BLUE FRONTIERS

In pursuit of smugglers at sea

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1 Introduction

‘Smuggling’ refers to the act of intentionally trading in a legal commodity in violation of national or international laws (see, for example, Bruwer, 2020).¹ Smuggling has an economic goal, such as making a profit and evading taxes and sanctions (Basu, 2013). For example, even a small price differential can be an incentive for cross-border fuel smuggling, as has been seen in the waters around places like Venezuela, Iran, Nigeria and Thailand (Ralby & Soud, 2018:9). Central to many smuggling operations, therefore, is the movement of these commodities in a way that is obscured from law enforcement. As criminal networks moving commodities are experts at this clandestine form of transport, they often turn to the oceans where their commodities can either be hidden behind 80% (United Nations Conference on Trade and Development, 2018: 23) – 90% (Hudson, 2018) of global trade, or where they can merely avoid the limited maritime law enforcement and security entities operating across the 70% of earth’s surface which is made up of the oceans. It is also at sea and in port where many smuggling attempts are countered.

Although the oceans are often portrayed as lawless (Prada & Roth, 2008; Urbina, 2019; Allott, 2021), such a blanket statement fails to reflect the reality of many state and non-state actors working to counter criminal activities at sea. It also fails to acknowledge that although the maritime domain is used as a vector for trade, the commodities being moved are almost exclusively destined for land. This highlights the importance of also considering territorial, and especially port security in efforts to achieve maritime security. This chapter considers smuggled commodities typically moved by sea and the impact which these commodities have once they reach land. It then turns to the international laws regulating human activity at sea and the challenges in implementing them in efforts to counter smuggling activity at sea and in ports.

2 Commodities smuggled at sea and modes of transportation

Most traded goods have historically been transported by sea, therefore making smuggling arguably as old as maritime trade. As the oceans as transport node benefit licit traders, so too the benefits attract illicit traders. Maritime transport allows for the movement of large quantities of goods, much more so than via land or air. It also allows for less law enforcement scrutiny due to

the vast size of the oceans and the challenges of responding to smuggling activities in waters where states have limited law enforcement assets and are afforded limited law enforcement powers. This is either due to international law limitations, failure to enact sufficient national laws providing for extra-territorial exercise of jurisdiction to counter crimes far from land, or even because states have no desire to exercise any form of control over their vessels at sea.

For these reasons, anything and everything can be moved across the seas. Migrants can be moved in containers or on board migrant smuggling vessels which are nearly certain to sink. Narcotics can be moved in makeshift submarines designed specifically for drug trafficking, or on board container vessels moving legal goods, passing through many transit destinations in-between as states struggle or neglect to secure their borders, and shipping companies ask few questions about their loads. Similarly, going out and illegally catching tons of fish is as easy as faking a fishing license, turning off your Automatic Information System (AIS) or merely plundering the fish stocks of a state which has little capacity to prevent it. To make the journey even more worthwhile, a drug shipment could be added on board.

The vessels used to move illicit goods depend on factors such as the commodity being moved, the region through which the conduit is moved, available resources and technologies, and law enforcement pressure. The *modus operandi* may change as law enforcement efforts to counter it are successful, sometimes even causing smuggling networks to copy other networks' successful *modus operandi*. An example is Iran and North Korea which turned to techniques refined by drug traffickers to move sanctioned military equipment in containers on board vessels from states known for lax oversight. This also reflects how, as containers became increasingly used over time, it became a low risk and effective concealment method for many illicit commodities (Griffiths & Jenks, 2012: 35–36). As smuggling networks gain expertise in exploiting transport systems, they may also use these expertise to expand to other commodities (Basu, 2013: 323).

When it comes to smuggling at sea, criminal networks have nearly free reign, especially on the high seas where no State enjoys sovereignty. This does not mean that there isn't an increasing amount of entities responding to such criminal activities at sea, or that there aren't any legal frameworks regulating the seas. It does however reflect that the resources and expertise required to address criminal networks are often outweighed by those smuggling or trafficking illicit commodities at sea. Smugglers are masters of evasion and have adjusted over time to allow them to expand markets and avoid law enforcement. It is also no secret that the transnational nature of contemporary smuggling activity holds many benefits for smugglers, as well as the increasingly large global maritime fleet behind which illicit commodities can be hidden.

