

EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea

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1. Introduction

On 22 June 2015, the second naval operation of the European Union (EU)¹ was launched in the Southern Central Mediterranean (EUNAVFOR MED, later renamed as EUNAVFOR MED Operation Sophia)² with the aim of disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean. This Operation has been part of the so-called EU's Comprehensive Approach towards the current EU refugee crisis that was firstly conceived on 23 April 2015 by the European Council³ in the aftermath of the death of approximately 800 'boat people' in the Mediterranean Sea.⁴

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¹ The first naval operation has been EUNAVFOR *Operation Atalanta*. See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia [2008] OJ L 301/31. For comments see E Papastavridis, 'EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?' (2015) 64 *ICLQ* 533-568; R Gosalbo-Bono, S Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in P Koutrakos, A Skordas (eds), *The Law and Practice of Piracy at Sea. European and International Perspectives* (Hart Publishing 2014) 87-134.

² The Operation was renamed to EUNAVFOR MED Operation Sophia after the name given to a baby born onboard of a ship participating in the Operation, which rescued her mother off the coast of Libya <www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/>.

³ On 23 April 2015, the European Council expressed its indignation about the situation in the Mediterranean and underlined that the Union will mobilise all efforts at its

EUNAVFOR MED Operation Sophia is one of the missions that the EU has carried out in the framework of the Common Security and Defence Policy (CSDP).⁵ Council Decision (CFSP) 2015/778, dated 18 May 2015, is the legal basis of EUNAVFOR MED Operation Sophia. In accordance with Article 2,

‘EUNAVFOR MED [Operation Sophia] shall be conducted in sequential phases, and in accordance with the requirements of international law. EUNAVFOR MED [Operation Sophia] shall:

(a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law;

(b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants;...’⁶

Since 7 October 2015, the mission moved to its second phase as set out in the Council Decision. As recently reported by the EU External Action Service, ‘the operation has contributed to the arrest and transfer to the Italian authorities of 71 suspected smugglers and traffickers and

disposal to prevent further loss of life at sea and to tackle the root causes of this human emergency, in cooperation with the countries of origin and transit, and that the immediate priority is to prevent more people from dying at sea. See ‘Special Meeting of the European Council’ (23 April 2015) <www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>.

⁴ On 19 April 2015, more than 800 people drowned after their 20 mt boat capsized in the Mediterranean. The migrants reportedly fell overboard when they rushed to draw the attention of a passing merchant vessel, causing their ship to capsize. See *inter alia* Guardian, ‘700 migrants feared dead in Mediterranean shipwreck’ (19 April 2015) <www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>.

⁵ For a comprehensive review of CSDP missions see F Naert, *International Law Aspects of the EU's Security and Defence Policy* (Intersentia 2010); P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013).

⁶ See art 2 of Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31 [hereinafter: Council Decision].



neutralised 139 vessels. In addition, the operation has helped save close to 16 000 lives'.⁷

On 20 June 2016, the Council of the European Union extended until 27 July 2017 the mandate of the Operation and added two supporting tasks: training of the Libyan coastguards and navy and contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya. According to the Council, 'the operation will contribute to information sharing and support implementation of the UN arms embargo on the high seas off the coast of Libya. This will increase maritime situation awareness and limit arms flows to Da'esh and other terrorist groups'.⁸

As the above Council Decision mentioned, the operation is to be conducted 'in accordance with the requirements of international law', which in the present case includes *inter alia* requirements of the law of the sea, international human rights law and international refugee law. This legal framework was supplemented by a long-anticipated Security Council Resolution under Chapter VII of the UN Charter.⁹ Since May 2015 the EU has tried to secure a Resolution that would authorize the interdiction of smuggling vessels either on the high seas or more importantly, within the territorial waters of Libya.¹⁰ Eventually, the Council adopted Resolution 2240 two days after the commencement of the second phase of the Operation on the high seas, on 9 October 2015, and authorized under certain conditions the inspection of foreign-flagged vessels on the high seas and their subsequent seizure.¹¹ Further,

⁷ See 'EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added', Council Press Release (20 June 2016) <www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EUNAVFOR+MED+Operation+Sophia%3a+mandate+extended+by+one+year%2c+two+new+tasks+added>. See also <http://www.eas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf>.

