals prosecuted

As the District Court properly pointed out in the Judgment of 1 February, the Japanese officials had done their best to respond to linguistic difficulties in communication and to ensure that due process was carried out in the proceedings concerned. However, it might still be possible to raise a question regarding the prosecution and trial in a State so far away from the home of the accused. There are inevitable problems in the exercise of universal jurisdiction, from various viewpoints of both of the public prosecutors and of the accused.

The public prosecutors faced difficulties not only in communication with the accused but also in other aspects of the proceedings, such as the identification of the personal data of the accused, including their ages, places of birth, addresses, and vocations which are required to be determined in criminal proceedings in Japan in order to ensure due process. From the viewpoint of the accused, they had to face criminal proceedings in a foreign language and pursuant to a foreign legal regime, which were unknown to them. Moreover, the accused were obliged to commit acts of piracy because of the social circumstances of Somalia. Their imprisonment in Japan for the purpose of their correction and rehabilitation in the community might also be questioned. It should also be noted that one of the accused was sixteen years old and another was nineteen years old at the time of arrest. Nevertheless ,their role in the commission of the acts of piracy was so substantial that the decision not to treat them as juvenile delinquents was appropriate. However, the fact that they were young underlines the importance of their correction and rehabilitation. It is easy to assume that the circumstances of Somalian society might have constituted an important factor in their decision to take part in the piracy. Such circumstances could apply in the cases of the other two criminals, who had no other choice but to join the group of pirates because of

social and economic factors in Somali society. The correction and rehabilitation of the accused in the community and their education will be even more important for their future than the punishment is. It might be questioned whether Japan is the appropriate place to achieve these purposes.

VII. Concluding remarks

International cooperation in the fight against piracy is important for Japan's economy, which depends heavily on maritime transport. To ensure the legal grounds for Japan's role in this fight, the enactment of the Anti-Piracy Act and operations undertaken by JCG and SDF officers in the vicinity of Somalia reflect the willingness of Japan to contribute to international operations in that area. To realize such contributions, it was necessary for Japan to establish legal rules that justify the operations of SDF abroad in this capacity.

The prosecution of the criminals who were captured and arrested pursuant to this Act was inevitable because the Anti-Piracy Act provides the legal basis for the public prosecutors and courts to deal with such cases. Pursuant to this Act, the first experience of prosecuting the Somali criminals appears to shed light on the significance of, and problems in, the exercise of universal jurisdiction in a concrete case. It might be necessary to consider the process of prosecution that is effective and appropriate for both the authorities and the accused. It appears that the mere punishment of the criminals cannot be effective in achieving the purpose of ensuring a fundamental solution to the problem. However, it is true that the act of piracy is a very serious crime, and that it affects the common interests of the international community. Therefore, the idea behind universal jurisdiction is that it shall ensure the prosecution of serious crimes by the international cooperation of the States concerned. However, in that process, the situations of the individuals concerned should not be ignored. The aspects of the correction and education of the criminals might be an even more important consideration in preventing people, such as the Somalis in this case, from participating in or repeating the act of piracy.

Human rights at aea: does the law of the sea clash with well-established human rights principles?

*Stefano Dominelli**

I. The coexistence of multiple self-contained regimes in international law; II. The fear of fragmentation and proliferation: the International Law Commission; III. The goals of the law of the sea and its "non-indifference" to human rights; IV. The principle of nullum crimen, nulla poena sine praevia lege poenali; V. The offence of piracy under international law and the Sea Shepherd case; VI. Conclusions.

I. The coexistence of multiple self-contained regimes in international law

The international law of the sea has often been defined as a self-contained system,[1] embodying principles and rules (relating to a particular subject-matter) whose provisions are both primary (normative in nature) and secondary (providing means of dispute settlement),[2] developing its organizations and courts[3] with the possibility for these rules to differ from those of public international law.[4] For example, while under international law States have an obligation to solve their disputes[5] by

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1 E*x multis* A. E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*"*, in *The International and Comparative Law Quarterly* (1997), at 37 ff.; A. Lindroos, M. Mehling, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO", in *European Journal of International Law* (2006), at 858 and T. Treves, "Human Rights and the Law of the Sea", in *Berkley Journal of International Law* (2010), at 1.

2 A. Kaczorowska, *Public International Law*, (4th ed., 2010), at 46 and B. Simma, D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", in *European Journal of International Law* (2006), at 484 ff.

3 T. Treves, "Fragmentation of International Law: The Judicial Perspective", in *Comunicazioni e Studi* (2007), at 827.

4 Ibid.

5 According to the Permanent Court of International Justice (PCIJ) '[a] *dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests* [...]' (PCIJ, The Mavrommatis Palestine Concessions (Greece v. Britain), Judgment No. 2 of 30 August 1924, in *1924 P.C.I.J. (ser. B) No. 3 (Aug. 30),* paragraph 19).

peaceful means[6] and, as a matter of principle, States can freely[7] choose the peaceful settlement dispute procedure they prefer amongst those listed in Article 33 of the UN Charter,[8] the United Nation Convention on the Law of the Sea (UNCLOS), which is nothing but one (even though one of considerable importance) source[9] of the international law of the sea, sets a complex – and flexible[10] – framework for the settlement of disputes, once it has been acknowledged that diplomatic negotiations have failed to resolve the dispute.[11] In this sense, the departure from the principles of public international law lies in the obligation for States to first try through diplomatic means to settle a dispute.

It is worth noting that the «self-contained» nature of a legal regime is not to be deduced from the voluntary compliance of its provisions by States, but only from the fact of its peculiarity, that is, the creation of its own principles and rules.

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[6] I.e., avoid the use of force in international relations. See P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed. 1997), at 273 ff.; Article 2(3) of the UN Charter and the corresponding customary rule (ICJ, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) (merits), Judgment of June 27 1986, in *I.C.J. Reports* 1986, at 14, paragraphs 290-291). On the customary nature of the principle see *ex multis* F. Munari, "Risoluzione pacifica e prevenzione delle controversie internazionali", in S.M. Carbone, R. Luzzatto, A. Santa Maria (eds.), *Istituzioni di diritto internazionale* (4th ed., 2011), at 279 ff. and A. Peters, "International Dispute Settlement: A Network of Cooperational Duties", in *European Journal of International Law* (2003), at 1 ff.

[7] See UN GA Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the charter of the United Nations (A 8082), 2526 XXV, 24 October 1970.

[8] I.e.: a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.

[9] On the sources of the international law of the sea, see Y. Tanaka, *The International Law of the Sea* (2012), at 8 ff. and R. J. Dupuy, D. Vignes, *A Handbook on the New Law of the Sea*, Vol. I (1991), at 29 ff.

[10] On the reasons for this flexibility, namely the need to guarantee universal participation in the instrument, see A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea* (1987), at 243 and N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2004), at 53. In general on this framework see A. Cannone, Il *tribunale internazionale del diritto del mare* (1991); J. I. Charney, "Entry into Force of the 1982 Convention on the Law of the Sea", in *Virginia Journal of International Law* (1995), at 389 ff.; G. Galdorisi, K. Vienna, *Beyond the Law of the Sea* (1997), at 108 ff.; P. Ivaldi, L. Schiano di Pepe, "Il diritto del mare", in S.M. Carbone, R. Luzzatto, A. Santa Maria (eds*.), Istituzioni di diritto internazionale* (4th ed., 2011), at 516 ff.; J. G. Merrills, *International Dispute Settlements* (5th ed., 2011); M. N. Shaw*, International Law* (5th ed., 2003), at 568 ff.; L. B. Sohn, "Settlement of Law of the Sea Disputes", in *International Journal of Marine and Coastal Law* (1995), at 205 ff.; T. Treves, *Le controversie internazionali. Nuove tendenze, nuovi tribunali* (1999); R. Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti* (2008).

[11] See UNCLOS, art. 283 (*Obligation to exchange views)*. In the legal literature on this, among that already cited, see R. Churchill, A. W. Lowe, *The Law of the Sea* (1999), at 453 ff.

The special system of the international law of the sea binds all Coastal States just because they have access to the sea.[12] Which of course does not exclude the possibility to develop or create "optional" (like the law of diplomatic relations)[13] or "regional" (like the EU) self-contained regimes, as long as they have – at least – their own customary principles and rules.

II. The fear of fragmentation and proliferation: the International Law Commission

To use the words of the ILC, '[t]*he problem [...] is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law*'.[14] This is because the rules of the self-contained regime, being *lex specialis,* are applied *in lieu* of the *lex generalis*,[15] which still stands[16] for various purposes: in particular for a « gap – filling » function in those case in which the special rules are overruled or, for any reason, not applicable.[17]

Rules of self-contained systems may also be inconsistent with rules of other self-contained regimes, where their scope of application overlaps. Here, both being *lex specialis*, the ILC rejects the idea that the principle *lex posterior derogat prori* should find automatic application.[18]

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[12] In this sense see S. Rosenne, "The Perplexities of Modern International Law. General Course on Public International Law", in *Recueil des Cours*, Vol. 291 (2001), at 46, suggesting that there are different types of self-contained regimes (open at will, objective participation) and that the *discrimen* according to which a system has to be qualified as «self-contained» is the existence of primary and secondary provisions related to a specific topic.

[13] Ibid., when noting that a State is free to enter into diplomatic relationships with other States, but if it does so, then the related law does apply, independently of the will of the sending State. In addition, on the principle that there is no obligation to keep diplomatic relationships with other States M. Frulli, "Sull'immunità dalla giurisdizione straniera degli organi statali sospettati di crimini internazionali", in A. Bardusco, M. Cartabia, M. Frulli, G.E. Vigevani (eds.), *Immunità costituzionali e crimini internazionali. Atti del Convegno. Milano*, (2008), at 44.

[14] Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, 2006 (AG A/CN.4/L.682), at par. 8, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[15] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, Conclusion (5) and ff. and Conclusion (14), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf.

[16] Ibid., Conclusion (9).

[17] Ibid., Conclusion (15) and (16).

[18] Ibid., Conclusion (26).

The fear of clashes between principles can arise not only from written provisions, but also from their interpretation. Deeply connected[19] with the phenomenon of fragmentation, is the increasing[20] «proliferation» of new international Courts that increases the risk of fragmentation of international law through the possible different interpretations of the same rule of law.[21] This scenario, where a specialized court interprets public international law even though self-contained regimes tend to exclude its application, is possible because no self-contained regime is completely autonomous. Even the EU, portrayed as the closest to a truly self-contained regime,[22] is subject to international law.[23] No system is truly self-contained or autonomous;[24] all have a certain connection with public international law[25] either because i) a reference to it is made within the system itself;[26] ii) the self-contained regime is incomplete under some aspects[27] or iii) at the

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[19] T. Treves, *Fragmentation of International Law: The Judicial Perspective*, n. 3 above, at 828 ff.

[20] E*x multis* A. von Bogdandy, I. Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers", in A. von Bogdandy, I. Venzke (eds.), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (2012), at 3; C. Romano, "The Pieces of the Puzzle", in *New York University Journal of International Law and Politics* (1999), at 709 ff.; T. Treves, "Judicial Law making in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?", in R. Wolfrum, V. Roeben (eds.), *Developments on International Law in Treaty-Making* (2005), at 587 ff. and J. I. Charney, *Is International Law threatened by Multiple International Tribunals?*, in *Recueil des Cours*, Vol. 271 (1998), at 108 ff.

[21] E*x multis* T. Treves, *Fragmentation of International Law: The Judicial Perspective*, n. 3 above, at 829; Id., "Le Tribunal international du droit de la mer et la moltiplication des jurisdictions internationales", in *Rivista di diritto internazionale* (2000), at 726 ff., B. Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?", in *New York University Journal of International Law and Politics* (1999), at 679 ff.; N. Matz-Lueck, "Promoting the Unity of International Law: Standard-Setting by International Tribunals", in D. Koenig, P.T. Stoll, V. Roeben, N. Matz-Lueck(eds.), *International Law Today: New Challenges and Need For Reform?* (2008), at 126 and S. Dominelli, "Delimitazione dei confini marittimi e dialogo tra corti internazionali: Quale ruolo per l'ITLOS? Il caso Bangladesh/Myanmar", in *Il Diritto Marittimo* (2013), at 791.

[22] See A. Kaczorowska, *Public International Law*, n. 2 above, at 46.

[23] For a first study, see F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea* (2008).

[24] B. Simma, "Self-Contained Regimes", in *Netherland Yearbook of International Law* (1985), at 117 and T. Treves, *Human Rights and the Law of the Sea*, n. 1 above, at 1.

[25] See J. Beckett, "Fragmentation, Openness and Hegemony: Adjudication and the WTO", in M. Kolsky Lewis, S. Frankel (eds.), *International Economic Law and National Autonomy* (2010), at 49 ff.

[26] See UNCLOS, art. 293 (1) ('[a] *court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention*').

[27] B. Simma, *Self-Contained Regimes*, n. 24 above, at 116.

very least because the international treaty which creates the subsystem is subject to the rules of interpretation of the 1969 Vienna convention.[28] In particular, the UNCLOS includes international law in general terms in its provision concerning the applicable law[29] and, as a consequence, the ITLOS has never had to struggle to apply public international law.[30]

Given the proliferation of tribunals, the problem of fragmentation has often been studied both with regard to conflicts of jurisdiction, the MOX Plant case[31] being one of the most commonly referred to, and with regard to conflicts amongst decisions. The latter has proven to be more of an exception than a rule. While there are cases in which the same rule has been interpreted in different ways [32]

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[28] This is the position of the ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, cit., where it refers to the 1969 Vienna convention as an interpretative guide for treaties establishing a self-contained regime. Cf. also ITLOS, The Volga Case Judgment, 23 Dec. 2002, par. 77 and ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of the Seabed Dispute Chamber, 1 February 2011, in *Il diritto marittimo*, 2012, at 825, par. 57 ff.

[29] UNCLOS, art. 293 (1), cit.

[30] T. Treves, "The International Tribunal For the Law of the Sea: Applicable Law and Interpretation", in G. Sacerdoti, A. Yanovich, J. Bohanes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), at 490.

[31] Here there was some controversy whether the European Court of Justice (ECJ) or the bodies under the dispute settlement procedure envisaged in the UNCLOS had jurisdiction. On this see ITLOS, The Mox Plant case, provisional measure, order of the 3 December 2001, in *ITLOS Reports*, 2001, at 95, paras. 50 ff.; Arbitration Tribunal constituted pursuant Annex VII of the UNCLOS on the Mox Plant case, Ireland v. United Kingdom, Order n. 3, 24 June 2003, in *International Legal Materials*, 2003, at 1187, paragraphs. 20 ff.; ECJ, Commission of the European Communities v. Ireland, case C-459/03, Judgment 30 May 2006, in 2006 ECR I-04635 and in the legal literature, see *ex multis* C. Semmelmann, "Forum shopping between UNCLOS arbitration and EC adjudication - And the winner ... should be ... the ECJ!",in *European Law Reporte*r (2006), at 234 ff.; K. Kaiser, "Ausschließliche Zuständigkeit des EuGH bei Auslegung und Anwendung von zum Gemeinschaftsrecht gehörenden Bestimmungen", in *Europäische Zeitschrift für Wirtschaftsrecht* (2006), at 470 ff.; N. Lavranos, "Protecting its Exclusive Jurisdiction: the Mox Plant-Judgment of the ECJ", in *The Law and Practice of International Courts and Tribunals* (2006), at 479 ff.; Id, "Freedom of Member States to bring disputes before another court or tribunal: Ireland condemned for bringing the MOX plant dispute before an arbitral tribunal. Grand Chamber decision of 30 May 2006, Case C-459/03, Commission v. Ireland, European", Constitutional Law Review (2006), at 456 ff.; F. Casolari, "La sentenza MOX: la Corte di giustizia delle Comunità europee torna ad occuparsi dei rapporti tra ordinamento comunitario ed ordinamento internazionale", in *Il diritto dell'Unione Europea* (2007), at 327 ff.

[32] With regard to the case law of the ITLOS and its Seabed Dispute Chamber, it should be noted that in its Advisory Opinion the Chamber, when dealing with the issue whether the interpretation of regulations adopted by the International Seabed Authority (ISA) followed

not for reasons directly connected with the pursuit of the specific goals of the self-contained regime, and cases where the "common" interpretation was rejected[33] by a specialized body, it is true that courts usually seek common interpretations of rules of public international law.[34] Thus, part of the legal literature noted that '*we should not exaggerate the phenomenon of fragmentation*';[35] moreover, '*the existence of diverging judgments […] is not an alarming occurrence, unless it amounts to consolidated trends that clash with each other'*.[36]

Still, in the context of possible clashes between public international law and self-contained regimes, and between self-contained regimes themselves, the focus was broadly on specific provisions and on the case law of international courts. This is understandable if we think that – most of the time – self-contained regimes are created through international agreements. But self-contained regimes do also know of the existence of customary law,[37] as is the case of the international law of the sea, either because it already existed[38] before the adop-

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the ICJ teachings, though differing from them. While the ICJ stated that regulations should be interpreted according to the 1969 Vienna convention – bearing in mind the different procedures of adoption of the regulations (namely the fact that they are adopted by a majority) from those of the adoption of an international agreement (*i.e*., unanimity) (ICJ, *Accordance with international law of the unilateral declaration of independence of Kosovo*, Advisory Opinion n. 141, 22 July 2010, at para. 94) – the Seabed Dispute Chamber simply said that the same rules should apply. Nothing was said about giving weight to the different circumstances in which the two different acts are adopted (ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of the Seabed Dispute Chamber, cit., at para. 60). On this see S. Dominelli*, "*Questioni di responsabilità nella prima advisory opinion della camera per i fondali marini" in *Il diritto marittimo* (2012), at 709 ff.

[33] ICTY, *Prosecutor v. Tadic*, Case n. IT-94-1-A, Appeals Chamber, Judgment 15 July 1999, in *Rivista di diritto internazionale*, 1999, at 1072. The ICTY departed from the «effective control» test of armed forces previously adopted by the ICJ, *Case concerning military and paramilitary activities in and against Nicaragua, Nicaragua v. United States*, Judgment 27 June 1986, in *I.C.J. Reports*, 1986, at 14, to follow an «overall control» test that required a lower threshold (ICTY, *Prosecutor v. Tadic*, at par. 137).

[34] In these terms cf. R. Higgins, "A Babel of Judicial Voices? Ruminations From the Bench", in *International and Comparative Law Quarterly* (2006), at 797 ff.