3 The potential dangers of smuggled commodities moved at sea

One of the biggest tragedies of 2020 illustrates the potential catastrophe which can result from illicit or dangerous goods shipped by sea. The COVID-19 pandemic has been linked to the consumption of wildlife (Wu, Chen & Chan, 2020). COVID-19 is a zoonotic disease which, though yet to be confirmed, is suspected of originating from the human consumption of illegally traded wildlife like pangolins (Lam et al., 2020), thereby causing the disease to be transmitted from animals to humans. Pangolins are the most trafficked mammal in the world (TRAFFIC, no date) and as Asia's own pangolins numbers have plummeted, the overwhelming majority of pangolins are now moved from Africa to Asia (World Wildlife Foundation, 2016), either alive, dead or stripped of their scales, in multiple tonnes in containers on board commercial shipping vessels (UNODC, 2020: 53). Had such shipments never left Africa for Asia, the pandemic might have been prevented. Multiple tonnes of illegal wildlife products are

shipped at sea and have driven many species to the brink of extinction. While the annihilation of species is the primary impact of the illegal wildlife trade, it often also funds conflicts, causes violence and leads to endemic corruption across the globe (see for example, Barron, 2015; Brooks & Hopkins, 2016; CITES, n.d.; EIA, 2018: 32; UNODC, 2020).

Many other commodities are moved in direct violation of national and international laws and trade embargoes, posing a similar security risk. Examples include charcoal smuggled from Somalia and heroin smuggled from the Makran Coast off Iran and Pakistan, both funding terror organizations in Somalia and Afghanistan respectively. Smuggling at sea also holds particular dangers for crewmembers and migrants who pay to be smuggled. Thousands of migrants and refugees armed only with hope and often fearing persecution in their country of origin drown at sea as people smugglers make use of vessels which are unseaworthy, sometimes purposefully relying on the responsibility of other vessels, both law enforcement and merchant, to rescue vessels in distress (Røsæg, 2020).² Migrants may also fall victim to human traffickers (Karim, 2020). Crew members of vessels used exclusively for smuggling, such as dhows, are also easily forsaken by vessel owners once they have been intercepted and have failed to deliver their illicit cargo. Smuggling at sea therefore threatens a wide variety of interests, including human life, the environment and security across the globe. In response to this, an increasing number of state and non-state actors are entering the maritime domain in efforts to respond to smuggling activity at sea. State actors include maritime entities like navies and coast guards, while private entities include the shipping and transport industries.

4 The international legal framework regulating responses to smuggling at sea

Despite the oceans being vast and the number of actors able to operate at sea being limited, they are not unregulated. There is a legal framework dedicated exclusively to regulating human activity at sea – the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS, along with more general international legal frameworks which also apply at sea, is however consistently under-enforced, perhaps especially so when it comes to criminal activity, which was never intended to be the convention's principal focus.

Three key questions determine the response to smuggling activity at sea – which actors may respond, what may they do and do they wish to exercise this right? The answer to the first two questions lies in the international legal frameworks of UNCLOS and the United Nations Convention against Transnational Organized Crime (UNTOC). It is however important to remember that, although international law specifies the rights and obligations of states, it remains the responsibility of states to incorporate these international law rights and obligations into their domestic legislation in order to allow them to establish jurisdiction over smuggling activities at sea. This is because states establish jurisdiction in terms of their national laws, not international law. This section covers selected international legal frameworks applicable specifically to smuggling at sea.

United Nations Convention on the Law of the Sea (UNCLOS)

Flag State Jurisdiction

UNCLOS Article 92 provides that a vessel may only sail under the flag of one state and that the primary jurisdiction over the activities of that vessel, when operating on the high seas, lies with that state, also known as the Flag State. A vessel's Flag State is the state in which the vessel is registered or is otherwise entitled to fly its flag, such as through ownership.³ UNCLOS Article

94 places a duty on Flag States to exercise this jurisdiction over their vessels “in administrative, technical and social matters”.⁴ Flag State jurisdiction therefore implies that the Flag State holds the primary responsibility to prevent and punish acts of smuggling committed on board its vessels, both on the high seas and in certain Coastal State waters as discussed in the following sections.