⁸ *ibid.*

⁹ See UN Security Council resolution 2240 (2015) UN Doc S/RES/2240 (2015) (9 October 2015).

¹⁰ See BBC News, 'EU seeks UN support to tackle migrant smuggling' (11 May 2015) <www.bbc.com/news/world-europe-32695483>.

¹¹ See UN Security Council resolution 2240 (2015) (n 9) paras 7 and 8. For the negotiations leading to the adoption of the resolution see at <www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php>.



on 14 June 2016 the Security Council adopted another Resolution, according to which Member States, including those taking part in the EUNAVFOR MED, will be authorized to inspect vessels suspected of being engaged in illicit transfer of arms and other related materials to Libya.¹²

Operation Sophia is engaged not only in boarding suspect vessels in the South Mediterranean Sea, but also, according to its mandate, in seizing them and diverting them to ports.¹³ The assertion of further enforcement measures, including the prosecution of the suspected smugglers, fall beyond the remit of the Operation, according both the Council Decision and its Rules of Engagement of the Operation¹⁴ and this matter is dealt with exclusively by the State to the competent authorities of which the suspects are transferred, that is, for the time being exclusively, Italy.¹⁵ Nevertheless, the legal basis for such measures on part of the Italian authorities is not clear. This brings to the fore the perplexing, yet of paramount importance question of jurisdiction over crimes at sea. The purpose of this short article is exactly this, ie to explore the legality of the unilateral assertion of (extraterritorial) jurisdiction over the suspect migrant smugglers and henceforth over illicit arm traffickers by Italy. It will be submitted that while the positive assertion of jurisdiction is very welcome in this regard, there are certain jurisdictional 'grey areas' that invite discussion.

2. *Asserting jurisdiction over crimes at sea*

In his 1964 Hague Lecture on the international law of jurisdiction, the late Professor Mann stated that, '[a]lthough there exists abundant material on specific aspects of jurisdiction, not a single monograph

¹² See UN Security Council resolution 2292 (2016) UN Doc S/RES/2292 (2016) (14 June 2016) paras 3 and 4.

¹³ See art 2(2)(b) Council Decision 2015/778 (n 6).

¹⁴ See Operation Rules of Engagement GENTEXT/11, which explicitly exclude from the mandate of the Operation Sophia the assertion of jurisdiction over the persons concerned (on file with the author).

¹⁵ See 'EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added' (n 7).



seems to have been devoted to the doctrine as a whole'.¹⁶ This still holds true mainly because it is one of the most difficult themes of international law that almost all feel trepidation to comprehensively explore it.¹⁷ Quite similarly, jurisdiction over crimes at sea lacks an exhaustive treatment. With few brave exceptions,¹⁸ there is no such treatise that tackles all the recurring questions of prescriptive and enforcement jurisdiction over crimes at sea. Needless to say, the present short article is not the place to endeavor such daunting task; however, it needs to set forth some basic canons of asserting jurisdiction over crimes at sea, in particular on the high seas.

Under international law, there is a basic distinction between legislative or prescriptive jurisdiction, ie the power to make laws and regulations and enforcement jurisdiction, ie the power to take executive or judicial action in pursuance of or consequent on the making of decisions or rules.¹⁹ As righteously observed by O'Keefe, 'separate reference is sometimes made, especially in the civil context, to jurisdiction to adjudicate ... But in the criminal context the distinction is generally unnecessary. The application of a State's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct.'²⁰

While the enforcement jurisdiction is primarily territorially-anchored,²¹ prescriptive jurisdiction may have an extraterritorial reach.²²

¹⁶ FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 1, 23.

¹⁷ But see the recent and very promising treatise by C Ryngaert, *Jurisdiction in International Law* (OUP 2015).

¹⁸ See *inter alia* M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007); I Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *ICLQ* 320–43.

¹⁹ See J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 486.