[35] Ibid., at 796 cf. also M. Lennard, "Navigating by the Stars: Interpreting the WTO Agreements'", in Journal of International Economic Law (2000), at 38.

[36] T. Treves, *Fragmentation of International Law: The Judicial Perspective*, n. 3 above, at 840.

[37] S. Rosenne, *The Perplexities of Modern International Law. General Course on Public International Law*, n. 12 above, at 45: '[a] *self-contained regime […] is a body of law, conventional and customary, governing a given activity by a State'*.

[38] This could be said with regard to the rules concerning the continental shelf, a right of the coastal State that the international practice developed after the Truman Declaration (in United Nation, *Laws and Regulations on the Regime of the High Seas*, I, New York, 1951, at 38). For a study on this point see R. Churchill, A.V. Lowe, *The Law of the Sea*, n. 11 above,

tion of secondary (and possible contextual enactment of new primary) provisions through a treaty, or because some treaty-based principles evolved into general customary law.[39]

A study on possible clashes between fundamental broad principles of different regimes is as important as the study on the conflict of treaty provisions and jurisprudence. An appellate decision from the United States of America[40] related to maritime piracy (as well as its further development),[41] gives us the chance to tackle this issue; we will therefore analyse to what extent fundamental principles of the law of the sea and of human rights law (both to be applied by domestic and international adjudicating bodies) may clash in order to ultimately determine if this fragmentation reaches an '*alarming occurrence*' when States decide to exercise their control over the high seas and their jurisdiction to repress piracy. In order to do so, it is necessary first to briefly recall the fundamental principles of both the law of the sea and human rights law.

III. The goals of the law of the sea and its "non-indifference" to human rights

Even if the UNCLOS is just one source of the law of the sea, given its wide acceptance and importance,[42] this treaty seems to be a particularly suitable instrument from which to deduce the general goals and the fundamental principles of the law of the sea. These are: i) the development of rules, including new ones,

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at 142 ff.; P. Ivaldi, L. Schiano di Pepe, *Il diritto del mare*, n. 10 above, at 500; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, n. 6 above, at 191 and T. Scovazzi, *Elementi di diritto internazionale del mare* (2002), at 55 ff.

[39] Some argue that the UNCLOS rules concerning the Exclusive Economic Zone (ECC), and more broadly the whole Part V of the convention, evolved into customary law. In the literature, amongst those already cited, see E. Franckx, C. van Assche, "Contemporary High Seas Fisheries Law", in E. Franckx (ed.), *Contemporary Regulation of Marine Living Resources and Pollution* (2007), at 30 ff. and B. Vukas, "The impact of the Third United Nations Conference on the Law of the Sea on Customary Law, in B. Vukas (ed.), *The Law of the Sea. Selected Writings* (2004), at 19 ff.

[40] United States Court of Appeals for the Ninth Circuit, *Institute of Cetacean Research et. al.* v. *Sea Shepherd Conservation Society et. al*., Appeal from the United States District Court for the Western District of Washington, February 25, 2013, available at the website of court (http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000655).

[41] United States Court of Appeals for the Ninth Circuit, *Institute of Cetacean Research et. al.* v. *Sea Shepherd Conservation Society et. al*., Order and amended opinion, May 24, 2013, also available at the website of the court.

[42] In light of its comprehensive regulatory regime, the UNCLOS has been called on different occasions a "constitution for the seas and oceans". See M. Gavouneli, "From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to accommodate New Uses and Challenges", in A. Strati, M. Gavouneli, N. Skourtos (eds.), *Unresolved Issues and Challenges to the Law of the Sea. Time Before and time After* (2006), at 205 ff.

for the settlement of all disputes related to the law of the sea, in order to promote peace, justice and progress[43], ii) the establishment of a legal order for the seas and oceans while iii) respecting, at the same time, national sovereignty.[44] The final goal is to facilitate international communication, promote the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources to contribute to the strengthening of peace, security, cooperation and friendly relations among all nations.[45] Thus, the objective of the law of the sea is not the protection of human rights.[46]

However, it could hardly be said that the law of the sea is indifferent to human rights, human rights being to some extent one of its interpretative guidelines. The UNCLOS system has in fact some «concerns» for human beings even though the treaty attributes rights and duties to States and not to individuals.[47] Article 18 concerning innocent passage[48] allows stopping and anchoring in so far as these are necessary for the purpose of rendering assistance to persons in danger or

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[43] UNCLOS, Preamble: '[...] *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*'.

[44] Ibid.: '[r] *ecognizing 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 utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment*'.

[45] Ibid.: '[b]*elieving that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations [...] and will promote the economic and social advancement of all peoples of the world*'.

[46] T. Treves, *Human Rights and the Law of the Sea*, n. 1 above, at 3.

[47] I. Papanicolopulu, "The Law of the Sea Convention: No Place for Persons?", in D. Freestone (ed.), *The 1980 Law of the Sea Convention at 30: Success, Challenges and New Agendas* (2013), at 197, also recalling article 116 UNCLOS.

[48] For a first study on the territorial sea and the related right of innocent passage see in the legal literature H. J. Abraham, *Das Seerecht* (1974), at 31 ff.; E. Beckert, G. Breuer, *Oeffentliches Seerecht* (1991), at 12 ff.; E. D. Brown, "The International Law of the Sea, Vol. I (1994), at 43 ff.; G. Cataldi*, Il passaggio delle navi straniere nel mare territoriale* (1991); R. Churchill, A.V. Lowe, *The Law of the Sea*, n. 11 above, at 71 ff.; P. T. Fenn, "Origins of the Theory of Territorial Waters", in *The American Journal of International Law* (1926), at 465 ff.; B. Hofmann, *Das Küstenmeer im Völkerrecht* (2008); P. Ivaldi, L. Schiano di Pepe, *Il diritto del mare*, n. 10 above, at 486 ff.; F. Ngantcha, *The Right of Innocent Passage and the Evolution of the Law of the Sea* (1990); O'Connell, "The Juridical Status of the Territorial Sea", in *British Yearbook of International Law* (1971), at 303 ff.; N. Ronzitti, "Il passaggio inoffensivo nel mare territoriale e la convenzione delle Nazioni Unite sul diritto del mare", in *Rivista di diritto internazionale* (1985), at 32 ff. and D. R. Rothwell, T. Stephens, *The International Law of the Sea* (2010), at 58 ff.

distress;[49] clearly, a concern for the protection of human life emerges from this provision. Inside the Exclusive Economic Zone[50] the Coastal State can exercise its jurisdiction to ensure compliance with its laws and regulations relating to the exploitation of resources of this area;[51] though i) arrested vessels and crews must be promptly released on the posting of a bond or a security that ii) must be reasonable (and therefore not excessive)[52] and iii) no imprisonment (unless different agreement are in force between States) is allowed in case of violations of fisheries laws and regulations.[53] In addition, the seizing State must promptly notify the seizure to the flag State.[54] All these provisions, limiting sovereign powers, find their *raison d'être* in the need to protect individuals.[55]

Moreover, the «concern» for some human rights can be derived from the case law of the ITLOS that introduced the so called «consideration of humanity»[56]

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[49] UNCLOS, article 18 (2), second sentence.

[50] Which is an area beyond and adjacent to the territorial sea (see article 55 UNCLOS) where the Coastal State has (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment (see UNCLOS article 56). On the exclusive economic zone see in the legal literature D. Attard, *The Exclusive Economic Zone in International Law* (1987); E. Beckert, G. Breuer, *Oeffentliches Seerecht*, n. 48 above, at 18 ff.; J. I. Charney., "The Exclusive Economic Zone and Public International Law", in *Ocean Development and International Law* (1985), at 233 ff.; R. Churchill, A.V. Lowe, *The Law of the Sea*, n. 11 above, at 160 ff.; P. Ivaldi, L. Schiano di Pepe, *Il diritto del mare*, n. 10 above, at 496 ff.; Phillips, "The Exclusive Economic Zone as a Concept in International Law", in *International and Comparative Law Quarterly* (1977), at 585 ff. and T. Scovazzi, *Elementi di diritto internazionale del mare*, n. 38 above, at 44 ff.

[51] UNCLOS, article 73 (1).

[52] Ibid., paragraph 2.

[53] Ibid., paragraph 3.

[54] Ibid., paragraph 4.

[55] In these terms T. Treves, *Human Rights and the Law of the Sea*, n. 1 above, at 3. Similar limitations can also be found in those rules according to which monetary penalties shall only be imposed for certain pollution violations (see UNCLOS, article 230) with, again, a duty to notify the flag State on the measures take (ibid., article 231). In any case, if a proceeding is started against (alleged) polluters, the proceeding State is bound by the UNCLOS to observe the recognized rights of the accused (*ibidem*, article 230(3)).

[56] S. Rosenne, *The Perplexities of Modern International Law. General Course on Public International Law*, n. 12 above, at 192, and there footnote 310; B. A. Boczek, *International Law. A Dictionary* (2005), at 286; Y. Tanaka, *The International Law of the Sea*, n. 9 above, at 16; H. Dipla, "The Role of the International Court of Justice and the International Tribunal on the Law of the Sea in the Progressive Development of the Law of the Sea", in A. Strati, M.

into its jurisprudence: when seized according to article 292 UNCLOS to order the prompt release of arrested ships,[57] the Tribunal[58] adopted what seems to be a teleological interpretation[59] of the UNCLOS provisions, functional to the protection of the individual; in particular, the term «detention» of the crew and the ship was broadly read and understood to encompass[60] the French practice of *contrôle judiciaire* (where members of the crew are not held in prison, but their passports are taken, and they have to acknowledge their presence on the territory to local authorities on a daily basis) even though the term «detention» could have been narrowly interpreted or, rather, interpreted in the light of its ordinary meaning

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Gavouneli, N. Skourtos (eds.), *Unresolved Issues and Challenges to the Law of the Sea. Time Before and Time After* (2006), at 244 ff.; I. Papanicolopulu, *The Law of the Sea Convention: No Place for Persons?*, n. 47 above, at 198; S. Trevisanut, "Corte europea dei diritti umani e Tribunale internazionale del diritto del mare", in *Diritti umani e diritto internazionale* (2010), at 168 and H. Tuerk, *Reflections on the Contemporary Law of the Sea* (2012), at 91.

[57] The origin of this procedure is mainly – but not only – to be attributed to the US delegation that with the jurisdiction of coastal States over foreign vessels in the exclusive economic zone proposed the introduction of two safeguards for flag States: the first was to include specific provisions requiring the prompt release of vessels arrested in the EEZ against the posting of bonds; the second was to create a procedure whereby an adjudicating body could supervise the application of those provisions to order – eventually – the release of the vessel. On this, see D. Anderson, *Modern Law of the Sea. Selected Essays* (2008), at 289.

[58] Here the submission was made by the flag State: ITLOS, *The Volga Case (Case no. 11) (Russian Federation v. Australia)*, Application for prompt release, Judgment 23 December 2002; *The Hoshinmaru Case (Case no. 14) (Japan v. Russian Federation)*, Prompt release, Judgment 6 August 2007; *The Tomimaru Case (Case no. 15) (Japan v. Russian Federation)*, Prompt release, Judgment 6 August 2007; *The Ara Libertad Case (Case no. 20) (Argentina v. Ghana)*, Request for the prescription of provisional measures, Order 15 December 2002 where the Tribunal ordered the release of the Argentine war ship that was seized in Ghana; *The M/V Luisa Case (Case no. 18) (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment 28 May 2013 (where the Tribunal denied that it had jurisdiction to adjudicate the case). In other cases the request was submitted by ship-owners or master after receiving authorization from the flag State: ITLOS, *The M/N Saiga Case (Case no. 1) (Saint Vincent and the Grenadines v. Guinea)*, Application for prompt release, Judgment 4 December 1997; *The Camouco Case (Case no. 5) (Panama v. France)*, Judgment 7 February 2000; *The Monte Confurco Case (Case no. 6) (Seychelles v. France)*, Application for prompt release, Judgment 18 December 2000; *The Grand Prince Case (Case no. 8) (Belize v. France)*, Application for prompt release, Judgment 20 April 2001; *The Chaisiri Reefer 2 Case (Case no. 9) (Panama v. Yemen)*, Prompt release, Order 6 July 2001 (then removed from the registry with Order 13 July 2001) and *The Juno Trader Case (Case no. 13) (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Application for prompt release, Judgment 18 December 2004.

[59] In general, on the moral or teleological interpretation see R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (2005).

[60] ITLOS, *The Camouco Case,* cit., at paras. 71 ff. and *The Monte Confurco Case*, cit., at paragraphs 90 ff.

and in the light of the objectives of the law of the sea[61] (which are to ensure the safe navigation and the rights of Coastal States over the territories under their jurisdiction). The Tribunal decided not follow such a line and stated that '*it seem[ed] appropriate to order the release of the Master'* given that the French practice amounted to a *de facto* detention and constituted a grave violation of personal rights.[62] Also where no legal barriers[63] against leaving the country were found, the Tribunal – in an *ex abundantia cautela* approach[64] – stressed the rights of the individuals to leave.

The Tribunal also stated that some provisions – such as article 73 UNCLOS – must be read in the light of the elementary considerations of humanity they encompass.[65] And these «considerations of humanity» are none other than human rights;[66] and if human rights are intrinsic in some provisions of the UNCLOS, the prompt release procedure – whose goal is to make sure that the rules encompassing humanitarian principles are not infringed – could be regarded as '*a person-oriented jurisdictional procedure [...] that becomes a human rights clause in the treaty'*.[67]

IV. The principle of nullum crimen, nulla poena sine praevia lege poenali

Before turning to the study of the US decision relating to piracy referred to above, having established that the UNCLOS does not exclude the application of some human rights, it is necessary to investigate a fundamental principle of the latter system that could be of relevance. Two core[68] principles of human rights

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[61] This, according to 1969 Vienna convention on the law of the treaties, article 31 (1).

[62] ITLOS, *The Monte Confurco Case,* cit., at par. 61 ('[t]*he Applicant contends that the placement of Mr. José Manuel Pérez Argibay, the Master of the Monte Confurco, under court supervision constitutes a de facto detention and a grave violation of his personal rights, contrary to the provisions of article 73, paragraph 3, of the Convention. It further contends that Seychelles was not given proper notification of the arrest of the vessel in terms of article 73, paragraph 4, of the Convention*').

[63] ITLOS, *The Juno Trader Case*, cit., at par. 79 and *The Hoshinmaru Case,* cit., operative provisions.

[64] In these terms T. Treves, *Human Rights and the Law of the Sea*, n. 1 above, at 4.

[65] ITLOS, *The Juno Trader Case*, cit., at paragraph 77.

[66] T. Treves, *Human Rights and the Law of the Sea*, n. 1 above, at 5 and I. Papanicolopulu, *The Law of the Sea Convention: No Place for Persons?*, n. 47 above, at 200.

[67] In these terms M. Gavouneli, *From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to accommodate New Uses and Challenges*, n. 42 above, at 229.

[68] See *ex multis* S. Dana, "Beyond Retroactivity to Realizing Justice: a Theory on the Principle of Legality in International Criminal Law Sentencing", in *The Journal of Criminal Law and Criminology* (2009), at 859 ff. and W. Schabas, "Nulla Peona Sine Lege", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), at 463.

law are the *nullum crimen* and the *nulla poena sine praevia lege poenali*, according to which i) criminal laws are not to be retroactively applied ii) nor are they to be interpreted by analogy (*in malam partem*) and iii) no crime – as well as no punishment – can exist, if it is not clearly foreseen by the law.[69] These two specifications of the principle of legality[70] constitute an indispensable tool for the protection of the individual against the arbitrary power of the State.[71] Although there are some decisions that qualify the *nullum crimen* as a general principle of justice,[72] it is quite agreed nowadays that it is a principle of strict legality[73]

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[69] C. Kress, "Nulla poena nullum crimen sine lege", in R. Wolfrum (dir.), *The Max Planck Encyclopedia of Public International Law*, Volume VII (2012), at 890 ff.

[70] S. Dana, *Beyond Retroactivity to Realizing Justice: a Theory on the Principle of Legality in International Criminal Law Sentencing*, n. 68 above, at 861 ff.

[71] See PCIJ, *Consistence of certain Danzig legislative decrees with the Constitution of the Free City*, Advisory opinion of 4 December 1935, in *Permanent Court of International Justice, Series A./B. 65*, 1935, at 56 ff.

[72] Meaning that this was considered a principle of natural law discussable if other considerations of natural justice were preponderant. In these terms The International Military Tribunal (Nuremberg), *Judgment and Sentences, 1 October 1946*, in *The American Journal of International Law*, 1946, at 217: '[...] *the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished*'. For a first study on the Nuremberg Trials see Hans-Heinrich Jescheck, "Nuremberg Trials", in R. Bernhardt (dir.), *Max Planck Encyclopedia of Public International Law, Vol. III* (1997), at 749; R. Cryer*, "*International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice", in G. Boas, W. Schabas, M.P. Scharf (eds.), *International Criminal Justice. Legitimacy and Coherence* (2012), at 155; M. C. Bassiouni, *Crimes Against Humanity. Historical Evolution and Contemporary Application* (2011), at 328 and A. Cassese, "Nullum Crimen Sine Lege", in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 439.

[73] First references to the principle were made in the Virginia declaration of rights in 1776, section 8; in the 1779 Constitution of Maryland, article XV; in Article 1, Section 9, no. 3 of the 1787 United States Constitution; in Article 1 of the 1787 *Constitutio Criminalis Josephina;* in Article 4 of the Napoleon Criminal Code of 1810 that became a reference in the continental scenario; in UN GA Universal Declaration of Human Rights, Resolution 217 A (III) of 10 December 1948, Article 11 (2); in the Geneva Convention relative to the Treatment of Prisoners of War, Article 99 (1); in the 1950 European convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 7; in the 1981 African Charter on Human and People's Rights, Article 7 (2) and in the International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), Article 15. Cf. also the position of the UN Secretary General who, during the establishment of new international Tribunals highlighted the need to respect the principle of *nullum crimen* by making sure that they would apply rules of international law that were beyond any doubt part of customary law to avoid any problem of adherence of some, but not all States (Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S25704, 3 May 1993, para 34, available at http://

according to which a reasonably well-defined description of the offence must be drawn up in order to sustain the alleged criminal liability of the individual. While some countries[74] embrace the idea that criminal law must be written, such a narrow interpretation of the principle of legality has never found its way into international law.[75] Even though '*la coutume dérange*',[76] customs are a source of international criminal law[77] – where the principle of *nullum crimen* has to be respected. Even if with the entry into force of the ICC Statute the tradition of directly applying customary law by resting it on case law and State practice has shifted towards a code-based approach[78] that seems more in line with the principle of legality,[79] this tradition has not come to an end since, even within the framework of the ICC Statute, references to violation of customs are still made.[80]

The ban on interpretation *in malam partem* has also been discussed by international courts; according to the European Court of Human Rights, this principle does not limit the possibility for the judge to give a new interpretation of the criminal rule as long as this new interpretation responds to the wording of the law, to the nature of the offence and as long as the outcome of this new interpretation is foreseeable.[81] But for this, under international human rights law '*no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'*.[82]

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www.un.org/ga/search/view_doc.asp?symbol=S/25704). Moreover, see ICC Statute, Article 22 and, applying the principle of irretroactivity see Extraordinary Chambers in the Courts of Cambodia, Supreme court Chamber, Case no. 001, Appeal Judgment 3 February 2012, para. 174 ff. (available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf).