Coastal State Jurisdiction

In certain waters nearest to land, Flag State jurisdiction gives way to Coastal State jurisdiction. A Coastal State for the purpose of this chapter is a state which borders the sea and in which waters, known as maritime zones, a vessel is located when it commits an offence. Depending on how far away from a Coastal State a foreign vessel suspected of smuggling is intercepted, the Coastal State has varying powers to respond thereto. The further away from a Coastal State a crime is committed, the weaker the Coastal State’s right to respond becomes. Figure 30.1 indicates the different maritime zones and their distance from the coast.

Figure 30.1 Maritime zones

Source: Illustration by Louw and Keyser, 2020

Internal waters

A Coastal State’s internal waters,⁵ such as river mouths or ports, are sovereign. When a suspected smuggling vessel is identified by a Coastal State within its internal waters, the Coastal State has the right to board that vessel, search for smuggled commodities and arrest and

prosecute the crew for that crime, provided the crime has been criminalized and jurisdiction established in terms of the Coastal State's national legislation. No authorization needs to be sought from the Flag State to board its vessel. In this case, it will not matter where the vessels or the crew are from and it will be as if the crime was committed within the Coastal State's land territory. This right to board and respond to smuggling activity in any Coastal State's maritime zones, however, only applies to merchant vessels, not vessels on government service for non-commercial purposes,⁶ such as naval vessels. In all Coastal State maritime zones, only authorized vessels on government service, such as warships or law enforcement vessels, may intercept smuggling activity.

Territorial sea and archipelagic waters

Coastal States also have sovereignty in their territorial sea⁷ and archipelagic waters.⁸ UNCLOS Article 27 allows Coastal States to establish jurisdiction over certain crimes in these maritime zones, which includes smuggling activity:

1. The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
 - a. if the consequences of the crime extend to the coastal state;
 - b. if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
 - c. if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state; or
 - d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[...]

As smuggling activity aimed for the Coastal State's territory will impact on the Coastal State, the Coastal State may board such vessels and prosecute for smuggling activities. In accordance with UNCLOS Article 27(5), the Coastal State may however not establish such criminal jurisdiction for crimes committed before a foreign flagged vessel entered the Coastal State's territorial sea and the vessel is merely passing through its territorial sea without the intentions of entering its internal waters. The only exception to this is for resource related crimes, as discussed under the exclusive economic zone (EEZ) below.

Contiguous zone

The Coastal State must claim a contiguous zone (Guilfoyle, 2009: 13)⁹ in its national legislation before being afforded the jurisdiction applicable in that zone. The contiguous zone was in fact established to allow Coastal States to respond to smuggling activity beyond their territorial seas (UNODC, 2019: 40). In this zone, the Coastal State may only establish criminal jurisdiction over activities which violate its fiscal, immigration, sanitary or customs laws. This jurisdiction is twofold and distinguishes between Coastal States' right to *prevent* and *punish* certain crimes (see, for example, Guilfoyle, 2009:13):

1. When encountering a vessel suspected of smuggling activity in this zone and the vessel is heading towards the Coastal State's territorial sea, the Coastal State may only board the vessel and warn it not to proceed into its territorial sea, as doing so will violate its fiscal, immigration, sanitary or customs laws. It may not arrest the vessel or prosecute for any smuggling offence which has not yet taken place in the Coastal State's land territory, territorial sea or internal waters. However, if the commodity being smuggled is a resource, such as fish, in violation of the Coastal State's sovereign rights in its EEZ, the Coastal State may board, arrest and prosecute the vessel and crew.¹⁰
2. If the vessel is suspected of having already committed smuggling activity within the Coastal States' land territory, internal waters or territorial sea, the Coastal State may stop, board, search and arrest the vessels and crew and prosecute if evidence of smuggling activity is found. This applies only to crimes which have already been committed within the Coastal States' territory.

As smuggling activity will typically breach customs regulations, or, in the case of people smuggling, immigration laws (see, for example, UNODC, 2004: 11), the Coastal State is entitled to establish jurisdiction over vessels which have already committed smuggling offences in its territory, territorial sea or internal waters. This means that up to 24 nautical miles from the Coast, States have the right to arrest and prosecute those suspected of smuggling activities in their territory.