²⁰ R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *J Intl Criminal J* 735, 737. See similarly M Akehurst, 'Jurisdiction in international Law' (1972-73) 46 *British YB Intl L* 145, 179; P Daillier, N Quoc Dinh, M Forteau, A Pellet, *Droit International Public* (LGDJ 1999) 334-336.

²¹ In the famous *Lotus* case, the Permanent Court of International Justice held as to enforcement jurisdiction: '[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense

There are two approaches in this regard: either one allows States to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary,²³ or one prohibits States from exercising jurisdiction as they see fit, unless there is a permissive rule to the contrary. The second approach, which purportedly reflects customary international law, has been taken by most States and the majority of the doctrine. Under this approach, States are *not* authorized to exercise their jurisdiction, unless they can rely on such permissive principles as the territoriality, personality, protective and universality principles.²⁴ However, there is no priority among these bases of jurisdiction and thus States are not prohibited from establishing concurrent jurisdiction over one and the same situation on the basis of these principles, also known as heads of international jurisdiction.

Under the law of the sea now, Article 92 of the UN Convention on the Law of the Sea (1982),²⁵ which undoubtedly reflects customary law, prescribes that vessels on the high seas are subject only to the prescriptive and enforcement jurisdiction of their flag state. Even in cases that the law of the sea accords the right of visit on the high seas under Article 110 of LOSC, ie the right to board and search suspect foreign-flagged vessels,²⁶ this does not mean automatically that the boarding state may assert enforcement jurisdiction over the respective offence, including the right to bring the offenders before their own courts. The only provision in this Part of LOSC, ie the Part on High Seas, that does grant to all States the right to assert both prescriptive and enforcement

jurisdiction is certainly territorial ...'; see PCIJ, *SS Lotus (France v Turkey)* Series A No 10 (1927) 18-19.

²² According to the US Ninth Circuit, '[e]xtraterritorial application, in other words, does not automatically give rise to extraterritorial enforcement authority.' *Alvarez-Machain v United States*, 331 F 3d 604 (9th Cir 2003). See also B Stern, 'L'extraterritorialité revisitée: Où il est question des affaires *Alvarez-Machain*, *Pâte de bois* et de quelques autres ...' (1992) 38 *Annuaire Français de Droit International* 268-288.

²³ *Lotus* case (n 21) 18-19.

²⁴ See Ryngaert (n 17) 29.

²⁵ See art 92 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, in force 16 November 1994) 1833 UNTS 397 [hereinafter: LOSC].

²⁶ On the contemporary right of visit see D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009); E Papastavridis, *Interception of Vessels on the High Seas* (Hart Publishing 2013).



jurisdiction over crimes committed therein is Article 105 concerning piracy.²⁷

Thus it is essential for third States, ie non-flag States, to have either a treaty provision analogous to Article 105 of LOSC, or a customary rule in the form of a jurisdictional principle, such as the protective²⁸ or the universality principle,²⁹ which would provide the necessary legal basis for the establishment of prescriptive jurisdiction. As per enforcement jurisdiction, the fundamental principle governing enforcement jurisdiction on the high seas is that it may not be exercised without the consent of the flag state. If the flag state accords its consent for the exercise of enforcement jurisdiction, this could entail measures such as bringing the vessel to a port of the boarding state, seizure of the vessel, arrest of the suspects on board, initiation of criminal proceedings in pursuance of prior enacted legislation and confiscation of the illicit cargo and of the vessel itself. This consent may be granted either by a pre-existing international agreement or on an *ad hoc* basis. Agreements that grant the right of visit often also permit further enforcement measures. Alternatively, the boarding state may request the authorization of the flag state for such enforcement measures after the visit and search of the delinquent foreign-flagged vessel. Even in those cases, however, the lawful assertion of enforcement and subsequently of adjudicative jurisdiction is contingent upon the existence of prior legislation proscribing the offence in question.

Special attention should be given in this regard to stateless vessels, which are often used in order to smuggle migrants to the EU. While by virtue of Article 110(1)(d) of LOSC, warships or other duly authorized

²⁷ Under art 105, '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 upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'. See further analysis of art 105 in A Grymaneli, 'La compétence des tribunaux internes en matière de piraterie', in E Papastavridis, K Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, Hague Academy of International Law (Martinus Nijhoff 2014) 199.