[74] For a study on the possible declinations of the principle of *nullum crimen* see C. Grandi, *Riserva di legge e legalità penale europea* (2010), at 7 ff.

[75] In these terms see D. Akande, "Source of International Criminal Law", in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 51.

[76] B. Stern, "La coutume au coeur du droit international: quelques réflexions", in *Mélanges offerts à Paul Reuter, Le droit international:unité et diversité* (1981), at 479.

[77] On which see M. C. Bassiouni, "The Discipline of International Criminal Law", in M.C. Bassiouni M.C. (ed.), *International Criminal Law, Vol. I* (2008), at 3 ff. and A. Cassese, P. Gaeta, *Casses's International Criminal Law* (2013), at 9 ff.

[78] A. Pellet, "Applicable Law", in A. Cassese, P. Gaeta, R.W.D. Jones R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), at 1057.

[79] C. Kress , *Nulla poena nullum crimen sine lege*, n. 69 above, at 894.

[80] See ICC Statute, article 8 (2) (b) and (e).

[81] European Court of Human Rights, *Affaire Pessino v. France*, Application 40403/02, Judgment 10 October 2006, at paragraph 36, on which see also C. Kress, *Nulla poena nullum crimen sine lege*, n. 69 above, at 895 and S. Huerta Tocildo, "The Weakened Concept of the European Principle of Criminal Legality", in J. Garcia Roca, P. Santolaya (eds.), *Europe of Rights: A Compendium on the European Convention on Human Rights* (2012), at 318.

[82] ICCPR, article 15 (1), first sentence.

V. The offence of piracy under international law and the Sea Shepherd case

Having established that the law of the sea and human rights law have their own fundamental principles, it remains to determine if these may clash one against the other. As said above, the Sea Shepherd case[83] offers an interesting opportunity to analyse this possibility. Here the domestic court applied customary criminal provisions of the law of the sea concerning piracy, offering what could be argued to be a new interpretation of the elements of the crime.

The Sea Shepherd Conservation Society (SSCS) is an environmental activist organisation whose goal is to ensure marine wildlife conservation by taking direct action; disrupting the movements of – and collisions with – other ships on the high seas are part of the Society's *modus operandi*.[84] In pursuing its goal to protect the marine environment, the SSCS stops maritime researchers and hunters by ramming and/or sinking their ships.[85] The SSCS holds that it is empowered by international law to take such actions to protect recognised public interests for the benefit of the whole ecosystem.[86]

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[83] United States Court of Appeals for the Ninth Circuit, *Institute of Cetacean Research et. al.* v. *Sea Shepherd Conservation Society et. al*., Appeal from the United States District Court for the Western District of Washington, February 25, 2013, cit., and United States Court of Appeals for the Ninth Circuit, *Institute of Cetacean Research et. al.* v. *Sea Shepherd Conservation Society et. al*., Order and amended opinion, May 24, 2013, cit.

[84] For the goals and the principles inspiring the SSCS action see its website at http://www.seashepherd.org/. In the legal literature see D. Doby, "Whale Wars: How to end Violence on the High Seas",in *Journal of Maritime Law & Commerce* (2013), at 135 ff. and J. E. Roeschke, "Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters", in *The Villanova Environmental Law Journal* (2009), at 99 ff.

[85] In the Appeal Judgment it emerges that the SSCS has sunk in the past various ships. As can be seen in the annex of the decision, the Society also keeps a record of those ships by painting the names of the sunken ships on its own side. One of the most recent episodes is the Ady Gil where, on January the 6 2010, the New Zealand flagged SSCS Ady Gil collided with Japan's Shonan Maru 2 vessel, on which see in J. Teulings, "Peaceful Protests Against Whaling on the High Seas – A Human Rights-Based Approach", in C.R. Symmons (ed.), *Selected Contemporary Issues in the International Law of the Sea* (2011), at 232 ff. and N. Klein, *Maritime Security and the Law of the Sea* (2011), at 142.

[86] J.E. Roeschke, *Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters*, n. 84 above, at 100 ff. The SSCS invokes the UN World Charter for Nature (http://www.un.org/documents/ga/res/37/a37r007.htm) according to which '[e]*ach person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met'* (article 24).

As is well known, the fight against piracy as *crimen iuris gentium* was born as a military campaign on the part of the maritime empires to protect their economic interests at sea.[87] Given the threats piracy[88] poses to safe navigation, under international customary law all States may take action[89] against pirates in spite

[87] Trib. Ravenna 3 December 2010, *Metall-Market OOO* v. *Moormerland Limited et al.*, in *Il diritto marittimo*, 2012, at 1194-1195, for a comment on which and for further references see S. Dominelli, "Il pagamento del riscatto ai pirati quale atto di avaria comune: applicabilità delle Regole di York e Anversa in Italia e possibili sviluppi nel sistema statunitense", in *Il diritto marittimo* (2012), at 1189.

[88] On piracy see *ex multis* G. Bevilacqua, "Il problema della repressione del reato di pirateria marittima e il necessario bilanciamento tra esigenze di esercizio effettivo della giurisdizione e di garanzia dei diritti individuali", in *Il diritto marittimo* (2012), at 664; A. B. Bazan, "War against Piracy? Some Misconceptions and Over-sights in the Repression of Crimes at Sea", in *Il diritto marittimo* (2009), at 264; A. Boglione, "Pirateria in Somalia e pagamento del riscatto", in *Il diritto marittimo* (2011), at 981; Id., "Pirateria in Somalia: la cattura della nave, col suo carico, perpetrata a scopo di riscatto di per sé sola non giustifica l'abbandono agli assicuratori e non costituisce perdita né attuale né costruttiva dei beni assicurati", in *Il diritto marittimo* (2011), at 282; M. Brignardello, "Sull'impossessamento in alto mare di una nave con violenza e sulla giurisdizione delle Corti federali statunitensi", in *Il diritto marittimo* (2009), at 890; A. Caligiuri, "Le misure di contrasto della pirateria nel mare territoriale somalo: osservazioni a margine della Risoluzione 1816 (2008) del Consiglio di Sicurezza", in *Il diritto marittimo* (2008), at 1506; S. M. Carbone, "Repressione della c.d. pirateria aerea nei rapporti internazionali", in *Rivista di diritto internazionale privato e processuale* (1971), at 534 ff.; M. C. Ciciriello, F. Mucci, "La moderna pirateria al largo delle coste della Somalia: un banco di prova per vecchi e nuovi strumenti internazionali di prevenzione e repressione", in *Rivista del diritto della navigazione* (2010), at 87; A. Converti, "Attività delle organizzazioni internazionali. Nazioni Unite. Consiglio di Sicurezza (ottobre-dicembre 2010)", in *La Comunità Internazionale* (2011), at 315; A. De Guttry, "Lotta alla pirateria e alla rapina armata nel XXI secolo: alcuni problemi giuridici legati all'operazione militare della UE Atalanta", in *Studi sull'integrazione europea* (2010), at 325; F. Graziani, *Il contrasto alla pirateria marittima nel diritto internazionale* (2009); F. Moliterni, "Assicurazione marittima ed assicurabilità del rischio pirateria", in *Banca borsa e titoli di credito* (2011), 4, at 447; F. Munari, "La "nuova" pirateria e il diritto internazionale. Spunti per una riflessione", in *Rivista di diritto internazionale* (2009), at 325; F. Pocar, "Pirateria in Somalia: per sradicare il fenomeno necessario coinvolgere gli Stati della regione", in *Guida al Diritto* (2009), 19, at 11; G. Reale, "La pirateria del XXI secolo", in *Diritto dei trasporti* (2009), at733; N. Ronzitti, "Prevenzione e contrasto della pirateria in mare: via libera a team privati e rimborsi alla Marina. Un passo avanti per la tutela delle navi italiane ma troppa cautela nella legge di conversione", in *Guida al Diritto* (2011), 43, at 54; Id., "The Enrica Lexie Incident: Law of the Sea and Immunity of State Official Issues", in *Italian Yearbook of International Law* (2012), at 3; C. Severoni, "La pirateria tra fonti normative di regolamentazione e strumenti contrattuali di gestione del rischio", in *Il diritto dei trasporti* (2010), at 31; F. M. Torresi, "La pirateria marittima del XXI secolo", in *Il diritto marittimo* (2007), at 598 and T. Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", in *The European Journal of International Law* (2009), at 399.

[89] Trib. Ravenna 3 December 2010, *Metall-Market OOO* v. *Moormerland Limited et al.*,

of the traditional principle of the flag State.[90] According to article 101 UNCLOS (and the 1958 Geneva Convention on the high seas),[91] piracy is an illegal act of violence or detention, or an act of depredation, committed on the high seas for private ends against another ship or aircraft; even those States who did not ratify the UNCLOS recognise that such definition corresponds to a customary rule.[92] This definition was adopted when piracy was considered to be a relatively small problem;[93] indeed, even though the phenomenon has never ceased, it is only in the last decades that pirates have been acting in such force as to become – again – a threat to safe navigation on the high seas which cannot be ignored.[94]

Before turning to the elements of crime that can be drawn from article 101 UNCLOS, and in order to understand the seriousness of the threats posed to safe navigation on the high seas by maritime piracy, the principles on jurisdiction to enforce control at sea must be recalled. Save in exceptional cases, ships sailing under the flag of a State are subject only to the jurisdiction of that State.[95] Ships are indeed considered part of the territory of the flag State,[96] which is responsible for ensuring the respect of laws on the high seas.[97] This rule on jurisdiction over ships is strictly inter-connected with the principle of territoriality, according to which States shall not exercise their jurisdiction over the territory of another State,[98] equally sovereign under international law.

In spite of the importance of this principle, the seriousness of the offence of piracy has induced States to develop the idea of universal jurisdiction: even

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cit., at 1195.

[90] PCIJ, *The Lotus Case, France v. Turkey*, 1927, in *PCIJ Series A n. 10*, at 70.

[91] See F. Munari, *La "nuova" pirateria e il diritto internazionale. Spunti per una riflessione*, n. 88 above, at 739, who notes that the rules on piracy are the same as those in the Harvard Research in International Law, Draft Convention on Piracy with Comment, in *The American Journal of International Law*, 1932 at 739.

[92] For the United States of America see US Court of Appeals for the Fourth circuit 680 F.3d 374, May 23, 2012 and US Court of Appeals for the Fourth circuit 680 F.3d 446, May 23, 2012.

[93] In these terms P. Todd, *Maritime Fraud and Piracy* (2010), at 6.

[94] T. Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, n. 88 above, at 399 ff.

[95] See UNCLOS, article 92 (*Status of Ships*).

[96] This is a settled principle under international law, for which see William Oke Manning, Commentaries on the Law of Nation, 1839, 210. In case law, cf. *Lauritzen* v. *Larsen* 345 U.S. 571 (73 S.Ct. 921, 97 L.Ed. 1254), quoted by R. Geiss, A. Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), at 105.

[97] Scholars and experts have already stressed the necessity to subject vessels on the high seas to some jurisdiction (that of the flag State), in order to avoid a situation of chaos. In these terms see the comments of the Report on the ILC, A/3159, article 30.

[98] This is also another well-established principle under international law, for which see Benjamin Ziegler, The International Law of John Marshall (1939), at 64.

though the rule is that the exercise of jurisdiction by one State is justified when there is a connection between the facts and the State, when it comes to piracy '*every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide on the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith*'.[99] Such derogation from the principle of territoriality[100] clearly represents the state of mind of States: universal jurisdiction, and thus the exercise of powers from other States over their own territory, is a lesser evil than piracy.

In order to ensure safe navigation and control at sea, States have accepted a limitation of their sovereignty (even though such limitations are not themselves without limits).[101] Jurisdiction over pirates raises numerous questions: do States have a discretionary power to prosecute pirates or do they have an obligation to do so? Can States hand over arrested pirates to other States with whom they have entered into an agreement so to "delegate" their functions? Can States "delegate" the suppression of piracy on the high seas to private contractors?

Amongst these different questions, the purpose here is to determine whether States, once they have decided to seize a ship and prosecute pirates, and thus to exercise their jurisdiction to ensure control over the high seas in application of the law of the sea, can breach the fundamental human rights law principle of the *nulla poena*. In general terms, the aim is to verify how different branches of international law interact and to what extent human rights law affects, or should affect, the exercise of jurisdiction of States enforcing the law of the sea. For this purpose, a brief analysis of the elements of the crime of piracy is necessary.

Concerning the definition of piracy offered by article 101 UNCLOS, corresponding to customary international law,[102] whilst there is little doubt of the fact that the private end requirement has now to be understood also to encompass conducts that are not merely of robbery at sea, as , e.g., hijacking for ransom,[103] so that the requirement is fulfilled even without an actual *animus furandi*,[104] some

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[99] UNCLOS, article. 105 (*Seizure of a pirate ship or aircraft*).

[100] Besides the already cited literature, see Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law (2005), at 49 ff.

[101] See for example UNCLOS, article 106.

[102] Clearly in the case-law *United States of America* v. *Mohammed Modin Hasan, Gabul Abdullahi Ali, Abdi Wali Dire, Abdi Mohammed Gurewardher, Abdi Mohammed Umar*, United States District Court for the Eastern District of Virginia, Norfolk Division Oct. 29, 2010.

[103] Trib. Ravenna 3 December 2010, *Metall-Market OOO* v. *Moormerland Limited et al.*, cit.; US Court of Appeals for the Fourth circuit 680 F.3d 374, May 23, 2012 cit. and US Court of Appeals for the Fourth circuit 680 F.3d 446, May 23, 2012, cit.

[104] N. Ronzitti, "The Law of the Sea and the Use of Force Against Terrorist Activities",

doubts still exist with regard to the exact interpretation of the requirement. Historically speaking, this element was included in the definition of piracy to make civil war insurgents fall outside its scope of application when their target were ships of the government they sought to overthrow.[105] Following this interpretation, nowadays the debate is whether or not political acts fall within the scope of application of piracy under international law.

While some believe that the interpretation of 'private end requirement' should be broad enough to encompass all acts of private individuals[106] without State authorization,[107] others believe that political acts do not fall within the scope of application of the private end requirement.[108] When this requirement was included in article 15 of the 1958 Geneva convention, it was already criticized by Czechoslovakia, which was against such a narrow interpretation of the term piracy. Nevertheless, the requirement remained in the UNCLOS in spite of the legal debate in the years following the Geneva convention.[109]

State practice seems to point towards a narrow interpretation of the private end requirement. The Santa Maria and the Achille Lauro cases, even though more than one of the elements which constitute the crime of piracy were lacking, raised the idea that politically oriented acts should not be treated as piracy.[110] Piracy and maritime terrorism were also clearly considered as two separate issues[111] at the time of the drafting of the 1988 Rome convention for the suppression of unlawful acts against the safety of maritime navigation (SUA convention). Moreover, recent events, while confirming the narrow interpretation of what consti-

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in N. Ronzitti (ed.), *Maritime Terrorism and International Law* (1990), at 2.

[105] R. Geiss, A. Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, n. 96 above, at 61.

[106] Military ships (whose personnel have not mutinied) cannot commit an act of piracy. See UNCLOS, article 102 and 103.

[107] D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), at 36 ff. and for a study on the different positions see D. Doby, *Whale Wars: How to end Violence on the High Seas*, n. 84 above, at 143 ff.

[108] N. Ronzitti, *The Law of the Sea and the Use of Force Against Terrorist Activities*, n. 104 above, at 2. Cf. also N. Klein, *Maritime Security and the Law of the Sea*, n. 85 above, at 119 and A. van Zwanenberg, "Interference with Ships on the High Seas", in *International and Comparative Law Quarterly* (2008), at 803 and ff.

[109] N. Ronzitti, *The Law of the Sea and the Use of Force Against Terrorist Activities*, n. 104 above, at 2.

[110] Ibidem. Cf. also N. Klein, *Maritime Security and the Law of the Sea*, n. 85 above, at 119; A. van Zwanenberg, *Interference with Ships on the High Seas*, n. 108 above, at 803 and ff.

[111] See R. Dominiguez-Matés, "From the Achille Lauro to the Present Day: An Assessment of the International Responses to Preventing and Suppressing Terrorism at Sea", in P.A. Fernàndez-Sànchez (ed.), *International Legal Dimension of Terrorism* (2009), at 213 ff.

tutes piracy, are symptomatic of the legal uncertainty surrounding the definition itself. In the *Arctic Sunrise* case, a vessel flying the Dutch flag was seized by Russia after the crew of the ship (composed of members of Greenpeace) tried to board a Russian oil-rig in the Russian Exclusive Economic Zone.[112] The arrest of the crew and the seizure of the ship took place on September 19th 2013 and they were freed following a prompt release order of the ITLOS in November.[113] For the purposes of this specific investigation, what must be highlighted in the *Arctic Sunrise* case is that, not only was the two-ship requirement lacking, but the Russian authorities also opened a criminal investigation initially alleging that such conduct (boarding an oil-rig for activist purposes and propaganda) would amount to piracy.[114] Subsequently, the charges of piracy were dropped, such activists being then considered, not pirates, but common criminals.[115]

The decision of the US Court of Appeals in the Sea Shepherd case followed a broad interpretation of the private end requirement. It must be said that the case decided by the Court was not a criminal case but, nonetheless, qualified SSCS members as pirates; in December 2011 the Institute of Cetacean Research filed a law suit against the SSCS seeking preliminary and permanent injunctive relief under the 1958 High Sea convention, the SUA convention, the Terrorism Alien Tort Act and domestic law, requesting the SSCS to refrain from attacking the plaintiff's crew and fleet. Under US law, a court may issue a preliminary injunction where the plaintiff, amongst other things, establishes a likelihood of success on the merits. The District Court adopted a narrow interpretation of piracy and rejected the claims of the plaintiff holding that the SSCS does not act for any private end. The US Court of Appeals reversed this decision holding that the District Court erroneously interpreted the private end requirement and that this should be understood as encompassing everything that does not fall under a public action.[116] In support of its decision, the Court of Appeals quoted two different

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[112] For a detailed study of the events of the case see the Dutch Request for the Prescription of Provisional Measures under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf.