Exclusive economic zone (EEZ)

The Coastal State's powers are much more limited with regard to the crimes it may respond to in its EEZ¹¹ as these are limited to resource related crimes.¹² If a vessel is therefore suspected of transporting fish caught illegally in the Coastal State's EEZ, criminal jurisdiction may be established over the vessel in this zone. However, if a vessel is suspected of trafficking drugs in the EEZ, criminal jurisdiction over the vessels may only be established once it enters the Coastal State's territorial sea. This is in accordance with UNCLOS Articles 27 and 33. There are however exceptions, such as hot pursuit which applies once a vessel flees from law enforcement after committing an offence in a Coastal State's relevant maritime zones.¹³

High seas

The high seas are all waters which do not form part of internal waters, territorial seas, archipelagic waters or exclusive economic zones. The primary jurisdiction and responsibility to respond to smuggling on the high seas¹⁴ rests with the Flag State.¹⁵ UNCLOS does however contain a few exceptions to this, most notably in Article 110, which allows foreign flagged vessels to be boarded on the high seas under certain conditions in order to confirm their flag.¹⁶ Of these exceptions, none are aimed specifically at smuggling, though some may be used to board suspected smuggling vessels. Article 110(1)(d) allows visitation of vessels suspected of being without nationality, while Article 110(1)(e) allows vessels to be boarded if they, although hiding it, are in fact from the same state as the law enforcement vessel wishing to board. Article 110(b) might also apply, as it allows vessels suspected of engaging in the slave trade to be boarded, but this depends on differing interpretations of whether human trafficking can be considered a modern form of slave trade (See, for example, Davidson, 2015; Davidson, 2010).

Which steps intercepting States may take if illicit activity is indeed found on vessels without nationality, remains debated. Most States argue that there is no legal basis to arrest and prosecute

(Papastavridis, 2013: 208.), while others argue that by virtue of being without nationality vessels attempt to escape any jurisdiction and therefore enjoy the protection of no state (Guilfoyle, 2009: 17–18; 297), therefore they can be prosecuted by the intercepting State in accordance with its national laws.

Additional exceptions to Flag State jurisdiction on the high seas are found in other international legal instruments. For example, in order to allow states to respond to drug trafficking on board foreign vessels on the high seas, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 allows states to request Flag State permission to board foreign flagged vessels and establish jurisdiction over drug trafficking activity, as discussed below.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)

The Vienna Convention was established to promote cooperation among states wishing to counter transnational drug trafficking.¹⁷ It contains a section aimed specifically at drug trafficking at sea which provides an exception to Flag State jurisdiction on the high seas. Article 17(3)¹⁸ allows states to request confirmation of registry from a foreign Flag State upon reasonable suspicion of their vessels being engaged in drug trafficking on the high seas. Only once registry has been confirmed may the vessel request further authorization from the Flag State to board the vessel, conduct a search and take steps should evidence of drug trafficking be found.¹⁹ If the Flag State confirms the Flag, but refuses their vessel to be boarded or searched, the interdicting state may take no further action. If the Flag State allows their vessel to be boarded, they can authorize the interdicting state to take such steps as they deem fit to counter drug trafficking. This could include arrest and prosecution.

United Nations Convention against Transnational Organized Crime of 2000 and Protocols (UNTOC)

UNTOC is the primary international instrument applicable to smuggling activity. Trafficking and smuggling, when conducted by a group, are forms of organized crime, which are typically crimes which have a profit or other material benefit as motive (Varese, 2010; Von Lampe, 2016).²⁰ While UNCLOS forms the jurisdictional basis for responding to smuggling activity at sea, UNTOC was established with the aim of countering transnational organized crime on land, sea and air by enabling cross-border cooperation. UNTOC has three protocols, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol) and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. From the protocols it is already clear which crimes are typically considered forms of trafficking or smuggling – human trafficking, migrant smuggling and arms trafficking. This list is hardly exhaustive and commodities like fauna and flora, drugs and counterfeit goods can all be added thereto. UNTOC, however, only applies to crimes which are executed by an organized criminal group,²¹ which are of a transnational²² nature and which are punishable by at least 4 years imprisonment.²³

UNTOC Article 15 reflects Article 94 of UNCLOS, confirming Flag State jurisdiction over vessels engaged in smuggling or trafficking activity at sea.²⁴ UNTOC, being aimed at countering transnational organized crime, has numerous provisions which provide for transnational counter-efforts and investigations. Examples include Articles 16–20 on mutual legal assistance

(MLA), joint investigations and extradition, all providing a useful tool which states can use to conduct cross-border law enforcement operations and investigations. Again, it is important that states must incorporate the provisions of UNTOC into their national legislation in order to exercise their rights to respond to smuggling and trafficking activity at sea in terms of UNTOC.