²⁸ Under the protective principle, a state claims jurisdiction over crimes which are injurious to its national security; see, inter alia, I Cameron, *The Protective Principle of International Criminal Jurisdiction* (Darmouth 1994).

²⁹ On universal jurisdiction see, inter alia, M Inazumi, *Universal Jurisdiction in Modern International Law* (Intersentia 2005); O'Keefe (n 20).



vessels of any state may exercise the right of visit on stateless vessels, this does not *ipso facto* entail the full extension of the jurisdictional - both prescriptive and enforcement - powers of the boarding States. This is the submission of the present author notwithstanding a significant strand of legal doctrine, which supports that the boarding States may also completely subject stateless vessels to their laws.³⁰ The boarding States would have to rely on another legal basis in order to exert jurisdiction over persons and property on these vessels, since the statelessness itself would fall short of according them such jurisdiction. In other words, the States concerned should have enacted legislation in accordance with a well-accepted principle of international jurisdiction that criminalizes the conduct in question, even on stateless vessels on the high seas, in order to lawfully arrest and subject the offenders to their criminal jurisdiction.

The lack of a legal basis for the assertion of jurisdiction or the lack of precise and foreseeable legislation concerning the crimes in question may also amount to a violation of human rights law, in particular the right to liberty and security. Under, for example, Article 5 of the European Convention on Human Rights (ECHR),³¹ any detention must be in accordance with a procedure prescribed by law, which must be accessible, foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty. Safeguards relating to the right to liberty include: informing the persons detained of their rights, allowing them to contact a lawyer and bringing them before an appropriate judicial authority within a reasonable time.

As the European Court of Human Rights has consistently upheld, 'where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be

³⁰ This is in accord with the practice by the UK and US, that a stateless vessel may be seized by any State, as it enjoys the protection of none; see DP O'Connell, *The International Law of the Sea* (Clarendon Press 1984) 756 and also the United States *Commander's Handbook on the Law of Naval Operations* NWP 1-14M (July 2007) para 3.11.2.3.

³¹ See art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 [hereinafter: ECHR].



foreseeable in its application... a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness'.³² In the *Medvedyev v. France case*, the Court was of the opinion that these safeguards also apply to interception and detention activities at sea.³³

3. *The question of jurisdiction over suspected smugglers by Italy*

In the light of the foregoing analysis, it is submitted that States that intend to prosecute suspected smugglers in the context of EUNVAFOR Operation Sophia – up to this day, exclusively Italy –, should, *first*, have prescribed legislation that criminalize the conduct in question, ie the smuggling of migrants on the high seas pursuant to the above-mentioned jurisdictional principles; *second*, they should have an entitlement under international law to exert enforcement jurisdiction, in particular to arrest the suspected smugglers and initiate criminal proceedings and *third*, the assertion of jurisdiction should be in accordance with the strict requirements of international human rights law, ie the right to liberty and security.

Evidently, the boarding of the vessels suspected of being engaged in smuggling of migrants from Libya is allowed pursuant to the statelessness of the vessel or, as regards foreign-flagged vessel, pursuant to the consent of the flag state and the authority of Security Council Resolution 2240 and more recently of Security Council Resolution 2292.³⁴ Moreover and more importantly, the former Resolution authorises 'for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organizations [EU] to *seize vessels* inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking

³² See *Medvedyev v France* App no 3394/03 (ECtHR, 10 July 2008) para 80; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) para 67.

³³ *ibid.* Generally on the application of human rights law in maritime operations see T Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J Intl L 1; E Papastavridis, 'European Convention of Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in M Fitzmaurice, P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2013) 117.