[113] ITLOS, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), Request for the prescription of provisional measures, Order of the 22 November 2013, available on the web-site of the Tribunal.

[114] See Dutch Request for the Prescription of Provisional Measures under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea, cit., para. 23.

[115] The declaration of the Russian President in the New York Times, Europe Section, of September 25th 2013, available at http://www.nytimes.com/2013/09/26/world/europe/seizure-of-a-greenpeace-vessel-by-russia.html?_r=1&.

[116] The United States Court of Appeals for the Ninth Circuit, *Institute of Cetacean Research et. al.* v. *Sea Shepherd Conservation Society et. al*., cit.: '[t]*he district court's analysis turns on an erroneous interpretation of "private ends" and "violence." The district court construed "private ends" as limited to those pursued for "financial enrichment." But the*

precedents: a domestic decision of the US Supreme court and a decision of the Belgian Court de cassation.

The US Supreme court *Harmony* v. *United States*,[117] which is anything but a recent case, does not seem to be a proper precedent given that, in that decision, the Supreme court was applying not the law of nations but a domestic legislation '*which seem[ed] designed to carry into effect the general law of nation*'. The Supreme court found that all acts lacking State authorization fall within the notion of '*piratical act*' used by the statutory provision which was supposed to transpose customary law into the domestic system.[118] But no investigation on this point is

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common understanding of "private" is far broader. The term is normally used as an antonym to "public" (e.g., private attorney general) and often refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy). See Webster's New Int'l Dictionary 1969 (2d. ed. 1939) (defining "private" to mean "[b]elonging to, or concerning, an individual person, company, or interest"). We give words their ordinary meaning unless the context requires otherwise. See Leocal v. Ashcroft, 543 U.S. 1, 8–9 (2004); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012). The context here is provided by the rich history of piracy law, which defines acts taken for private ends as those not taken on behalf of a state. See Douglas Guilfoyle, Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter Piracy Efforts, 57 Int'l & Comp. L. Q. 690, 693 (2008) (discussing the High Seas Convention); Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 Vand. J. Transnat'l L. 1, 32(2007); see also Harmony v. United States, 43 U.S. (2 How.) 210, 232 (1844) ("The law looks to [piracy] as an act of hostility ... being committed by a vessel not commissioned and engaged in lawful warfare."). Belgian courts, perhaps the only ones to have previously considered the issue, have held that environmental activism qualifies as a private end. See Cour de Cassation [Cass.] [Court of Cassation] Castle John v. NV Mabeco, Dec. 19, 1986, 77 I.L.R. 537 (Belg.). This interpretation is "entitled to considerable weight." Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (internal quotation marks omitted). We conclude that "private ends" include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public'.

[117] US Supreme Court, *Peter Harmony et al.* v. *United States*, 43 US 210 (1844).

[118] Ibid.: '[t]*he next question is whether the acts complained of are piratical within the sense and purview of the act. The argument for the claimants seems to suppose, that the act does not intend to punish any aggression, which, if carried into complete execution, would not amount to positive piracy in contemplation of law. That it must be mainly, if not exclusively, done animo furandi, or lucri causa; and that it must unequivocally demonstrate that the aggression is with a view to plunder, and not for any other purpose, however hostile or atrocious or indispensable such purpose, may be. We cannot adopt any such narrow and limited interpretation of the words of the act; and in our judgment it would manifestly defeat the objects and policy of the act, which seems designed to carry into effect the general law of nations on the same subject in a just and appropriate manner. Where the act uses the word 'piratical,' it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means*

to be found anywhere in the decision of the US Supreme court. The second case the Court of Appeals quoted is a case decided by the Belgian Court de cassation: the Castle case.[119] Unlike the US precedent, this one seems to be a more adequate precedent to invoke; here the Belgian court held that NGOs like Greenpeace act as pirates, since the realization of their personal views falls within the scope of application of the private end requirement, it not being possible to say that they act for political purposes.[120] Though, such an interpretation is difficult to reconcile with the notion of acts for political purposes/terrorism '*which can be defined [...] as using [...] violence against innocent people or non-combatants – or even property – to effect political change and achieve political goals by creating an atmosphere of fear*'.[121] And indeed this decision remained without any judicial follow-up.[122]

The question on where the law of the sea stands with regard to the treatment of eco-activists is not easy to answer; State practice in this regard is not fully developed. On the one hand, it must be noted that eco-activists are not always prosecuted for their illegal activities, and States, lacking the will and/or the means to enforce laws against them, seem sometimes '*to be turning a blind eye to their actions*'.[123] On the other hand, Japan, one of the States most affected by the SSCS

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that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, hostis humani generis. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, lucri causa. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically hostis humani generis. We think that the aggressions established by the evidence bring the case completely within the prohibitions of the act; and if an intent to plunder were necessary to be established, (as we think it is not,) the acts of aggression and hostility and plunder committed on the Portuguese vessel are sufficient to establish the fact of an open, although petty plunderage'.

[119] Belgian Court de cassation 1986, *Castle John and Nederlandse Stichting Sirius* v. *NV Mabeco and NV Parfin*, in 77 *I.L.R*., at 537.

[120] Ibid. , at 540.

[121] G. Nagtzaam, P. Lentini, "Vigilantes on the High Seas? The Sea Shepherds and Political Violence", in *Terrorism and Political Violence* (2007), at 110.

[122] A. Moffa, "Two competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean", in *Yale Journal of International Law* (2012), at 210 and B. Conforti, A. Labella, *An Introduction to International Law* (2012), at 93.

[123] G. Nagtzaam, P. Lentini, *Vigilantes on the High Seas? The Sea Shepherds and Political Violence*, n. 121 above, *passim*. It is also true that not all States seem to be willing to turn a blind eye to the problem of whale hunting; in broad terms, the issue of whale hunting

actions, even though it has labelled[124] their actions as acts of piracy in violation of the law of nations, has held in the past an inconclusive position;[125] Japan has never convicted members of the SSCS for piracy under international law: when Pete Bethune, who boarded the Shonan Maru No. 2 in 2010, was arrested, he was convicted for other crimes, such as trespass, destruction and assault.[126] Nor

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has again caught the attention of the media and the public, thanks to a recent decision of the International Court of Justice (ICJ, *Case concerning Whaling in the Antarctic, Australia v. Japan*, Judgment 31 March 2014, not published yet, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>).

[124] See L. E. Likar, *Eco-Warriors, Nihilistic Terrorists and the Environment* (2011), at 94.

[125] C. R. Symmons, "Use of the Law of Piracy to Deal with Violent Inter-Vessel Incidents at Sea Beyond the 12 Mile Limit: the Irish Experience", in C.R. Symmons (ed.) *Selected Contemporary Issues in the International Law of the Sea* (2011), at 193. In addition, for a reading of the 2009 Japanese act to exclude its application to the activities of the SSCS – or any other eco-activist organisation – see A. Kanehara, "So-Called 'Eco-Piracy' And Interventions By NGOs To Protest Against Scientific Research Whaling On The High Seas: An Evaluation Of The Japanese Position, in *ibid.*, at 205 ff., arguing that even if sub para vi) of article 2 could be read at first glance as encompassing obstructive conducts of NGO's, the conditional phrase referring to sub paras from i) to iv) would exclude the possibility to apply the domestic legislation to eco-activist. The Japanese Government declared that this would be the interpretation of the new act (see A. Kanehara, "Japanese Legal Regime Combating Piracy— The Act on Punishment of and Measures Against Acts of Piracy", in *Japanese Yearbook of International Law* (2010), at 499 ff.). This is the text of the article: (Definition of Acts of Piracy) [t]he term "acts of piracy" as used in this Law shall mean the acts falling under any of the following items committed for private ends on the high seas (including exclusive economic zone (EEZ) prescribed in the United Nations Convention on the Law of the Sea) or territorial sea as well as internal waters of Japan by crew or passengers of a ship (except for warships and other government ships): (i) seizing another ship in navigation or taking control of the operation of another ship by rendering persons irresistible by assault, intimidation or any other means; (ii) robbing property on board another ship in navigation or obtaining or causing others to obtain an unlawful profit by rendering persons irresistible by assault, intimidation or any other means; (iii) kidnapping a person on board another ship in navigation for the purpose of taking the person hostage to demand a third person to deliver any property or to take any other unobligated action or to waive that person's right; (iv) demanding a third person to deliver any property or to take any other unobligated action or to waive that person's right by taking a person, on board a robbed ship or a ship whose control is taken or kidnapped on board another ship in navigation, hostage; (v) breaking into or damaging another ship in navigation for the purpose of committing the acts of piracy as referred to in each preceding items; (vi) operating a ship and approaching in close proximity of, beleaguering, or obstructing the passage of another ship in navigation for the purpose of committing the acts of piracy as referred to in items (i) to (iv) above; and (vii) preparing weapons and operating a ship for the purpose of committing the acts of piracy as referred to in items (i) to (iv) above.

[126] On this case see J. Mossop, "The Security Challenge Posed by Scientific Permit Whaling and its Opponents in the Southern Ocean", in A.D. Hemmings, D.R. Rothwell, K.N. Scott (eds.) *Antarctic Security in the Twenty-First Century. Legal and Policy Perspectives* (2012), at 314. Cf. also N. Klein, *Maritime Security and the Law of the Sea*, n. 85 above, at 142.

does the new anti-piracy law seem adequate to convict activists for piracy.[127] In addition, the legal literature specializing in eco-activists, even when describing them as eco-terrorists, while acknowledging the legal gap, does not consider SSCS members to be pirates, because of the absence of personal gain (given that they allegedly act on behalf of international law for the protection of common interests), and hold possible, at least, the application of the SUA convention.[128]

VI. Conclusions

The case law according to which members of the SSCS are to be qualified as pirates does not seem sufficiently developed (only one case prior to the US Court of Appeals decision) to say that a custom exists; on the other hand, State practice concerning political acts at sea shows the tendency not to treat maritime terrorists as pirates and, thus, the legal literature, while challenging the definition of the private end requirement, excludes that –at the moment– eco-activists are to be considered pirates.

De iure còndito, qualifying pirates in the absence of a clear rule of law, which, given the practice of some States and the position of the legal literature could arguably said to be foreseeable, while enforcing the principle of safe navigation, clashes with the principle of the *nullum crimen*. If the SSCS members already qualified as pirates were also to be convicted in a criminal proceeding, the clash would be manifest, even though, probably, not an alarming occurrence as long as it remains an isolated case. With regard to the problem of fragmentation and the inter-connection of human rights law and the law of the sea when States exercise their jurisdiction and control at sea, it is true that the problem of fragmentation must be re-evaluated and not exaggerated as long as it does not amount to consolidated trends that clash with one other, nonetheless in the SSCS case a fundamental human rights law principle seems to have been compromised.

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[127] See n. 113 above.

[128] G. Nagtzaam, P. Lentini, *Vigilantes on the High Seas? The Sea Shepherds and Political Violence*, n. 121 above, at 127; C.R. Symmons, *Use of the Law of Piracy to Deal with Violent Inter-Vessel Incidents at Sea Beyond the 12 Mile Limit: the Irish Experience*, n. 125 above, at 191 ff.; D. R. Rothwell, "Law Enforcement in Antarctica", in A.D. Hemmings, D.R. Rothwell, K.N. Scott (eds.) *Antarctic Security in the Twenty-First Century. Legal and Policy Perspectives* (2012), at 150; A. Powers, C.Stucko, "Introducing the law of the Sea and the Legal Implications of Rising Sea Levels", in M.B. Gerrard, G.E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013), at 137; A. Moffa, *Two competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean,* n. 122 above, at 210 ff.; D. Doby, *Whale Wars: How to end Violence on the High Seas*, n. 84 above, at 143 ff. and A. Hoek, "Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?", in *Journal of Animal Law and Policy* (2010), at 186 ff., noting that the private end requirement seems to lack, though the point being arguable.

Thus, it is necessary to stress the rift following this decision before it becomes a consolidated clash; States have to assess the *status* of environmental activists either by accepting that they are to be considered as pirates or by clearly pointing out the relevant legal framework, be it the SUA convention or any other rule of international law. Only by taking up an express position on this point will there be (at least for the future) a coherent application of international human rights law and the international law of the sea.

De iure condéndo, one must think of the possible developments of international law with specific regard to eco-activists. As of now, there are no treaty-based provisions explicitly dealing with this phenomenon (even though provisions such as those of the SUA convention could be applied), and the existence of a customary rule can be excluded since there seems to be no general practice accepted as law[129] by States, even in spite of the US and Belgian case-law qualifying eco-activists as pirates, and thus treating them as such. It is, rather, not surprising that a new customary rule extending the scope of application of the principles concerning piracy to activists is struggling to emerge: international law is witnessing a crisis of customary law which has increased the importance of regional customs,[130] only binding for a limited number of States.[131]

The question thus becomes whether or not the legal uncertainty surrounding the definition of piracy and the tendency of some States to extend the scope of application of the principles related to such offences can in the future lead to the evolution of a regional custom, according to which the term eco-activist (or eco-terrorist) should be replaced by the term eco-pirates at least when all the States involved in the case are bound by such international regional custom: with

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[129] State of the International Court of Justice, article 38. In general, on the development of customary international law see in the legal literature R. Luzzatto, "Il diritto generale e le sue fonti", in S.M. Carbone, R. Luzzatto, A. Santa Maria (eds.), *Istituzioni di diritto internazionale* (4th ed., 2011), at 47 ff.; A. Sinagra, P. Bargiacchi, *Lezioni di diritto internazionale pubblico* (2009), at 126 ff.; N. Ronzitti, *Introduzione al diritto internazionale* (2013), at 162 and E. Cannizzaro, *Corso di diritto internazionale* (2011), at 87 ff.

[130] Amongst the causes of this crisis one might recall the fact that after the decolonisation process the increase in number of States made it more difficult to create a wide-spread practice accepted as law. This issue, which is deeply connected with the issue of the ineffectiveness of international law, has been studied with particular attention to human rights law. For a study on this point, and the regional answer to such ineffectiveness in the context of human rights law see *ex multis* I. Queirolo, "Globalizzazione e diritti umani: verso una sempre più completa tutela multilivello dei diritti fondamentali nell'Unione europea?", in I. Queirolo, A.M. Benedetti and L. Carpaneto (eds.), *Le nuove famiglie tra globalizzazione e identità statuali* (2014), 17.

[131] As bilateral customs can be, for which see ICJ, *Asylum Case*, *Colombia* v. *Perù*, Judgment 20 November 1950, in *I.C.J. Reports 1950*, at 266 and, more recently ICJ, *Dispute Regarding Navigational and Related Rights, Costa Rica* v. *Nicaragua*, Judgment 13 July 2009, in *I.C.J. Reports 2009*, at 213.

the consequence that these States could exercise jurisdiction at sea over eco-activists as they can over pirates.

Whilst this possibility is not be excluded *a priori*, it seems unlikely that this evolution will come about: the inconsistent approach of some States does not give the idea that they will take a different (and clearer) position on the exclusion of eco-activists from the scope of application of the principles and rules concerning piracy, given the lack of the private end requirement.[132] In addition, States might find in the SUA convention treaty-based provisions suitable to effectively contrast these actions, avoiding the need to struggle to create new rules concerning the interpretation of the private end requirement. These two considerations seem to point towards the treatment of eco-activists as eco-terrorists; though the contemporary uncertainty still stands and States should bear in mind that, when exercising their jurisdiction in application of the law of the sea, in this state of legal uncertainty, fundamental human rights must be respected to ensure, amongst the measures for the protection of the individual, a consistent interpretation and application of both the law of the sea and human rights law.

[132] On this idea also G. Nagtzaam, P. Lentini, *Vigilantes on the High Seas? The Sea Shepherds and Political Violence*, n. 121 above, at 127; C.R. Symmons, *Use of the Law of Piracy to Deal with Violent Inter-Vessel Incidents at Sea Beyond the 12 Mile Limit: the Irish Experience*, n. 125 above, at 191; D.R. Rothwell, *Law Enforcement in Antarctica*, n. 128 above, at 150; A. Powers, C. Stucko, *Introducing the law of the Sea and the Legal Implications of Rising Sea Levels*, n. 128 above, at 137; A. Moffa, *Two competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean,* n. 122 above, at 210 ff.; D. Doby, *Whale Wars: How to end Violence on the High Seas*, n. 84 above, at 143 ff. and A. Hoek, *Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?,* n. 128 above, at 186 ff.

The applicability of the European Convention on Human Rights to State enforcement and control at sea

*Kiara Neri**

I. Introduction; II. The applicability of the "notion of jurisdiction" to State enforcement and control at sea; A. The applicability of the European Convention when the law of the sea gives jurisdiction to the State; 1. Zones under the sovereignty of the Contracting State; 2. Zones under the exclusive jurisdiction of the State; 3. The exclusive jurisdiction of the State over vessels flying its flag; B. The applicability of the European Convention when the law of the sea gives no jurisdiction to the State; III. Article 1 requirements facing new forms of State enforcement and control at sea; A. The applicability of the Convention to the conduct of Military Vessel Protection Detachments (VPDs); B. The applicability of the Convention in the framework of shiprider agreements; 1. Can a State party to the Convention be held responsible for an action it conducted but which was authorized by another State?; 2. Can a State Party to the Convention be held responsible for an action conducted on the maritime territory of another State?; IV. Concluding remarks.

I. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS)[1] or the 'constitution for the oceans', as it has been aptly termed, sets the legal and institutional framework of the legal regime applicable to the sea. However, UNCLOS "does not say the final word on the law of the sea".[2] State practice has shown a need to revisit existing rules, especially when they appear inadequate or insufficient. This is particularly the case with respect to both criminal activities and human rights issues at sea.

In recent years, States' actions at sea have increased and evolved in such a way as to raise serious questions, mainly on compatibility with human rights law. For instance, the recent counter-piracy operations off the coast of Somalia,[3] and the struggle against drug trafficking at sea or illegal immigration have ines-

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1 United Nations Convention on the Law of the Sea (hereafter «UNCLOS»), Montego Bay, 10 Decembre 1982.