UNTOC's Migrant Smuggling Protocol, for example, reflects similar provisions to the Vienna Convention. It contains a section aimed specifically at migrant smuggling at sea which also allows foreign flagged vessels to be requested to confirm their registry and once confirmed, to be requested permission to board the vessel on suspicion of migrant smuggling and to take steps as authorized by the Flag State if evidence of migrant smuggling is found.²⁵ It goes further than the Vienna Convention, however, in that it also allows states to board vessels without nationality if they are suspected of smuggling migrants.²⁶ Key to the Protocol is therefore that it allows an additional jurisdictional basis to board foreign and stateless vessels on the high seas if suspected of migrant smuggling. The Migrant Smuggling Protocol is aimed at migrant smugglers and not migrants, who must have their rights protected despite their status of attempting to enter another state illegally.²⁷

United Nations Security Council Resolutions

Often, international legal frameworks are insufficient to address the contemporary manifestations of threats to security and crime. This has necessitated additional jurisdiction regimes, such as those authorized by the United Nations Security Council (UNSC) in terms of resolutions. Resolution 2240 of 2015 applicable to migrant smuggling in the Mediterranean (See, for example, United Nations Security Council, 2019a) is one such an example, where the UNSC concluded that migrant smuggling between North Africa and Europe is of such serious concern, posing a threat to international peace and security, that it required the authorization of an additional jurisdictional regime than that contained in UNCLOS and UNTOC.

UNSC Resolution 2240 allows for flagged vessels to be boarded by foreign navies on the high seas if they believe the vessel to be engaged in migrant smuggling. While the Resolution notes that attempts must be made to notify the Flag State of such actions, this is not a prerequisite for boarding.²⁸ Similarly, the UNSC has imposed embargoes on the smuggling of arms and charcoal into and out of Somalia (United Nations Security Council, 2014; United Nations Security Council, 2019b). In terms of UNSC Resolution 2082 of 2014, foreign flagged vessels can be boarded on the high seas and in Somalia's territorial sea if they are suspected of smuggling arms or charcoal. Similar to Resolution 2240 on migrant smuggling, while good faith efforts must be made to gain authorization from the Flag State, this is not a prerequisite for boarding (United Nations Security Council, 2014). These are clear exceptions to Flag State jurisdiction when the existing legal frameworks seem insufficient to address serious threats within a defined region at a certain moment in time.

Bilateral and multilateral treaties

In addition to international laws and UNSC authorizations, states may conclude agreements amongst themselves agreeing to a specific interdiction regime which is perhaps not provided for in existing international legal frameworks. Examples are often found in regional agreements in response to drug trafficking. One example is the 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of the 1988 Convention. In terms of this agreement, Member States of the Council of Europe undertake to exercise jurisdiction over

each other's vessels engaged in drug trafficking, but also over vessels without nationality. Where UNCLOS Article 110 is silent on which enforcement actions may be taken against a vessel without nationality once it has been boarded to confirm its flag, the Council of Europe Agreement Article 5 allows Members to establish their jurisdiction over such vessels.²⁹

International Ship and Port Facility Security (ISPS) Code

The ISPS Code is the primary international instrument applicable to port security and therefore applies to Coastal State efforts to counter smuggling through ports. The Code is a 2004 amendment to the Safety of Life at Sea (SOLAS) Convention of 1974 and applies to vessels on international voyages. Although the Code was initially established to provide protection against terror activities, its application also benefits efforts to counter smuggling, provided its guidelines are implemented. It establishes minimum standards to which vessels and ports must adhere to ensure safety and security in ports and on board vessels. This is aimed at protecting both vessels entering ports and ports from arriving vessels. Multiple tonnes of smuggled or trafficked goods however continue to pass through ports on vessels across the globe and efforts to counter smuggling through ports are arguably some of the least effective measures due to massive volumes of trade, corruption, concealment of illicit shipments and limited security measures on land.

5 Challenges in responding to smuggling at sea

The previous section has described the options available to those working to combat smuggling activity at sea and in ports. But when it comes to putting these rights and obligations into practice, there are many obstacles. In addition to rough seas, unpredictable weather, dilapidated vessels and the inherent challenges in responding to smuggling at sea, many additional factors come into play for those wishing to respond to smuggling activity at sea. Below are selected examples.