³⁴ See further discussion in E Papastavridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea' (2016) 2 Maritime Security and Safety L J 57.



from Libya'.³⁵ However, it underscores that 'further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith'.³⁶ In a similar vein, Security Council Resolution 2292 '[a]ffirms that the authorisation provided for in paragraph 4 includes the authority to divert vessels and their crews to a suitable port to facilitate such disposal, with the consent of the port State';³⁷ however, it remains silent on further enforcement measures against the suspected traffickers.³⁸

Hence, Italy insofar as suspect migrant smugglers is concerned and any other port State in the case of arms trafficking (potentially Italy again) may lawfully exert their enforcement jurisdiction in accordance with the territoriality principle,³⁹ since the suspects will have been brought to its territory. However, this does not mean that Italy should not have prior enacted precise and foreseeable legislation making these offences punishable within domestic jurisdiction. And the paramount question is as follows: on what jurisdictional principles may Italy base its prescriptive jurisdiction in this regard?

In addressing this question, we may have to distinguish between jurisdiction over stateless vessels and jurisdiction over persons smuggling migrants with foreign-flagged vessels on the high seas. On the one hand, with respect to stateless vessels, as said above, there is a certain ambiguity on whether the statelessness as such warrants the enforcement of domestic legislation over the persons on board in a manner similar to the universality principle.⁴⁰ This ambiguity is far from dispelled by the

³⁵ See UN Security Council resolution 2240 (2015) (n 9) para 8 (emphasis added).

³⁶ *ibid.*

³⁷ See UN Security Council resolution 2292 (2016) (n 12) para 8.

³⁸ On the face of the Resolution 2292 is not clear what it will happen to the arms traffickers since the Resolutions speaks solely for the seizure and the destruction of related material (para 5) (jurisdiction *in rem* rather *in personam*). It is likely that these persons will fall under the jurisdiction of the respective port State in accordance with previous SC Resolutions concerning sanctions in Libya (eg UN SC Resolution 1970 (2011)) or more specifically in accordance with the 2000 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime [hereinafter: Arms Trafficking Protocol]

³⁹ See *Lotus* case (n 21).

⁴⁰ See (n 30) and accompanying text.



instruments specifically applicable to smuggling of migrants at sea: neither Security Council Resolution 2240 nor the 2000 Protocol against the Smuggling of Migrants⁴¹ do include any particular provision in relation to jurisdiction with regard to vessels without nationality. Indeed, Article 8(7) of the Smuggling Protocol sets out that ‘a State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality ... may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law’.⁴²

Thus, the legality of any trial of the arrested smugglers on board stateless vessels would be assessed on the basis of the ‘relevant domestic and international law’. It falls thus upon the States, *in casu* Italy, willing to prosecute such offenders to have appropriate legislation in place criminalizing the commission of these offences on the high seas and then enforce it the moment that these persons arrive at their ports. As said above, in the context of Operation Sophia the diversion to Italy is rendered lawful due to Security Council Resolution 2240, but in any case, it is considered an appropriate measure against stateless vessels.⁴³ Furthermore, Italy has long considered the ‘stateless vessel’ ground as sufficient for the arrest and assertion of criminal jurisdiction over illegal migrants on the high seas bound for the coast of Italy.⁴⁴ Recently, in 2014, the Italian Court of Cassation held in the *HH v. Court of Catania case* that the reference to ‘appropriate measures’ in Article 8(7) of the Smuggling Protocol entailed also the diversion of the vessel to the port and the initiation of criminal proceedings against the suspected per-

⁴¹ See Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507 (entered into force 28 January 2004) [hereinafter: Smuggling Protocol]. As at 4 February 2016, the Protocol has 142 contracting States <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en>. The overwhelming majority of the States bordering the Mediterranean Sea are parties to the Protocol.

⁴² Emphasis added.

⁴³ This was the opinion also of the Special Rapporteur of the International Law Commission, François; see ‘Regime of the High Seas, Draft Articles, A/CN.4/79, section II’, in ILC YB (1955-I) 26.

⁴⁴ See eg the decision of Tribunale di Crotona, 27 September 2001, *Pamuk et al* cited in (2001) *Rivista di Diritto Internazionale* 1155 and for commentary: S Trevisanut, ‘Droit de la Mer’ (2006) 133 *Journal du Droit International* 1035.



sons.⁴⁵ Thus, it appears that Italian authorities assert that statelessness as such suffices as a valid jurisdictional ground to enforce Italy's legislation and there is no need to have recourse to other heads of international jurisdiction, such as the protective principle or universality.