2 I. Papanicolopulu, "The Law of the Sea Convention: No Place for Persons?", in *The International Journal of Marine and Coastal Law*, 27 (2012), 867-874, Introduction.

3 See for instance: P. Bodini, "Fighting Maritime Piracy under the European Convention on Human Rights", EJIL, 22(3) (2011), 829-848 or D. Guilfoyle, "Counter-piracy Law enforcement and Human Rights", ICLQ, 59(1) (2010), 141-169.

capably involved human rights issues.[4] The arrest, trial and conviction of pirates have led to debate among the international community and among scholars, as has the treatment reserved by some coastal States to migrants and asylum seekers.[5] This has lead to a series of judgments by the European Court of Human Rights, in settling cases which have taken place at sea. As a result, "human rights and the law of the sea are becoming closer".[6]

State enforcement and control at sea raise issues in relation to the European Convention on Human Rights[7], regarding, for instance, the right to life under article 2, the prohibition of torture under article 3 or the right to liberty and security under article 5. But issues can also arise from the application of article 10 which protects freedom of speech and article 13 which safeguards the right to an effective remedy[8]. Such cases lead to the effective condemnation of States Parties for the violation of these articles. But this paper does not discuss the content of the rights and their application at sea, but rather the criteria imposed by the European Court for the applicability of the Convention to enforcement by states at sea.

The notion of jurisdiction is essentially territorial[9], however the European Court agrees that in exceptional cases, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction. This mainly concerns situations where the State through its agents operating outside its territory exercises effective control and authority over an individual or a territory. For the European Court of Human Rights, "it is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the

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[4] E. Papastavridis, "European Convention on Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?", in M. Fitzmaurice and P. Merkouris, *The Interpretation and Application of the European Convention of Human Rights. Legal and Practical Implications*, Boston/Leidem (2012), at 117.

[5] See I. Papanicolopulu, "International Judges and the Protection of Human Rights at Sea", in N. Boschiero et al. (eds.), *International Courts and Development of International Law*, The Hague (2013), at 535.

[6] Ibid., at 535.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the Convention"), Rome, 4 Novembre 1950

[8] See E. Papastavridis, "European Convention on Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?", *loc.cit.*

[9] ECHR, Grand Chamber, 12 December 2001, Decision as to the admissibility, *Bankovic and others v. Belgium and others*, application no. 52207/99, paragraph 67: "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention".

Convention that are relevant to the situation of that individual".[10] This rule could apply at sea, as illustrated by the famous *Medvedyev v. France* or *Hirsi Jamaa v. Italy* cases.

It is therefore necessary to revisit the principles that govern the notion of jurisdiction at sea (I), in order to apply them to the new forms of State enforcement at sea (II).

II. The applicability of the "notion of jurisdiction" to State enforcement and control at sea

The European Convention is applicable to State enforcement and control at sea in two cases: either when the law of the sea gives jurisdiction to the Contracting State (A), or when the Contracting State exercises effective control over the individuals (B).

A. The applicability of the European Convention when the law of the sea gives jurisdiction to the State

The Convention is applicable when the Law of the Sea gives jurisdiction to the State. As a matter of fact, in its assessment of the criteria of article 1 of the Convention, the Court takes into account the relevant rules of international law:

> "the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part[11]."

The Court takes into account the international law of State responsibility, but also the international law of the sea, as shown in the *Hirsi Jamaa case.*[12] As a result, when the law of the Sea gives sovereignty or jurisdiction to the State over a maritime zone or a vessel, the Court finds the Convention applicable.

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[10] ECHR, 7 July 2011, *Al Skeini and others v. United Kingdom,* Application n° 55721/07, paragraph 137.

[11] ECHR, Decision as to the admissibility, 12 December 2001, *Bankovic and others v. Belgium and others*, Application n° 52207/99, paragraph 57.

[12] ECHR, 23 February 2012, *Hirsi Jamaa v. Italy*, Application n°27765/09, paragraph 77.

1. Zones under the sovereignty of the Contracting State

In its ports, internal waters and territorial sea, the State exercises its sovereignty. As a result, the Convention is, without any doubt, applicable to State operations taking place in these zones. The "jurisdiction" of the State over ports and internal waters has been implicitly recognized in the *Consorts D.* Case.[13] The Court likewise recognized the applicability of the Convention to States' actions on its territorial sea, for instance in the *Antonsen case*, where the management of fisheries was at stake and in the *Pressos Compania Naviera SA* cases, concerning collisions that occurred in Belgian or Netherlands territorial waters.[14]

2. Zones under the exclusive jurisdiction of the State

Even if the Coastal State is not sovereign on its continental shelf and on its exclusive economic zone, it has, under the law of the Sea, sectorial competences.

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources".[15]
>
> In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment;
> (c) other rights and duties provided for in this Convention.[16]

The European Court of Human rights has interpreted these "sovereign rights" to be constitutive of an exercise of "jurisdiction" under article 1 of the Convention. As a result, the Convention is applicable to law enforcement activities conducted

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[13] EComHR, Decision as to the admissibility, 31 August 1994, *Consorts D v. France*, application n° 21166/93.

[14] EComHR, Decision as to the admissibility, 15 January 1997, *Antonsen v. Norway*, application No. 20960/92 and EComHR, Decision as to the admissibility, 6 September 1993, and ECHR, Judgment, 20 November 1995, *Pressos Compania Naviera SA c. Belgium*, application n° 17849/91.

[15] art. 77(1) of UNCLOS.

[16] art. 56(1) of UNCLOS, for the EEZ.

by the coastal State in its EEZ[17] and its continental shelf, especially towards offshore platforms.[18] For instance, in *Geert Drieman*, Greenpeace conducted, with two of its vessels, *MS Solo* and *MS Sirius*, registered in the Netherlands, and fast rubber dinghies stationed on board the ships, a campaign against Norwegian whaling in the exclusive economic zone. The purpose of the campaign was to prevent a Norwegian ship, the *Senet*, from hunting wales in this area. To achieve this purpose, a dinghy was launched from the *Solo* and positioned in front of the bows of the *Senet* where it drove in a zigzag course, and in so doing forced the *Senet* to change course. The applicants, Greenpeace members, were arrested by the Norwegian coast guards and held in detention for two days, prosecuted and sentenced to pay fines for having obstructed lawful fishing.

> "The Court notes that the applicants' convictions and sentence to pay fines, and the confiscation of the first applicant's dinghy were all measures which the respondent State had taken in the exercise of its jurisdiction in the sense of Article 1 of the Convention, and thus were capable of engaging its responsibility under the Convention".[19]

The action of the Norwegian coast guards and the procedure, which followed, was considered by the Court to be in accordance with the Convention and the application was declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and rejected in accordance with Article 35 § 4.

3. The exclusive jurisdiction of the State over vessels flying its flag

> "As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States".[20]

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[17] ECHR, Decision as to the admissibility, 4 May 2000, *Geert Drieman and others v. Norway*, application no. 33678/96.

[18] ECHR, Decision as to the admissibility, 27 June 2002, *Federation of Offshore Workers' Trade Unions v. Norway*, application no. 38190/97. EComHR, 21 October 1996, *Edgardo Ty v. Netherlands,* application No. 26669/95.

[19] ECHR, Decision as to the admissibility, 4 May 2000, *Geert Drieman and others v. Norway*, application no. 33678/96, p. 8.

[20] *Bankovic*, paragraph 59.

Indeed, the Court notes that the extra-territorial exercise of jurisdiction by a State includes cases involving the activities of its diplomatic or consular agents abroad and "on board craft and vessels registered in, or flying the flag of, that State".[21] In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State. The Court refers to the relevant provisions of the law of the sea, especially that a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. As a result,

> "this principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as in those concerning registered aircraft, cases of the extraterritorial exercise of the jurisdiction of that State".[22]

As a result, the Court recognizes the jurisdictional competence of the State when a fact occurs on a vessel flying its flag, whether it is a public vessel belonging to the State or a private vessel. For instance, the jurisdiction of Italy was expressly recognised by the Court in the *Hirsi Jamaa* case, where the applicants were held on a governmental ship. Indeed, according to the Court:

> "The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion".[23]

As a result, the events that take place on board a governmental ship are automatically under the jurisdiction of the State, and the Convention is therefore applicable.

But the Court also considers that the persons placed on board a civilian ship flying the flag of a contracting party are under the jurisdiction of that State under article 1 of the Convention. For instance, in the *Leray case*, the Court declared the application admissible, even though the facts occurred at sea, on a private ship. In this case, a Cargo ship, the *François Vieljeux*, flying the French flag, sank off the coast of Spain. Three persons died in the accident. The families of the victims launched an application to the European Court, considering that the French

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[21] *Bankovic*, paragraph 73.

[22] *Hirsi Jamaa*, paragraph 77.

[23] *Hirsi Jamaa*, paragraph 81.

authorities had not taken the necessary measures to prevent the accident, especially in terms of control of safety requirements, nor to rescue the crew[24]. This case is also important because it leads to the consideration that the Convention is applicable not only to police operations conducted by States authorities, but also to rescue operations. In the *Leray case*, everything is indirect and implicit. But these finding were subsequently confirmed by the Court, for instance in the *Hirsi Jamaa case* where the Court expressly stressed that States cannot circumvent their jurisdiction under the Convention by alleging that the event in issue is a rescue operation as opposed to a law enforcement operation.[25]

B. The applicability of the European Convention when the law of the sea gives no jurisdiction to the State

The international struggle against criminal activities at sea sometimes requires States to pursue law enforcement operations outside their maritime territory, for instance on the high seas and against vessels flying a foreign flag. The law of the sea does not give States automatic jurisdiction over foreign vessels on the high seas, except to combat piracy, slave trading or unauthorized broadcasting:

> "a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship".[26]

Where the law of the sea gives no jurisdiction to the Contracting State, the Convention is, *prima facie*, not applicable. Indeed, the Court notes that the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.[27] The non-State party being here the flag State.

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[24] ECHR, Decision as to the admissibility, *Leray and others v. France*, 16 January 2001 and ECHR, Judgment, 20 December 2001, application n° 44617/98.

[25] *Hirsi Jamaa*, paragraph 79.

[26] Art. 110 UNCLOS.

[27] See ECHR, 7 July 1989, *Soering v. the United Kingdom*, paragraph 86, *Banković* paragraph 66 and ECHR, 29 March 2010, *Medvedyev v. France,* Application n° 3394 /03, paragraph 63.

However, the Court has accepted in exceptional cases that actions of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of Article 1 of the Convention, if the persons were effectively under the control of the Contracting State. In the framework of law enforcement at sea, the Contracting Party exercises its jurisdiction over the foreign vessel and its crew if it exercises "full and exclusive control"[28].

For instance, in the *Rigopoulos* case[29], the *Archangelos*, a vessel flying the Panamanian flag, was on the Atlantic Ocean sailing towards Europe with a cargo of cocaine. After obtaining verbal authorisation from the Panamanian embassy in Spain, in accordance with Article 17 §§ 3 and 4 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[30], the Spanish investigating judge, in a decision of 20 January 1995, ordered that the vessel, which was on the high seas of the Atlantic Ocean approximately 3,000 nautical miles (5,556 km) from the Canary Islands, be boarded and searched. As a result, a Spanish customs inspection department vessel, the *Petrel I*, boarded the *Archangelos*. Part of the crew was detained on the *Archangelos*, whereas the other part, including the applicant in the Rigopoulos case, was transferred to the vessel belonging to the Spanish customs police, where they were placed under police supervision. The jurisdiction of Spain over the individuals is certain for those who were transferred onboard the *Petrel I*, a governmental vessel flying Spanish flag, but the jurisdiction over the rest of the crew, on board a foreign ship on the high seas is problematic. The Court evaded the question in this decision and the issue of the applicability of the Convention was not even raised since the applicant was in fact detained on the Spanish Ship.

This issue was raised again in the *Medvedyev* case, brought to the Court by crew members of a merchant ship named the *Winner*, registered in Cambodia, which was suspected of carrying large quantities of drugs, with the intention of transferring them to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe. The Cambodian Minister of Foreign Affairs gave his Government's agreement for the French authorities to take action, namely to intercept, inspect and take legal action against the *Winner*. The French frigate *Le Hénaff* intercepted the Cambodian ship and boarded it. The crew of the Winner were confined to their quarters under military guard and therefore never left the Cambodian ship. Thus, the crew was not on board a French ship and cannot appear to be under the jurisdiction of France under the Flag State basis, recognized by both the Law of the Sea and the European Court. Since the *Winner* was, at the

[28] *Medvedyev*, paragraph 67.

[29] ECHR, Decision as to the admissibility, 12 January 1999, *Rigopoulos v. Spain*, Application n° 37388/97.

[30] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988.

time of the boarding, sailing on the high seas, the territorial jurisdiction of France cannot apply either. Therefore, to determine whether the crew was effectively within France's jurisdiction for the purpose of Article 1 of the Convention, the Court had to evaluate whether the French forces had exercised sufficient control over the ship and the crew:

> "In the instant case, the Court notes that a French warship, the frigate Lieutenant de vaisseau Le Hénaff, was specially instructed by the French naval authorities to intercept the Winner, and that the frigate sailed out of Brest harbour on that mission, carrying on board the French Navy commando unit Jaubert, a special forces team specialised in boarding vessels at sea. When the Winner was spotted off Cape Verde on 13 June 2002, the frigate issued several warnings and fired warning shots, before firing directly at the merchant ship, under orders from France's Maritime Prefect for the Atlantic. When they boarded the Winner, the French commando team were obliged to use their weapons to defend themselves, and subsequently kept the crew members under their exclusive guard and confined them to their cabins during the journey to France, where they arrived on 26 June 2002. The rerouting of the Winner to France, by decision of the French authorities, was made possible by sending a tug out of Brest harbour to tow the ship back to the French port, escorted by another warship, the frigate Commandant Bouan, all under orders from the Maritime Prefect and at the request of the Brest Public Prosecutor.
> That being so, the Court considers that, as this was a case of France having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention".[31]

Therefore, the Convention is applicable to police operations on the high seas conducted by member States against foreign vessels if the State exercises full and exclusive control over the foreign ship and its crew. In this case, the Convention was deemed applicable but the Court found a violation, by France, of the requirements of article 5§1 prohibiting deprivation of liberty without a clear legal basis.

III. Article 1 requirements regarding new forms of State enforcement and control at sea

The European Court on Human rights has developed a well-defined case law regarding the applicability of the Convention at Sea. Things are now clear: maritime actions conducted by States Parties fall under the scope of the Convention

[31] *Medvedyev* paragraph 66 and 67.

when they are conducted on their own maritime territory or in a zone where the State has jurisdiction to enforce its legislation; on vessels flying its flag; or on a foreign vessel on the high seas if the Contracting Party exercises full and exclusive control over the vessel and the crew. The Convention is thus applicable to a wide range of law enforcement activities at sea, providing good protection for individuals at sea. The Contracting Parties have to ensure that the persons arrested or detained at sea benefit from the guarantees of the European Convention.

However, new issues may arise as a result of the evolution of the practice of States at sea. In particular, recourse to military vessel protection detachments or shiprider agreements does not fit into the options identified by the Court.

A. The applicability of the Convention to the conduct of Military Vessel Protection Detachments (VPDs)[32]

VPDs are State agents and as such, they do engage their State's international responsibility in case of a breach of an international obligation owed by that State.[33] But the terms of the European Court of Human Rights (ECHR) judgments in the *Medvedyev* or *Hirsi Jamaa* cases sow the seeds of doubt regarding the VPDs' State of nationality as to which jurisdiction should be applied to possible victims at sea.

The decisions of the ECHR to hold France and Italy responsible for the conduct of their agents at sea were based on the fact that there was a violation of human rights both on the warship (in the *Hirsi Jamaa* case) and on the civilian ship, since the latter had been placed under the control of State agents[34] (*Medvedyev* case). As a result, Italian jurisdiction prevailed because "the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities".[35] The above cannot be true when it comes to VPDs operations for the simple reason that armed guards, in most cases,[36] do not have police powers

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[32] This part is from K. Neri, "The Use of Force by Military Vessel Protection Detachments", in *The Military Law and the Law of War Review*, Volume 51 (2012) Issues 1-2.

[33] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 2001, General Assembly resolution 56/83 of 12 December 2001, art. 4.

[34] The crew of the Winner were confined to their quarters under military guard, *Medvedyev v. France,* paragraph 15.

[35] Ibid*.,* 81.

[36] States do not usually grant police powers to their VPDs. Therefore, VPDs are authorized neither to arrest pirates nor to detain them. The presence of VPDs on a merchant ship is solely to ensure the protection of that ship. In some cases, however, domestic law does give police powers to VPDs – such is the case of Italy. Article 5 of Decree Law of 12 July 2011, No 107, 'Extension of the interventions of development cooperation and in support of peace processes and stabilization, as well as international missions of the armed forces and police, and provisions for the implementation of Resolutions 1970 (2011) and 1973 (2011) adopted by the Security Council of the United Nations. Urgent anti-piracy measures', states

either to board a suspected ship, to inspect the ship, to arrest the crew or to take control of any kind over the crew. The *Al Skeini* criteria requiring the exercise of elements of governmental authority would therefore be very difficult to meet.

For instance, in the *Enrica Lexie* incident, the Indian fishermen never set foot on the Italian ship and were never under the control of the Italian soldiers in any way (the Italian marines never took control of the fishing ship as in the *Medvedyev* case). The issue raised is: since the *St Antony's* fishermen were not under the control of the Italian armed guards, could it be said that they were under Italian jurisdiction in the meaning of Article 1 of the Convention?

An older ECHR case, concerning Italy, might be a good starting point for the consideration of this question. Indeed, in the *Viron Xhavara* case, the Court considered that the criterion of Article 1 was met, and recognized the jurisdiction? and consequent responsibility? of Italy for the sinking of a ship, which was carrying illegal migrants from Albania to Italy.[37] The ship sank as a result of a collision with an Italian warship. According to the Court, the sinking of the *Kater I Rades* 'was directly caused by the Italian warship *Sibilla'*.

Similarly, in the *Andreou v. Turkey* case (3 June 2008, Application no. 45653/99) the Court considered that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as being 'within (the) jurisdiction' of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged". This case does not concern maritime operations, but is nevertheless relevant to the present discussion because Turkish soldiers opened fire from their territory towards individuals located in a zone over which they exercise no control.