Flags of Convenience

Flags of Convenience (see, for example, Marine Insight, 2019), also known as international or open registries (Watt, & Coles, 2019: 45; Ford & Wilcox, 2019: 98), refer to flagging regimes whereby vessels register in a state to which it does not necessarily have a link, such as the owner being a national of the Flag State or the shipping company being registered there. Once a vessel is registered in a Flag State, it has the nationality of that state.³⁰ Although UNCLOS Article 91 requires a genuine link between the Flag State and the vessel, a 'genuine link' is not defined. Economic motivations are one of the key factors influencing flagging to an open registry and a 'genuine' link might include such an economic link (Hamad, 2016: 207). Flagging under open registries, can however also be done to evade Flag State jurisdiction when a vessel is purposefully flagged to a state which is known to exercise little control over its vessels. This is when a Flag becomes referred to as 'convenient' (Hamad, 2016: 213–214; Ford & Wilcox, 2019: 298). If a vessel suspected of smuggling is flagged to a known Flag of Convenience, this might raise additional suspicion. A vessel may also be deregistered and reregistered under a Flag of Convenience in order to avoid sanctions (Griffiths & Jenks, 2012: 41), for example.

If those wishing to smuggle commodities at sea use vessels registered under Flags which are known to exercise little control over its vessels, it allows them the freedom to do as they wish on board the vessel (see, for example, Hamad, 2016: 221). This may include, for example,

employing a foreign crew and paying them sub-standard wages or not adhering to ISPS code requirements. Key Flags of Convenience include Panama, Liberia and the Marshall Islands, which have open registries due to the financial benefits it brings. In turn, vessel owners may choose to flag to such States because registration is easy and cheap, and because in doing so they may avoid having to pay income tax (Chapsos, 2018). A Flag is also considered as a Flag of Convenience if a vessel flies more than one flag and switches between them. UNCLOS Article 92 provides that such a vessel shall be assimilated to a vessel without nationality as a vessel may have only one Flag State.³¹ One example of how multiple flags are used is of the STS 50, a notorious fishing vessel used to plunder the seas illegally. It claimed to be flagged to eight Flag States, all of whose exercise of Flag State authority leaves much to the imagination (Tory, 2020).

Flags of Convenience pose a particular problem to countering smuggling efforts, especially on the high seas. Not only do Flag States which are unable or unwilling to exercise control over their vessels pose a threat to safety and security at sea (Hamad, 2016: 215), they also limit foreign law enforcement efforts in response thereto as the Flag State has the primary responsibility to respond to smuggling activity on board its vessels. It is only once such a flagged vessel enters Coastal State waters that Coastal States may respond to smuggling activity on board those vessels. The challenge, however, remains when these vessels operate on the high seas and may never even enter Coastal State waters if they instead tranship their illicit cargo to other vessels going to shore.³² Such at-sea offloads simulate a port without any port state control (Long, 2018). The use of Flags of Convenience may also make it nearly impossible to establish who owns a vessel, as owners may have gone out of their way to conceal their identity (Hamad, 2016: 220–222; Tory, 2020).

Vessels without nationality

The second and perhaps most challenging smuggling vessel to counter, is one without nationality. While no vessel can ever be truly without a nationality, as all vessels belong to someone who is a national from somewhere, and typically returns to one specific state after voyages are complete, a vessel is considered without nationality under the following conditions:

1. UNCLOS Article 92 (2) provides that a vessel is without nationality if it is flying more than one flag and uses them according to convenience;
2. If the Master fails to make a valid claim of registry, such as when it cannot provide the necessary documents as proof of its Flag State upon a request by law enforcement;
3. If the flag which is claimed by the master is denied by the state which has been claimed;
4. If the claimed Flag State cannot confirm or deny that it is their vessel; and
5. If the Flag State being claimed is not recognized by the intercepting state (McLaughlin, 2016: 486–487).