As regards foreign-flagged vessels that are suspected of being engaged in smuggling of migrants and are boarded by vessels participating in Operation Sophia the following remarks are in order. Firstly, LOSC and the Smuggling Protocol retains the exclusive enforcement jurisdiction of the flag state on the high seas. Thus, any measure taken under the Protocol, including diversion, let alone assertion of enforcement jurisdiction should be pursuant to the express consent of the flag state.⁴⁶ While diversion is permitted under the authority of the Security Council Resolutions 2240 and 2292, there is no further elaboration on the assertion of enforcement, including adjudicative jurisdiction *per se*; the Resolution only says that it must be 'in accordance with applicable international law'. Thus, absent the consent of the flag state concerned, it is exclusively a matter of the domestic jurisdiction of Italy or any other EU Member State that assumes jurisdiction over the crime in question pursuant to the presence of the offenders in their territory.

That said, however, the crime as such seems not to have been committed in the Italian territory so as to allow Italian authorities to use the territoriality principle as a basis for the assertion of both enforcement and prescriptive jurisdiction, but on the high seas. To overcome this, Italian authorities have come up with various jurisdictional techniques or tools: for example, in a recent case, the Italian Court of Cassation Judgment, very interestingly, held that the violation of Italian immigration laws had been committed in Italian territorial waters even though the smuggled migrants were rescued on the high seas. It found that smugglers committed the crimes as indirect perpetrators (*'autore mediato'*) through the Italian Rescue Authorities. The Authorities acted as the smugglers' innocent agents by bringing the migrants to Italy.⁴⁷ Another solution could be the invocation of the 'objective territoriality

⁴⁵ See H.H. against Order No 1642/2013 of the Tribunal of Catania, Italian Court of Cassation, Judgment of 23 May 2014 (unreported) (on file with the author).

⁴⁶ See art 8(5) of the Smuggling Protocol.

⁴⁷ Prosecutor at the Court of Catania v H.A., Italian Court of Cassation, Judgment of 11 March 2014 (unreported) (on file with the author).



principle',⁴⁸ ie the idea that there is a conspiracy on the high seas to commit immigration offences in Italy, or that the persons concerned are part of a criminal network that intends to benefit a legal person established in Italy. Article 4 of the Framework Decision 2002/946/JHA 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence states that '[e]ach Member State shall take the measures necessary to establish its jurisdiction with regard to the infringements ... committed (a) in whole or in part within its territory; (b) by one of its nationals, or (c) for the benefit of a legal person established in the territory of that Member State'.⁴⁹ As stated by Matilde Ventrella, 'this provision has been complied with in recent investigations conducted by Italian public prosecutors in Palermo, which successfully detected a criminal network which smuggled migrants from Libya, Eritrea, Ethiopia, Sudan, Israel to Sicily'.⁵⁰

It is beyond the bounds of the present article to assess the merit of each one of these tools under international and domestic law; suffice it to note that the objective territoriality theory, especially in cases that there is a manifest and well proven intention to smuggle these persons in Italy,⁵¹ seems more in consistency with international law, while Article 4 of the Framework Decision could be helpful under certain circumstances, yet in some and not all the cases concerning smuggling of migrants from Libya to Italy. In short, it is submitted that despite the potential applicability of the above theories, there may still be incidents that neither the Italian rescue authorities would have acted as intermediaries nor the effects of the crime as such would have occurred in Italy or would have benefited an Italian legal person.

⁴⁸ On this principle see inter alia Akehurst (n 20) 145, 152 and C Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 Intl Criminal L Rev 187.

⁴⁹ See art 4 of Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1, 5/12/2002.

⁵⁰ See M Ventrella, 'The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers' (2016) 30 QIL-Questions of Intl L 10, with references to relevant case-law.

⁵¹ For example, when phone calls are intercepted between the smugglers on the boat and their accomplices in Italy. As Ventrella (n 50) reveals, evidence gathered through wiretapping has been admitted by the Italian Supreme Court.