So, if the VPDs' actions "directly cause" a violation of human rights, the ECHR may consider that the requirement of Article 1 is fulfilled and therefore the Convention would be applicable. However, this applicability remains uncertain, unless the targeted vessel flies the flag of the national State of the VPDs. In this case, the law of the sea gives jurisdiction to the flag State over its vessel. This rule has been applied by the European Court in the *Hirsi Jamaa* Case (paragraph 77).

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that the military personnel onboard merchant ships must operate in accordance with the directives of the Ministry of Defence, and that the commanding officer of each detachment acts as an 'ufficiale di polizia giudiziaria' and can use police powers in respect of any alleged pirate. See K. Neri, "The Use of Force by Military Vessel Protection Detachments", *loc.cit.*

[37] P. Tavernier, «La Cour européenne des droits de l'homme et la mer», in *La mer et son droit, Mélanges offerts à L. Lucchini et J.-P. Quéneudec*, Paris, Pedone, 2003, at 580.

B. The applicability of the Convention in the framework of shiprider agreements

The recourse to shiprider agreements in the struggle against criminal activities at sea is increasing. For instance, in Resolution 1851 (2008) the Security Council encourages States and regional organizations to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution. This very convenient technique enables foreign vessel to patrol in the territorial waters of another State, to combat illicit activities such as drug trafficking, illegal immigration or piracy and armed robbery. These agreements also enable maritime forces to intercept vessels flying a foreign flag. This law enforcement action in the maritime territory of another state or against a foreign vessel is made possible by the presence, on the foreign warship, of an officer of the Coastal or Flag State.

A shiprider agreement is indeed an agreement by which a law enforcement officer (shiprider) is embarked on a vessel (governmental vessel) sailing a national flag different from the nationality of the shiprider. The purpose is to widen the powers or tools of the vessel by embarking an officer duly empowered to provide authorization for certain acts : entry into territorial waters of the State sending the shiprider or boarding, diverting and seizing a vessel flying the flag of that State or enforcing directly its national laws.

Some European countries are involved in shiprider agreements, usually to provide the governmental ship on which the foreign shiprider is embarked. For instance, such agreements were concluded between Spain on one side and Senegal, Mauritania and Cape Verde on the other, to fight illegal migration at sea[38]. This means that the law enforcement operations are most likely to take place outside European maritime territory, either on the high seas on a foreign ship (see above) or in the territorial sea of the shiprider's state of nationality. Therefore, European States involved in shiprider agreements, providing warships to conduct maritime interdiction operations, usually refrain from exercising ? their jurisdiction. For some commentators, " since the very purpose of carrying out controls in foreign territory or territorial waters is to shift jurisdictional responsibility, such agreements are unlikely to contain clauses or provisions explicitly acknowledging jurisdiction of the extraterritorially acting State"[39]. The European Court of Human Rights has not yet directly taken up a position on shiprider agreements, the exercise of jurisdiction and the applicability of the Convention. The *Hirsi Jamaa* case came very close since it took place within the framework

[38] These agreements were the basis for the Frontex HERA operations to prevent migrants from reaching the Canary Islands, see: Th. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of migration control*, Cambridge University Press, 2011, at 138.

[39] Ibid.

of the Italian-Libyan agreement that foresaw "the delivery of Italian coast guard cutters to be manned by mixed Italian and Libyan crews".[40] But in this case, no Libyan officer was embarked on the Italian warship.

Three important questions must be asked in order to determine the applicability of the Convention:

Can a State Party to the Convention be responsible for an action it conducted but which was decided upon by another country?

Can a State Party to the Convention be responsible for an action conducted on the territory of another State?

Can a State Party be responsible for a law enforcement operation conducted on the high seas against a foreign ship?

The last question has been treated above. But the other two remain.

1. Can a State Party to the Convention be held responsible for an action it conducted but which was authorized by another State?

An individual is considered to be under the jurisdiction of a State Party to the Convention if that State exercises effective control over him or her. In the framework of a shiprider operation, the warship conducting the operation will have effective control over the intercepted ship and crew, unlike the foreign officer on board, who is materially unable to exercise such control.

The issue here is that the intercepting authorities are only able to intervene if the shiprider gives his consent, and the operation is limited solely by his consent or otherwise. Thus, the shiprider retains his decision-making power, and the State conducting the operation at sea exercises enforcement powers.

These circumstances are quite close to those which obtained in the *Behrami* case, where the Court "observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN". In the *Behrami* case, the Court considered that the applicants were not within the jurisdiction of France, Germany or Norway, because the contracting States were exercising only "delegated" powers".[41] The decision-making power remained in the hands of Security Council.

The Court attaches importance to the decision making process and to the identity of the authority in charge of it. The transposition of this case-law to shiprider agreements would most probably prevent the Contracting States from being held responsible for the actions decided by a foreign State.

Moreover, in the *Behrami* case, the Court notes, as further argument, that the UN had "overall effective control of Kosovo", and only delegated part of the implementation of the UN Security Council resolutions. When a shiprider au-

[40] M. Heijer, *Europe and Extraterritorial Asylum*, Leiden University, 2011, at 225.

[41] ECHR, Decision as to the admissibility, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Application no. 71412/01 and no. 78166/01, paragraph 141.

thorizes an interception in territorial waters, the action will take place in a zone placed under the "overall control" of the Coastal State (see infra).

However, in maritime cases relating to criminal activities at Sea, the Court always rejects the attempt of a foreign authorization authority ? to shift jurisdictional responsibility. For instance, in the *Viron Xhavara* case the European Court held that since the Albanian ship sank as a direct consequence of the collision with the Italian warship, Italy held sole jurisdiction. According to the Court, "le fait que l'Albanie est partie à la Convention italo-albanaise ne saurait, à lui seul, engager la responsabilité de cet Etat au regard de la Convention pour toute mesure adoptée par les autorités italiennes en exécution de l'accord international en question".[42]

As a result, the agreement between Albania and Italy authorizing the interception in Albanian waters by Italian warships, cannot be considered a justification for shifting Italian responsibility for the incident.

In the same way, in the *Hirsi jamaa case*, the Court "observes that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States". Thus, Italy cannot evade its responsibility by relying on the Libyan authorization to conduct maritime interventions.

In these two cases, the authorization to conduct delegated maritime operations were given *a priori*, in an agreement between the two parties. The shiprider agreements are also the legal basis for maritime interception, but the authorization is given on a case-by-case basis, which reinforces the control of the shiprider over the operation.

2. Can a State Party to the Convention be held responsible for an action conducted on the maritime territory of another State?

Operations implemented in the territorial sea of the Coastal State are, per se, within the jurisdiction of that State, since it exercises its sovereignty over this territory. The shiprider agreements themselves usually, either recall the jurisdiction of the Coastal State over detained vessels and their crew, or refer to relevant international law.[43]

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[42] ECHR, 11 January 2001, Decision as to the admissibility, *Viron Xhavara and fifteen others v. Italy and Albania*, Application n° 39473/98, available only in French.

[43] Artículo 8. *Responsabilidad por las acciones de vigilancia.* "Cada Parte responderá, dentro del límite de sus responsabilidades, de los actos realizados en las misiones de vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de la Parte caboverdiana", Agreement between the Kingdom of Spain and the Republic of Cape Verde on Monitoring Joint Maritime Areas Under the Sovereignty and Jurisdiction of Cape Verde (Acuerdo entre el Reino de España y la República de Cabo Verde sobre vigilancia conjunta de los espacios

For instance, under the Agreement between Spain and Cape Verde:

"The Contracting Parties process in accordance with its laws, third party claims arising in their own territory as a result of or in connection with any act or omission of the participating forces personnel in performing acts of service related to this Agreement, the resulting injury, death, loss or damage".[44]

Under the Trinidad and Tobago-US shiprider agreement:

"In all cases arising in Trinidad and Tobago waters, or concerning Trinidad and Tobago flag vessels seaward of any nation's territorial sea, the Government of the Republic of Trinidad and Tobago shall have the primary right to exercise jurisdiction over a detained vessel and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of the Republic of Trinidad and Tobago may, subject to its Constitution and the laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board".[45]

Likewise, under the Canada-US shiprider agreement:

"While engaging in integrated cross-border maritime law enforcement operations a designated cross-border maritime law enforcement officer shall be subject to the domestic laws of the Party in whose territory any criminal misconduct is alleged to have occurred and be subject to the jurisdiction of the courts of that Party subject to the rights and privileges that a law enforcement officer from the host country would be able to assert in the same situation and subject to the rights and privileges that the host country would be able to assert in the same situation".[46]
A priori, the State of nationality of the shiprider exercises jurisdiction over

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marítimos bajo soberanía y jurisdicción de Cabo Verde, done at Praia, 21 February 2008, Boletín oficial del Estado, Núm. 136 Viernes 5 de junio de 2009 Sec. I. Pág. 4754.

[44] Agreement between the Kingdom of Spain and the Republic of Cape Verde on Monitoring Joint Maritime Areas Under the Sovereignty and Jurisdiction of Cape Verde, art. 10§2 : «Las Partes tramitarán, de acuerdo con su legislación, las reclamaciones de terceros que se produzcan en su propio territorio como consecuencia o en relación con cualquier acción u omisión del personal de las Fuerzas participantes en la realización de actos de servicio relacionados con el presente Acuerdo, de los que resulte lesión, muerte, pérdida o daño» (non official translation).

[45] Agreement between the government of the Republic of Trinidad and Tobago and the government of the United States of America concerning maritime counter-drug operations, 1996, art. 12.

[46] Framework agreement on integrated cross-border maritime law enforcement operations between the government of Canada and the government of the United States of America, Detroit, 26 May 2009, art. 11§1.

the vessel and its crew. However, international law does not exclude a combined responsibility of both States. Likewise, the European Court accepts to hold two or more member States responsible for the same facts, even when these facts occurred solely on the territory of one of them.

For instance in *Ilaşcu and Others v. Moldova and Russia*, the applicants were both within the jurisdiction of Moldova and Russia for the purposes of Article 1 of the Convention, and the Russian federation was held responsible for facts that took place entirely on the Moldavian territory.[47]

As a result, it is safe to conclude that the European Court would, by all accounts, hold the State Party to the Convention responsible for an action conducted on the maritime territory of another State, under a shiprider agreement.

IV. Concluding remarks

The ECHR has recently been faced with a series of cases, concerning issues connected with the law of the sea. It is clear that the importance of these cases "is that they have resoundingly introduced human rights and the rule of law to contemporary discourse over the fight against crimes on the high seas. It follows that the interdiction of foreign or stateless vessels on the high seas […] should not only be regulated by the LOSC or other pertinent treaties, but also by human rights instruments. Accordingly, the State Parties to the latter instruments [ECHR] are not free from their human rights obligations, because their vessels exercise jurisdiction beyond their territorial borders".[48] However, new forms of State enforcement and control at sea challenge these previously held certainties and reopen the debate on the rules governing the applicability of human rights instruments at sea.

[47] ECHR, 8 July 2004, *Ilaşcu and Others v. Moldova and Russia*, Application n°48787/99

[48] E. Papastavridis, "European Court of Human Rights Medvedyev et al. V. France (Grand Chamber, Application N) 3394/03) Judgment of 29 March 2010", *ICLQ* 59 (2010), at 882.

Mavi Marmara case:
State security and human rights at sea

*Martina Bianchi**

I. Introduction; II. The Mavi Marmara case; III. Reactions: States and other international actors; A. Turkish reaction; B. Israeli reaction; C. Reaction of the international community; IV. The principles and rules of international law applicable between State security and human rights; A. Legitimate defence; B. Naval blockade and…; C…. Embargo; V. Final reflections.

I. Introduction

There are many areas of interest relating to the Mavi Marmara case: on the one hand, the manner of exercising lawful self-defence and, on the other hand, the need to balance the legitimate claims for State security and the respect of human rights. It is thus necessary to refer to the following related aspects.

Firstly, this paper aims to discuss the evolution of the dispute between Israel and Turkey, whose authorities decided to appeal to their domestic jurisdiction, as was done in the well-known 'Lotus case' of 1927. Indeed, it highlights how Turkey usually makes this kind of choice in cases qualifying as serious international offences - a legal practice that has also been adopted by other States.

Secondly, the study focuses on the repercussions that the Mavi Marmara case has had for the international community, concerning the activities carried out by the Israeli authorities in the Gaza Strip against third States and Palestinian citizens.

Both aforementioned aspects represent key steps towards an understanding of the value and the effectiveness of the principles of international law in the relations between the protagonist States in one of the hottest and most strategic scenarios in the world. In particular, this case study underlines the impact of these principles in relation to fundamental human rights.

II. The Mavi Marmara case

The Mavi Marmara case has its origins in the actions of the special forces of the Israeli navy against a group of vessels, part of an international non-profit organization, called '*Freedom Flotilla*.'[1]

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On 31 May 2010, during an operation carried on approximately seventy-two miles from the Israeli coast and aimed at stopping the convoy and escorting the vessels to the Mediterranean port of Ashdod,[2] nine civilians aboard the flagship Mavi Marmara were killed: eight of Turkish nationality and one of dual Turkish and U.S. nationality. In addition, 156 passengers were injured - 52 of them seriously [3] -, together with 10 military members of Israel's Defence Forces (IDF) - 2 of whom were seriously injured, according to a Tel Aviv statement.

The other members of the convoy were held in custody for some days in the Ashdod prison, awaiting repatriation, and the Israeli authorities also confiscated the ship's cargo.

The arrested people reported to have suffered ill treatment, physical and mental torture during the period in which they were kept in prison; they also denounced the theft of personal property, in particular all their audio-visual recording equipment and photographic material.

The Freedom Flotilla international coalition, which included various associations from different nationalities, had intended to reach the Gaza Strip by sea in order to deliver a cargo of humanitarian aid to the civilian population, thus breaking the blockade imposed by Israel and its embargo.[4]

From the oral and written statements issued by the International Committee of the Freedom Flotilla, the primary intent of the action clearly emerged: rather than bringing humanitarian aid, the true aim was to focus the world's attention on the effects that the Israeli blockade has on the civilian population in Gaza. The group of vessels with their crews of activists, therefore, aimed to break the isolation of the Gaza Strip as an act of political denunciation against the embargo and the closure of the borders, both considered to be illegal, according to the principles of international law.

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for his useful comments.

[1] The convoy included eight ships, with a total of about 700 passengers of over 30 different nationalities, flying under the flag of the Union of Comoros, Kiribati, Turkey, Greece, Togo, United States of America and Cambodia.

[2] Ashdod is a port of over 200,000 inhabitants on the coast of the Mediterranean Sea, about 70 km from Jerusalem.

[3] The number of injured people was confirmed by the office of Forensic Medicine in Istanbul, where all passengers of the Freedom Flotilla were seen soon after their arrival at Ataturk International Airport. The results of medical examinations , complemented by photographic material, were then included in the papers of the criminal trial.

[4] The State of Israel imposed an almost complete closure of the borders around the Gaza Strip, as well as an embargo on a range of goods considered dangerous to its own security, following the victory in the elections of the Hamas party in 2007. The naval blockade was established on January 3rd, 2009. For a complete list of products subject to trade restrictions see the website of the Israeli non profit organization 'Ghisha', which reports the data provided by the Israeli government to the commissioners of the United Nations http://gisha.org/UserFiles/File/HiddenMessages/ItemsGazaStrip060510.pdf.

At the same time, the Israeli government had expressed on several occasions its disagreement with the Freedom Flotilla committee, openly stating that it would not tolerate any trespassing on the waters under its military control.

The reasons presented referred to the need to defend Israel's national security, as the authorities in Tel Aviv would not be able to conduct the proper checks either on the ship's cargo or on the passengers on board who were headed towards the Gaza Strip.

III. Reactions: States and other international actors

A. Turkish reaction

The Turkish government immediately expressed its condemnation of Israel's action, which had caused the death of its citizens; at the same time, the Istanbul Public Prosecutor's office opened a case on the incident, pursuant to Article 8 of the Turkish penal code.[5]

It is interesting to note that, although the mentioned Article 8 could be interpreted as an extension clause of Turkish territorial jurisdiction, because of the nature of the case, several commentators have referred to the principle of universal jurisdiction in order to strengthen the legitimacy of the Tribunal of Istanbul.

Indeed, in the current international context, the protection of people from gross violations of human rights and the fight against the impunity of those who perpetrate such violations, are now assumed as being common values shared by the international community as a whole. Therefore, the principle of *universality,* in its *purest* interpretation, has developed from the concept which views universal jurisdiction as an important tool in the worldwide effort to end impunity for serious international crimes. This is achieved by providing the means to prosecute perpetrators, regardless of where, by whom, or against whom the crimes are committed, or whether or not the accused is in the custody of the prosecuting States[6].

The Turkish choice, which reflects such common values, represents a case law of penal procedures that, even if in minority among States, is not entirely

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[5] The Turkish penal code n. 5237, article 8, enables Turkish courts to proceed 'for each crime committed in Turkey. Cases of attacks on ships or aircrafts in international waters or airspace are considered as attacks on Turkish territory.' In addition, in the cases provided in article 13, Turkish law prosecutes anyone who has committed a crime abroad, although he may have citizenship of a different Country.

[6] For further details, see A. Cassese and P. Gaeta, *Le sfide attuali del diritto internazionale*, (1st ed., 2008), at 203 ff., where the concept of the universality of jurisdiction is classified as '*pure'* and *'conditioned*'; conditioned exercise represents the most widespread practice among States and determines the exercise of internal criminal jurisdiction only in cases where the alleged offender can be reached within State borders.

insignificant – we especially refer to Belgium[7] and Spain.[8] It is worth mentioning the decisions of the Belgian Supreme Court judges, who have repeatedly applied the principle of universal jurisdiction, e.g. for war crimes committed in Rwanda or in the indictment of the former Israeli Prime Minister, Ariel Sharon, for the massacres of Sabra and Shatila.

Returning to the Freedom Flotilla incident, a criminal case was therefore opened at the seventh section of the High Criminal Court of Istanbul against four senior Israeli commanders, accused of having ordered the operation and having instigated the crimes. The commanders were charged with the following crimes: wilful killing, attempting to wilfully kill, intentionally causing serious injury to body or health, plundering, maritime hijacking, intentionally causing damage to property, restriction of freedom of expression, and instigating violent crimes.

B. Israeli reaction

Israel, claiming its own right to legitimate defence in the case of a violation of the maritime space under its control, did not recognize the legitimacy of the lawsuit pending in Turkey. The Government led by Prime Minister Benjamin Netanyahu, in fact, decided to deal with the case merely on a political and diplomatic level.