Hence, it is the view of this author that it would be on a sounder legal basis to argue the following: from the moment that the suspected smugglers, either they have used a stateless vessel or a foreign-flagged vessel, are diverted to the ports of Italy, the diversion *per se* being lawful,⁵² Italy may make use of the principle *aut dedere aut judicare*⁵³ under Article 16(10) UN Convention against Transnational Organized Crime (UNTOC)⁵⁴ and prosecute the alleged offenders found in its territory.⁵⁵ The provision enunciates that '[a] State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this Article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution'.

To that end, Article 15(3) sets out that '[f]or the purposes of Article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite ...'.

It follows that if both Italy and the State of nationality of the alleged offender are parties to the UNTOC and its Smuggling Protocol,⁵⁶ Italy could lawfully assert, first, prescriptive jurisdiction, and then upon the diversion of the suspected vessel to its port, enforcement, including adjudicative, jurisdiction in this regard. In all other cases, ie in cases in which the above instruments are not applicable, no matter how broadly Italian Courts interpret its immigration laws, the assertion of enforcement jurisdiction, including adjudicative jurisdiction would be contest-

⁵² See (nn 35 and 43) and accompanying text.

⁵³ See for the customary nature of this principle M Plachta, 'The Lockerbie case: The Role of the SC in Enforcing the Principle *Aut Dedere Aut Judicare*' (2001) 12 *Eur J Intl L* 125.

⁵⁴ See United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) UN Doc A/RES/55/25 (8 January 2001) Annex I (hereinafter: UNTOC)

⁵⁵ By virtue of art 1(2) of the Smuggling Protocol, the provisions of the UNTOC apply *mutatis mutandis* to this Protocol.

⁵⁶ In view of the wide ratification of the Smuggling Protocol (as of 4 February 2016, 142 parties), it is very likely that this would be the case. Italy is a party to the Smuggling Protocol since 2 August 2006 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en>.



able due to the manifest lack of a valid head of international jurisdiction. Noteworthy is that the principle *aut dedere aut judicare* could be instrumental also in respect of the persons trafficking arms in Libya and diverted to Italy by virtue of Resolution 2292, since the trafficking as such could be punishable under the Arms Trafficking Protocol to UNTOC.

Concluding, the EU Member States do have various jurisdictional tools to use in order to lawfully prosecute alleged smugglers, provided that they have enacted precise and foreseeable legislation pursuant to the Smuggling Protocol and the UNTOC. As said in the previous section, the existence of such legislation and its enforcement according to international law is part and parcel of the right to liberty and security enshrined, amongst others, in article of ECHR, binding thus Italy in this regard.

4. *Epilogue*

EUNAVFOR Med Operation Sophia was launched in summer 2015 in order to fight smuggling of migrants at the South Mediterranean Sea, as part of a more comprehensive response of the EU towards the continuing and increasing refugee crisis in Europe. Its mandate includes interdiction vessels suspected of being engaged in smuggling of migrants from Libya, the seizure of the vessels and even their disposal in certain cases, while since June 2016 it also includes inspection of vessels suspected of being engaged in trafficking illicit arms to Libya. Even not within the mandate of the Operation, a matter closely linked and of particular relevance is the issue of assertion of jurisdiction over the suspected smugglers after being handed in the competent authorities of a Member State, namely Italy for current purposes.

The paper discussed this issue by reference to the international rules governing the exercise of jurisdiction under international law and the law of the sea in particular as well as the relevant provisions of the Smuggling Protocol. It was argued that even though the relevant Security Council Resolutions have granted the necessary authority to States, including Italy, to seize suspect vessels and, apparently, divert them to Italian ports, the legality of the assertion of jurisdiction by Italian Courts is not clear. Regardless of the noble efforts of the competent ju-

dicial authorities to establish jurisdiction in this regard, it is not certain whether all cases of smuggling of migrants on the high seas fall within the remit of Italian jurisdiction according to international law. To address this shortcoming, it is submitted that the States concerned, in the present context Italy, should make more ample use of the principle *aut dedere aut judicare*, provided in the UNTOC and its Protocols, in order to lawfully establish their jurisdiction over all cases of illicit smuggling of migrants or trafficking in arms.