During the months following the incident on the Mavi Marmara, a number of attempts at reconciliation were registered between the respective foreign ministers which, however, were heavily set back as a result of Israel's refusal to submit its official apology to Ankara.[9]

The breaking point was reached the day after the publication of the *Palmer Report*,[10] when Turkey dismissed the Israeli ambassador from Ankara.

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[7] In 1993, the Belgian Parliament, reforming a previous application, approved a 'law of universal jurisdiction' (known as 'Belgium's genocide law'), which regulates the judgment of people accused of war crimes, crimes against humanity or genocide.

[8] Spanish law recognizes the principle of universal jurisdiction. Article 23.4 of the Judicial Power Organization Act (LOPJ), enacted on 1st July 1985, establishes that Spanish courts have jurisdiction over crimes committed by Spaniards or foreign citizens outside Spain when such crimes can be described, according to Spanish criminal law, as genocide, terrorism, or some other, as well as any other crime that, according to international treaties or conventions, must be prosecuted in Spain. On 25th July 2009 the Spanish Congress passed a law limiting the competence of the *Audiencia Nacional* to cases in which Spaniards are victims or there is a relevant link to Spain or the alleged perpetrators are in Spain, under Article 23.4.

[9] The presentation of an official apology by the offender State to the injured State is expected as a form of satisfaction pursuant to art. 37 of the Draft Articles on State responsibility for Internationally Wrongful Acts, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[10] See below paragraph 3.3.

At the same time, Israeli authorities opened their own internal investigation regarding the conduct of the IDF officers during the interception of the Freedom Flotilla, and verified that they had acted in accordance with Israeli and international laws.

The investigation showed that the use of firearms and the killing of nine passengers on the Mavi Marmara was the result, not previously planned or desired in any way, of the violent reaction of the people on board the ship, and of the consequent need of the soldiers to defend themselves.

The Israeli position was based , therefore, on the legitimate defence of the State and the self-defence of the individual. Note that the judging committee included two international members[11] admitted, however, only as observers and powerless to vote.

The result of the inquiry became part of a report published in January 2011, called *Turkel Report,*[12] in which, in addition to the analyses of the factual and legal profiles of what happened on 31 May 2010, was tackled the question of the legality of the naval blockade, which needed, in any case, to be considered, regardless of the incident on the Mavi Marmara.[13]

Leaving aside for a moment the legality of the naval blockade under international law, the conceptual distinction made in the report between the purpose of the blockade and that of Israel's border crossings policy is worth noting.

Indeed, a few Israeli officials, including the General Military Advocate, declared that 'it is important to distinguish between the purpose of the naval blockade and Israel's border crossings policy, i.e. the policy relating to the land border crossing with the Gaza Strip that Israel adopted after September 19, 2007, when the Ministerial National Security Committee decided to impose restrictions on goods entering the Gaza Strip, on the movement of persons and on the supply of electricity and fuel to the Gaza Strip, as a result of Hamas's rise to power.'

The report continues by referring to the content of the testimony, according to which 'the naval blockade was not imposed *(as the embargo)* to disrupt the commercial relations of the Gaza Strip, for the reason that there is no commercial port on the coast of the Gaza Strip, and therefore there has been no maritime commerce via the coast of the Gaza Strip in the past.[14] As a result, maritime ac-

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[11] The observers of the Public Commission appointed to inquire into the maritime incident of 31 May 2010, were Lord David Trimble and Brigadier- General Kenneth Watkin.

[12] The report takes its name from Justice Emeritus Jacob Turkel, Chairman of the Commission. The full text is available on the web site http://www.turkel-committee.gov.il/index.html.

[13] See *Turkel Report*, 25-111.

[14] The report doesn't state that Gaza City was equipped with its own international airport; on December 12th 2001 the Israeli army, whose warplanes had hit the control tower, bombed the airport. Afterwards, on January 10th 2002, it was completely destroyed; source: http://www.gazaairport.com/history.html.

tivity in the Gaza Strip was limited to fishing, whereas any maritime commerce went via the Israeli port of Ashdod or the Egyptian port of El Arish' (…) 'A naval blockade was regarded as the best operational method of dealing with the phenomenon – meaning the flotillas bound to the Strip - because other solutions, such as the use of the right of visit and search,[15] were proved to be problematic, and other sources of authority were regarded as weaker.'[16]

The General Military Advocate explains the concept of 'dual strategy,' i.e. 'the need to impose a naval blockade on the Gaza Strip arises from security and military considerations of great weight, which are mainly the need to prevent a military strengthening of terrorists in the Gaza Strip, the entry of terrorists and the smuggling of weapons into the Gaza Strip by sea, and also to prevent any legitimization and economic and political strengthening of Hamas and strengthening it in the internal Palestinian area.'[17]

The significant fact that emerges from the analysis of the Israeli reaction is that the parties recognize that the true issue is not so much to establish the legitimacy of the actions of the IDF in that specific episode, tragic as it was, but to establish the legitimacy of what enabled the military to take action, i.e. the naval blockade.

It is not a coincidence that, reaffirming its full right to impose the forced closure of the Gaza Strip,[18] after more than two years of tension in their diplomatic relations, in March 2013 Prime Minister Benjamin Netanyahu agreed to apologize to Turkey, with the following statement: 'I apologize to the Turkish people for any errors that may have led to the loss of life.'[19]

The Israeli government also announced its plans to pay up to six million dollars in compensation to the families of the dead activists.

C. Reaction of the international community

After the incident of the Mavi Marmara, there were several condemnations worldwide, both by politicians and by non-profit organizations.

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[15] The right to 'visit and search of merchant vessels' is provided in the San Remo Manual on International Law Applicable to Armed Conflict at Sea, 12th June 1994, in the Section II, arts. 118 and following.

[16] See *Turkel Report*, at 54.

[17] See *Turkel Report*, at 58.

[18] On February 2013, a second version of the Turkel report was published, entitled *"Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law",* which strengthens the findings of the first one. This report is available at: http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

[19] Reconciliation came only after heavy pressure received by the President of the USA, Barack Obama, during his visit to Israel, who called for a quick solution of the dispute in the interest of the entire international community and of the balances within N.A.T.O.

Nevertheless, the Turkish choice to take the path of an internal trial, rather than focusing on a diplomatic resolution of the dispute, has not always been shared and supported.

One of the main criticisms regarding the on-going trial focused on the essential futility of that procedure and the lack of a solid legal basis, any condemnation sentence having only a symbolic value.

A number of precedents were recalled both in response to this doctrinal interpretation and in the course of the trial, as juridical calls to strengthen the legitimacy of the application of the principle of universal jurisdiction.

The first regards the 'Lotus case' of 1927, which represents a landmark ruling of the Permanent Court of International Justice. The dispute arising between France and Turkey started, in fact, from the Turkish claim to exercise its criminal jurisdiction over the commander of the French steamer 'Lotus,' despite the opposition of Paris, which invoked the predominance of the jurisdiction of the State's flag. The issue had been decided by the Court with the recognition of the full legitimacy of exercise of internal criminal jurisdiction by the Turkish State,[20] a ruling from which it's easily possible to determine the principle whence obtaining, by means of analogical reasoning, the validity of the trial in the Mavi Marmara case.

During the criminal trial held at the High Criminal Court of Istanbul, reference was also made to the trial in Belgium, where - subsequent to the adoption of a law allowing non-residents to file lawsuits against foreign officials concerning 'crimes against humanity'- twenty-three survivors of the massacre of Sabra and Shatila, which occurred during Israel's invasion of Lebanon in 1982, sued the Israeli Prime Minister Ariel Sharon for his responsibility for civilian deaths; this case, also, led to a crisis, this time between Israel and Belgium.

For the sake of thoroughness, and leaving national questions to one side, it has to be mentioned that, among the international community, too, the necessity of opening an impartial investigation on the Mavi Marmara case has been shown, regardless of the particular nature of the political and diplomatic implications that the dispute brought itself.

In this regard, it is worth mentioning the decision of the UN Secretary-General Ban Ki-moon, on August 2nd, 2010, to set up a Panel of Inquiry (POI) to 'examine and identify the facts, circumstances and context of the incident,' and to 'consider and recommend ways of avoiding similar incidents in the future.' The outcome of the work of this commission of investigation was the *Palmer Report*,[21] published in September 2011, which instrument, however, proved to be

[20] The Permanent Court of International Justice showed that the practice adopted by the Member States to reserve the criminal jurisdiction of the incidents in international waters to the flag State is to be interpreted as a practice set in the agreement of the parties involved and not in a international custom binding a priori the choice of individual governments.

[21] Sir Geoffrey Palmer, the former Prime Minister of New Zealand, headed the commission.

inadequate to clarify what had happened or, at least, to resolve the dispute, given that no clear and certain responsibilities of all the parties involved were laid out.[22] In particular, the report lays emphasis on the illicitness of the blockade modality of the Freedom Flotilla convoy, but does not focus on the legal bases of the IDF attack, in particular whether they have a legitimate right to control vessels entering and leaving the Gaza Strip. A systematic reading of the report implies that the disproportional use of force against civilians of third States is to be condemned, but also that the POI does not intend to ascertain the juridical reasons that led to the incident, that is the naval blockade. Furthermore, recalling the line of reasoning already introduced in the Turkel Report - which was, let us not forget, supported by Tel Aviv- a conceptual and factual distinction is explicitly made between the institution of the naval blockade and the embargo. A distinction that, considering the type of shipment involved, appears specious and conceptual. So, the Palmer Report, in confirmation of its purpose as a diplomatic solution, was the first step towards arriving at the Israeli apology declaration in March 2013,[23] possibly acceptable regarding the specific episode, but unthinkable if referred to the entire political and military line adopted in the Gaza Strip.

There were three other members: the Vice Chair was Alvaro Uribe, the outgoing President of Colombia, although he represents a controversial political personality at international level. Indeed, on one hand, his administration was widely accused of systematic human rights violations, given that a coalition of ten Colombian Ngo against torture, on 18th November 2009, presented a report in Geneva to denounce 899 documented cases of torture, referable to security authorities, 502 of which concluded with the death of the victim. On the other hand, in 2007 the American Jewish Committee gave to Uribe its 'Light Unto The Nations Award,' and in 2009, U.S. President George Bush awarded Uribe the Presidential Medal of Freedom, the highest U.S. civilian award. The other two members of the investigation were the interested parties in the conflict, representing Israel and Turkey.

[22] It is indicative how the *Palmer Report* was defined by many as a 'masterpiece of diplomacy', since it was used to fully establish that Israel, was in the right with particular reference to the legality of the blockade on the Gaza Strip, as was Turkey, given the analysis of the way in which the nine passengers were killed on Mavi Marmara (the report speaks, indeed, of bullets fired at point blank range).

As an example, we report the comment of Prof. Richard Falk, professor emeritus of international law at Princeton University and UN Special reporter on the situation of human rights in the occupied Palestinian territory: 'The Palmer report was aimed at political reconciliation between Israel and Turkey. It is unfortunate that in the report politics should trump the law.' Mr. Falk continued, 'the most questionable move of the Palmer Panel was to separate the naval blockade from the overall closure of Gaza to a normal supply of humanitarian supplies, including supplies needed for medical operations and sanitation. The flotilla incident was about the effort to circumvent this aspect of Israeli policies, and the organizers posed no objection to inspection carried out to prevent weapons from entering Gaza.'(Source: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11363&LangID=E).

[23] See above paragraph 3.2.

A significantly different result came out of the report drawn up by another investigation commission, set up in June 2010 on the decision of the United Nations Human Rights Council.[24] The fifty-eight pages of the report examined not only the violations committed during the attack, but also the violations of international humanitarian law and human rights law after the military action. It underlines that 'the conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds.'[25] Moreover, the report concluded that 'there is clear evidence to support prosecutions of the following crimes within the terms of article 147 of the Fourth Geneva Convention: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health.'[26]

However, the most distinctive characteristic regarding the methodological approach used in Palmer Report, is that considerable attention was given to the context of the incident:[27] thanks to a brief but accurate analysis, the Human Right Council Report describes the main points of juridical weaknesses since the creation of the naval blockade, then the implementation of the embargo in Gaza and the consequent precarious humanitarian situation in the Strip. In this regard, it makes a clear reference to the statement of condemnation pronounced within the UN Security Council, as well as by spokespersons of other international agencies, such as the Red Cross and UNRWA. [28]

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[24] The decision of the UN Human Rights Council was adopted on June 2nd, 2010, n. A/HRC/RES/14/1. The commission was composed of a three-person independent expert team, under the presidency of Karl T. Hudson- Philips, an International Criminal Court Prosecutor. The other members were Sir Desmond De Silva, former International Criminal Court Chief Prosecutor for Sierra Leone and Mary Shanthi Dairiam, a former member of the Committee on the Elimination of Discrimination Against Women. The full text is available on http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf

[25] See paragraph n. 264 of the Report.

[26] See paragraph n. 265 of the Report.

[27] See at 6 ff. of the Report.

[28] Ibid. 'The humanitarian situation in Gaza resulting from the imposition of the blockade on the Gaza Strip since June 2007 has been a matter of increasing concern for the international community, including the Security Council. Following the Flotilla incident, the Security Council qualified the situation in Gaza as "not sustainable", stressing the full implementation of Resolutions 1850 (2008) and 1860 (2009), in which it, inter alia, expressed "grave concern [...] at the deepening humanitarian crisis in Gaza", emphasized "the need to ensure sustained and regular flow of goods and people through the Gaza crossings" and called for the "unimpeded provision and distribution throughout Gaza of humanitarian assistance, including food, fuel and medical treatment." In the Presidential Statement, the Security Council reiterated its "grave concern at the humanitarian situation in Gaza" and stressed "the need for sustained and regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza." In addition, the

Finally, the members of the Commission explicitly complained of the almost total lack of collaboration with the investigation by Israeli authorities, a fact that, although not decisive in the matter, certainly points out the profound differences from the ascertainment modality as used in the *Palmer Report*, in which, on the contrary, Tel Aviv's authorities proved to be very collaborative.

IV. The principles and rules of international law applicable between State Security and Human Rights

A. Legitimate defence

That the action perpetuated by the IDF against the *Flotilla* is to be treated as a breach of international law appears now as a well-established and indisputable fact. The illicitness, regardless of the context in which the case occurred, lies in the evidence of the disproportionate use of force by the Israeli authorities, given the type of subjects and vessels attacked and given the total absence of the conditions for appealing to the provisions of art. 51 of the UN Charter.

According to article 2 of the UN Charter, legitimate defence is, indeed, an exception to the prohibition of the use of force, which may be invoked only in case of an armed attack capable of affecting territorial integrity or the political independence of the State. Any self-defence action must, therefore, be justified by an attack beyond a certain limit of intensity and seriousness, and may not coincide with any episode that implies itself the use of force.

The fact that 1) the mission had overtly humanitarian purposes, 2) the action was perpetrated when the convoy was in international waters and 3) no openly hostile demonstration had taken place before the military intervention, clearly show both the lack of those elements necessary to represent a '*serious and real*' threat to the sovereignty of Israel, such as to justify the exercise of self-defence,[29]

United States Ambassador to the United Nations in Geneva said "we continue to believe the situation in Gaza is unsustainable and is not in the interest of any of those concerned". In a United Nations joint statement issued on 31 May, Robert Serry, the United Nations Special Coordinator for the Middle East Peace Process and Filippo Grandi, Commissioner-General of the United Nations Relief and Works Agency (UNRWA) emphasized that "such tragedies are entirely avoidable if Israel heeds the repeated calls of the international community to end its counterproductive and unacceptable blockade of Gaza." In a public statement issued on 14 June 2010, the International Committee of the Red Cross (ICRC) described the impact of the closure on the situation in Gaza as "devastating" for the 1.5 million people living there, emphasizing that "the closure constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law", saying the only sustainable solution was a lifting of the closure.'

[29] Numerous attempts have been made to introduce an extensive interpretation of art. 51 of the UN Charter, with particular reference to the concept of anticipatory self-defence and pre-emptive self defence. We should also remember the Presidential Document on 'national

and the fact that the fundamental corollary of the principle of art. 51, identified in the '*proportionality of the response*,'[30] was disregarded.

B. Naval blockade and…

The evaluations now briefly described generally correspond to the conclusions reached by all forms of investigation carried out, with the exception of that of Israel, which we described above.

However, it seems that the most important aspect to be dealt with is the broader issue, i.e. the one not considered in the Palmer report, that is whether a State can unilaterally close the sea and the air space around the borders of another State for reasons of national security.

Secondly, it is also important to analyse: 1) the effects that such a possible closure could have on third-country nationals and, in any case, 2) if its legality can always be assessed and deemed at first glance or 3) whether it should be balanced with the circumstances of the case and with the sacrifice of human rights.

First of all, it should be made clear that the use of unilateral naval blockades does not represent a new concept during conflicts between States.

The naval blockade is a classic tactic of war aimed at preventing the entry and exit of any ship into and from the ports of a belligerent State. This practice is governed – except for the Declaration of Paris of 16 April 1856 on the Principles of the Maritime War – by rules of customary nature, given that the London Declaration of 26 February 1909 on the Law of Maritime War, which tried to regulate it, never entered into force.

Another important document to which we should refer and which was mentioned several times in the *Turkel Report*,[31] is the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which offers a detailed statement of current customary international law of naval warfare, including naval blockades. This Manual, with the aim of identifying in geographical terms

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security strategy of the United States of America' of 17th September 2002 'where recourse to self defence is justified whenever the State deems that its safety and international peace are endangered.' This approach, known as the so called 'Bush doctrine' did not change the majority view oriented towards a narrow reading of Article. 51. The International Court of Justice, in its judgment on the case *Congo vs. Uganda* -2005-, stated that '*Article 51 of the Charter justifies the use of force in self-defence only within its narrow limits*.' For a deep analysis on these issues, see Gioia Andrea, "Brevi riflessioni sul Ius ad bellum alla luce della prassi recente -Comunicazioni e studi", Volume XXIII, University of Milano (2007).

[30] In the vast and remarkable overview of the doctrine related to the field of self defence , we will only mention here P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, Milan, (1972); O. Schachter, " Self-defence and the rule of law" in *American Journal of International Law*, 1989, 259 – 277; A. Tanzi, *Introduzione al Diritto Internazionale Contemporaneo* (3rd Ed., 2010).

[31] See *Turkel Report*, at 43.

the blocked area, requires the notification of the blockade to both belligerent and neutral States, the maintenance of a naval force permanently dedicated to the application of the block in an impartial manner to vessels of all flags, the capture of neutral merchants which violate the blockade, the attack on any merchant attempting to resist capture, exclusion from the blockade of basic necessities such as food and medicines (this principle was stated by Art. 54, No. 1 of the 1977 Protocol I of Geneva additional to the Fourth Conventions of Humanitarian Law 4 of 1949).

However, since the entry into force of the Charter of the United Nations in 1945, the blockade cannot be considered separately from cases of self-defence under Article 51 of the UN Charter, or, at least, from non-peaceful countermeasures.

The naval blockade, therefore, goes against Articles 2.3 and 4 of the Charter, which prohibit the use of force as a mean of settling international disputes between Member States. For this reason 'the blockade of ports or coasts of a State by the armed forces of another State' is included among the acts of aggression (whether or not there exists a declaration of war) in Article 3, letter. C of the Resolution of the UN General Assembly 3314 (XXXIX) of 14 December 1974.[32]

In terms of naval blockades, the case of the Gaza Strip has peculiarities which make it extremely difficult to compare with other cases,[33] above all, because of the uncertainty of the international subjectivity of Hamas and, so, of the internationality of the conflict between Israel and Gaza.

The most comparable is probably the naval blockade imposed by Israel against Lebanon in March 2006 during the war against Hezbollah.[34]

Although Hezbollah, like Hamas, do not represent a recognized subject of international law, the blockade was accompanied by an embargo against the sale of arms and military equipment and was also endorsed by a number of third States and by a resolution adopted by the UN Security Council.[35]

The distinctive issue regarding everything previously highlighted, is rooted in the fact that, according to Professor Natalino Ronzitti, 'in the case of Gaza there is a conflict between Israel and a non-recognized entity (Hamas), which Is-

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[32] For the legal classification of the 'sea blockade,' we referr to the definition given by Caffio Fabio, in the *Glossario di diritto del mare*, (3rd ed., 2007, appendix to the "Rivista Marittima, Mensile della Marina Militare dal 1868").

[33] Naval blockades were imposed in the conflict between the People's Republic of China and the Republic of China (Taiwan) (in 1949-1958), in the Korean War (1950-1953), during the Cuban Missile Crisis (1962), in the Vietnam War, during the sanctions against Iraq (1990-2003), in the Bangladesh Liberation War in 1971; by Egypt against the city of Eilat and the Gulf of Aqaba in 1967, and on the Bab el-Mandeb Strait in 1973; during the Iran-Iraq War of 1980-1988, and by Israel on the coasts of Lebanon during the Second Lebanon War (March 2006).

[34] Literally 'Party of God,' they represent an organization of militant Shiite Muslims based in Lebanon.

[35] See Res. 1701/2006 and Res. U.N. Security Council.

rael considers to be a terrorist organization. There are practically no precedents; the practice has had, as its unique object, the blockade of ports controlled by insurgents by of the legitimate government, beginning with the blockade of the Confederate ports during the American Civil War (1861). More recent examples refer to the blockade of the ports of Biafra by Nigeria (1967), which provoked the protests of the United Kingdom, or to the factual blockade of the Croatian ports by the Federal Republic of Yugoslavia (1991). "[36]

The case in question would appear to be so unique that it may be best to separate the formalistic aspects, generally used to identify an international conflict, from the interpretation made in the light of the practice, making special reference to the Fourth Geneva Convention and other rules arising from international humanitarian law.

First of all, it should be mentioned that the Israeli Supreme Court classified the conflict between Israel and Hamas as an international armed conflict, as many other UN organizations and humanitarian organizations, such as, for example, Amnesty International, have already done in several official statements and papers. In addition, although the Israeli forces withdrew from Gaza in 2005, the Strip could still be considered an occupied territory. Indeed, the Gisha Legal Center for Freedom of Movement,[37] identifies six elements that confirm the validity of this theory:

1) Israel controls movement to and from the Gaza Strip via land crossings; 2) Israel exercises complete control over Gaza's airspace and territorial sea waters; 3) Israel controls movement within Gaza through periodic incursions and a 'no-go zone'; 4) Israel controls the Palestinian population registry; 5) Israel exercises its control over Gaza's tax system and fiscal policy; 6) Israel exercises control over the Palestinian Authority and its ability to provide services to Gaza residents.

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[36] See N. Ronzitti, "E' legittimo il blocco di Gaza", in Affari Internazionali, rivista on-line di politica, strategia ed economia" on 14th June, 2010. This is an English translation of the following Italian extract: "nel caso di Gaza si tratta di un conflitto tra Israele e un'entità non riconosciuta (Hamas), che Israele considera come un'organizzazione terroristica. I precedenti sono praticamente inesistenti; la prassi ha per oggetto solo il blocco dei porti controllati dagli insorti da parte del governo legittimo, a cominciare dal blocco dei porti confederati durante la guerra civile americana (1861). Esempi più recenti riguardano il blocco dei porti del Biafra da parte della Nigeria (1967), che sollevò le proteste del Regno Unito; o quello di fatto dei porti croati da parte della Repubblica federale di Jugoslavia (1991)".

The full text is available on http://www.affarinternazionali.it/articolo.asp?ID=1476.

[37] See the reports: *Scale of control: Israel's continued responsibility in the Gaza Strip*, ed. November 2011. The full text is available on: http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.PDF; *Disengaged Occupiers: The legal status of Gaza*, ed. January 2007.

The full text is available on: http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf

In the light of the legal aspects mentioned above, it follows that the blockade imposed by Israel lacks the necessary conditions to be considered lawful under Article 51 of the UN Charter, as it was not an immediate response to a serious and certain threat, or to the use of force by another State. Furthermore, it was not accompanied by any attempt to find a solution by a request for intervention to the UN Security Council and does not appear to respect the principles of proportionality and immediacy required for the use of force.

Indeed, independently of the evaluations on the implications of art. 51 UN Charter, it is equally difficult to determine whether the Israeli blockade even complies with international law before the adoption of the UN Charter. A comprehensive evaluation has to consider the effects of the blockade, which cannot be perceived only as an abstract legal entity out of the context in which it takes place.

A blockade cannot lead to 'the exclusion of the transportation of basic necessities such as food and medicines' and Professor Natalino Ronzitti points out that a 'naval blockade is also subject to the limits of humanitarian law. A blockade aiming to starve the civilian population is prohibited. The Fourth Geneva Convention of 1949 excludes from the blockade any ships carrying medicines and art. 70 of the Additional Protocol I of 1977, which Israel has not ratified, allows humanitarian actions such as sending clothing and other objects that are indispensable to the survival of the civilian population. But such actions require the consent of the parties to the conflict and, in this case, that of Israel, which could have prescribed the modalities of delivery and ordered inspections of the ships in order to verify whether they were in fact carrying humanitarian aid. The Security Council of the United Nations in Resolution 1860 of 2009, recommended the distribution of humanitarian aid to Gaza, including food, fuel and medicines.' [38]

Although Israel did not ratify the Additional Protocol I of 1977, the regulations regarding the sending of clothing and essential goods should be interpreted as specifications of those regulations that protect the right to life, health and to human dignity which base their cogency not on treaty law, but on customary law (or, at least, *erga omnes* obligations).

These obligations must also apply to the State of Israel, and their inobservance can only be read as a serious breach of international law.

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[38] See N. Ronzitti, n. 36 above. This is an English translation of the following Italian extract: 'Il blocco navale è soggetto anche ai limiti del diritto umanitario. Quello mirante ad affamare la popolazione civile è vietato. La quarta Convenzione di Ginevra del 1949 esenta dal blocco le navi che trasportino medicamenti e l'art. 70 del I Protocollo addizionale del 1977, che Israele non ha ratificato, consente azioni umanitarie come l'invio di vestiario ed altri beni indispensabili alla sopravvivenza della popolazione civile. Ma tali azioni presuppongono il consenso delle parti del conflitto e, nel caso concreto, quello di Israele, che potrebbe prescrivere le modalità della consegna e la visita delle navi per accertare se effettivamente di aiuti umanitari si tratti. Il Consiglio di Sicurezza delle Nazioni Unite, nella risoluzione 1860 del 2009, ha raccomandato la distribuzione di aiuti umanitari a Gaza, inclusi derrate alimentari, carburante e medicinali.'

In the Mavi Marmara case, the theory was put forward that the Israeli authorities could have legitimately claimed to check the shipment of the Freedom Flotilla convoy, making their own decisions on how the goods should be delivered to the designated persons in the Gaza Strip.

However, leaving aside for a moment the political aim of the Freedom Flotilla coalition, the organizers should have considered the request of the Israeli authorities to change their route towards the port of Ashdod, and accepted the Israeli promise to deliver the cargo by land, taking into account the existence, near the naval blockade, of the embargo.

C. …Embargo

The use of embargos in the Gaza Strip is also a unique case if compared with classical forms covered by the international practice.

An embargo is defined as 'the application of measures of control and the imposition of coercive economic sanctions adopted by the United Nations, on the basis of Chapter VII of the Charter of 1945 (Art. 43), against countries that have committed serious breaches of the peace and of international law. The embargo operations do not involve the blockade of the coasts of the country related to which they are implemented. They legitimize, instead, the erga omnes exercise of coercive measures by the warships of countries participating in the transaction to the merchant vessels of any flag that is presumed to be involved in commercial maritime traffic with the State under embargo.'[39]

Apart from the resolutions of the Security Council of the United Nations, the embargo - as well as the naval blockade – has its own practice[40] among the forms of response carried out by the offended State, the so-called 'countermeasures.'

Given the fact that Israel imposed the embargo on Gaza without the prior authorization of the United Nations, it appears difficult to classify the case as consistent with the practice of countermeasures considered legitimate after the entry into force of the UN Charter. The countermeasure consists, in fact, in the breach of an obligation of a customary or pactional nature towards an offending State by the offended State;[41] the countermeasure should, in any case, refrain from threat and from the use of force, as expressed in the UN Charter, and should not affect the protection of fundamental human rights, humanitarian obligations prohibiting retaliation, or other obligations resulting from mandatory rules of general

[39] For the legal status of 'naval blockade,' see the definition given by F. Caffio, *Glossario di diritto del mare,* (3rd ed. 2007, annex to Rivista Marittima, Mensile della Marina Militare dal 1868).

[40] For more details about practices related to embargo qualified as a countermeasure, see C. Focarelli, *Le contromisure nel diritto internazionale*, 1994, at 36 ff.

[41] See Article 49 of the Draft Articles on State responsibility for Internationally Wrongful Acts.

international law. [42] In particular, once the material conditions of applicability have been ascertained, what determines the effective lawfulness or otherwise of a countermeasure is its compliance with the principle of proportionality, given that Article. 51 of the Draft articles on Responsibility of States for internationally wrongful acts provides that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'[43]

Even though the Draft articles on responsibility have no binding value, they codify principles considered to be part of customary law by eminent doctrine, [44] also on the basis of the clarifications from the International Court of Justice (ICJ).

In the case of the 'Dam project on the Danube,'[45] the Court clarified that the primary aim underlying the countermeasure is the peaceful solution of the dispute and, for this reason, it should have a temporary character and be proportional to the damage suffered.[46]

Considering the legal framework described above, it appears difficult, in the case of the embargo on the Gaza Strip, to identify any international offence justifying a countermeasure, as well as the subjectivity of the offending party.

Israel unilaterally instigated the embargo in 2007 after the victory of Hamas in the elections held in 2006 and the consequent absence of parties belonging to the more moderate Fatah faction. When considering the historical data, it is difficult to qualify this trigger even as an international wrongful act which could justify the adoption of a countermeasure, but, at best, as a risk factor, however serious, linked to the previous violent conduct of Hamas against Israeli settlements. Furthermore, even if we identify the international offence in the attack claimed by Hamas, the international subjectivity of this political organization is in doubt, since the State of Israel itself denies it completely.

Given that the international subjectivity of the offending subject is one of the constituent elements of a cause of exclusion of international responsibility (see countermeasures), it is difficult to affirm that this clause is applicable to the present case: it should be stressed that Israel itself does not recognize as an

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[42] These obligations are detailed at Article 50 of the Draft Articles on State responsibility for Internationally Wrongful Acts.

[43] Draft Articles on State responsibility for Internationally Wrongful Acts Text was adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[44] N. Ronzitti, *Introduzione al Diritto Internazionale*, (4th edition, 2013), 394 - 395.

[45] ICJ, Reports, 1997, paragraphs 83-84.

[46] Gabcikovo-Nanymaros Project (Hungary/Slovakia) (ICJ, Reports, 1997, paragraphs 83-84).

international subject those considered guilty of having committed the offence, i.e. Hamas.

Even if the embargo on Gaza does actually qualify as a countermeasure, we still have to verify the compliance of the prohibition under Article. 50 of the Draft articles on Responsibility of States for internationally wrongful acts, in particular with regard to the obligations referred to in paragraph 1, let. b), c) and d).

As already observed,[47] the embargo on Gaza does not include only a small series of products obviously connected with a possible threat to the State of Israel, but also a series of goods that might be described in part as 'having versatile nature' and in part totally irrelevant to security needs.

The first category includes, for example, concrete and building materials, subject to restrictions, as Hamas could potentially use them for the creation and/or strengthening of bunkers and military outposts. However, those same materials are also necessary for the construction of civil buildings, such as houses, schools, and hospitals as well as essential structures for the provision of basic services such as the distribution of water and electricity.

These lack of goods such as these, closely connected to the needs of the civilian population, reached emergency levels when, following Operation Cast Lead,[48] many of the buildings built in the Gaza Strip before the restrictions dating back to 2007 were completely destroyed.

Regarding the other goods covered by the embargo, it is difficult to understand how goods such as chocolate, dried fruit or musical instruments could constitute a danger to the security of Israel and its citizens living near the border of the Strip. Finally, a report published in 2010 by the U.S. Geological Survey[49] cast further doubt on the complete picture of the real reasons behind Israel's policy: indeed, abundant pockets of natural gas in the waters in front of Syria, Lebanon, Cyprus, Israel and Gaza have been discovered. Without venturing into over-articulated hypotheses, here we will limit ourselves to emphasizing how any exploitation of gas resources, by the Palestinian National Authority (PNA) or by Hamas, would currently be impossible given the status of the sea in front of the Strip and restrictions resulting from the embargo.

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[47] See n.4 above.

[48] The operation 'Cast Lead' was a military campaign waged between 27th of December 2008 and 18th of January 2009 by Israel with the intention of hard hitting the Hamas organization and heavily decreasing the number of rockets launched against Israeli settlements. This operation determined the death of about 1,300 Palestinians (there is a dispute regarding the precise number of victims) and 13 Israelis. Following 'Cast Lead,' several international investigations were activated, including the one promoted by the United Nations and ending with the drafting of the *Goldstone Report*, which accused Israel of committing war crimes and crimes against humanity, also as result of using banned weapons such as those based on white phosphorus.

[49] The report is available at http://pubs.usgs.gov/fs/2010/3014/.

V. Final reflections

Given the frame here presented, it can be said that the embargo imposed by Israel is not in accordance with international law. The offences deriving from it, in terms of human rights violations, become even more serious when added to the effects of the naval blockade, a practice that, in turn, itself constitutes a breach of international law.

Clearly, no type of analysis can disregard the full respect of the principle of proportionality of the response in self-defence and of the rules of customary law of *jus cogens*, especially those pertaining to the protection of fundamental human rights. These two elements must be established as a precondition of the application of any set of rules relating to the laws of war, by sea or land, and humanitarian law in general.

Consequently, the choice of participants in the Freedom Flotilla convoy to refuse to change their route towards Ashdod, thus not trusting in the Israeli promise to deliver by land the cargo of humanitarian aid, is to be seen in a totally different light.

Given the terms of the embargo, most of the goods would have been subject to seizure, and, in any case, the Israeli authorities have no legitimate right to prevent naval or air traffic towards Gaza.

In conclusion, the persistence of the status quo in the Gaza Strip must be read and interpreted not as a legitimate act rooted in the law, but rather as a case where the contingency of political balance creates a serious deficiency in the system of law, which gives way before a demonstration of force. Indeed, the Mavi Marmara case shows that this deficiency must be addressed if we are to preserve the system of collective guarantees, whose structure is based on the fundamental principles of international law, a system that cannot be separated from the formal and factual equality of the subjects of law.

For these reasons the political and legal battle which began after the Mavi Marmara attack represents just one tessera, even though symbolic, of a larger mosaic representing the Gaza Strip and the life of its one million, six hundred thousand inhabitants.

Indeed, the wish to protect this population, even in unconventional ways, played an essential role both in the conduct of the criminal trial in Turkey,[50] and in the launch of a preliminary investigation by the General Prosecutor of the International Criminal Court,[51] as well as in the repetition of other demonstrative

[50] On 27th of May 2014 the Judges of the Criminal Court of Istanbul, after four years of trial conducted in absentia, decided to emit a warrant of arrest against the four high Israeli commanders under accusation.

[51] On 14th of May 2013, Fatou B. Bensoud, Chief Prosecutor of International Criminal Court, stated that: 'My office will be conducting a preliminary examination in order to establish whether the criteria for opening an investigation are met', source: Ma'an NewsAgency, http://www.maannews.net/eng/ViewDetails.aspx?ID=595628.

actions similar to the first convoy of Freedom Flotilla.[52] In this frame, where a complete reconstruction seems to be thwarted by the reciprocal manipulation of the parties involved, the only reliable spectacles are those that use juridical lenses. Otherwise, it is impossible to make a correct and objective reading of the needs of protection and equality mentioned above.

Moreover, weighing the Gaza case with the scales of law not only seems to be the only feasible solution of the dispute according to the UN Charter, but, above all, this kind of choice could be the only one capable of filling the gap between the formal and the factual equality of the subjects of law. In expectation of a clear expression to support that choice, there is no doubt that the Palestinian issue will continue to be a hot topic for all those subjects who, today, hold only formal equality.

[52] For further details, see the source www.freedomflotilla .org, where the activities carried on by freedomflotilla2, Estelle Project and Gaza's Ark project are reported.

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The book focuses on several current maritime questions, while dealing with State sovereignty, jurisdiction and control at sea, with a focus on some particular environmental and security issues. The question of marine resources security in and beyond national jurisdiction is treated, with a focus on IUU fishing, marine genetic resources, marine protected areas in fragile seas, such as the Antarctic Ocean and the Mediterranean Sea, and private regulations standards and corporate social responsibility in fisheries. The book also puts under analysis the position of individual rights protection in State enforcement and control at sea, addressing some specific matters of discussion in the domain of national piracy prosecution and of protection of individual rights at sea in the European context.

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