As noted earlier, UNCLOS Article 110 provides exceptions to Flag State jurisdiction on the high seas and allows certain vessels to be boarded in order to confirm their flag. One of these grounds is suspicion of being a vessel without nationality.³³ The UNTOC Migrant Smuggling Protocol also allows the boarding of a vessel suspected of being without nationality and engaging in migrant smuggling.³⁴

There is no consensus among states on whether vessels without nationality can be assimilated to a vessel of the state wishing to intercept its smuggling activity, based on the fact that the

vessel enjoys the protection of no State. Some states therefore argue that they can establish their national jurisdiction on board that vessel and seize illicit commodities, arrest the vessel and crew and prosecute for that crime as if the vessel is their own. For example, Seychelles, a victim of the Indian Ocean heroin trade, has incorporated the right to try any drug trafficking offences committed outside of Seychelles on board vessels displaying no flag.³⁵ The US historically also has asserted that it may exercise enforcement jurisdiction over stateless vessels on the high seas because their activities threaten the interests of the US (Guilfoyle, 2009: 80–83).

Most states, however, feel that while they may board such vessels to verify their nationality, they have no further jurisdictional basis to establish their national laws and prosecute the crew for the crimes they have committed on the high seas. Instead, they would require an additional basis, such as a link to a crew member or the victim of a crime (see, for example, Guilfoyle, 2009: 17–18; 297; Gallagher, 2014: 246). As the second approach seems to be most prominent, stateless smuggling vessels enjoy a great deal of impunity when intercepted on the high seas. At best their illicit cargo will be seized, but the crew and vessels are likely to be allowed to continue on their way. This is why vessels without nationality are considered by some as inherently criminal as their main aim may be to avoid any form of jurisdiction (Hamad, 2016: 208).

The trafficking of Afghan heroin from Iran and Pakistan illustrates the challenges posed by vessels without nationality, which heroin trafficking dhows active in the Indian Ocean often are. While these dhows, which show no sign of registry, may be boarded by foreign navies to confirm their flag, few states have enacted national legislation which allows them to establishment enforcement jurisdiction over vessels without nationality engaged in drug trafficking.³⁶ The current practice is therefore to board these vessels to confirm their flag and if no nationality can be proven and heroin is indeed found on board, the heroin shipment is seized, samples taken and thrown overboard, after which the vessel and crew are let go. This practice has however resulted in the same vessels continuing to ferry heroin up and down the Indian Ocean with little consequence. Only once these vessels enter Coastal State waters may they be intercepted and seized for prosecution, allowing the vessels to be removed from circulation (Bruwer, 2020: 67–68).

Lack of private industry responsibility for vessel actions and illicit cargo

While some vessels used to smuggle goods are without nationality or privately owned and used exclusively to smuggle goods, vast amounts of commodities are smuggled on board commercial shipping vessels moving the overwhelming majority (United Nations Conference on Trade and Development, 2018; Hudson, 2018) of world trade. As the global shipping industry expands, so will its exploitation by smugglers and traffickers. Despite this, the shipping and transport industry has not fully taken responsibility for what is moved on board their vessels. While the primary responsibility for enforcing laws lies with the Flag State, an additional responsibility falls upon vessel owners and shipping companies which need to ensure that they have the necessary measures in place to prevent their vessels being used for smuggling. The ISPS Code aims to achieve this by setting minimum standards to which vessels must adhere to prevent their use for illicit purposes. With sea-borne insecurity threatening all corners of the globe, not only through smuggling, but also terror activity and environmental threats, it is long overdue that shipping companies take more responsibility for their fleet and the cargo they carry. Granted, this is no easy task. The largest container vessels carry over 20,000 twenty-foot equivalent unit containers. There are however few alternatives which are equally likely to prevent the use of cargo vessels for illicit means than those imposed by the shipping and transport industry.

Human rights concerns

Vessels on the high seas are notorious for human rights abuses – from the slave trade, to forced labour on fishing vessels and human trafficking. Another, lesser mentioned manifestation presents itself in response to illicit activities at sea. Smuggling vessels might come from regions where human rights enjoy little protection. This not only threatens the human rights of the crew while at sea, but also once they are returned home after being intercepted by law enforcement. If a smuggling vessel is intercepted in line with international law and smuggling activity is found on board, the vessel and crew's arrest and prosecution might not be considered an option by foreign law enforcement, despite having the necessary jurisdiction to do so. This can be the case when the crew might be subjected to human rights abuses due to their smuggling activity should they be returned to their home state.

Another example illustrating the tension between human rights and law enforcement at sea is migrant smuggling operations which turn into rescue operations. International law places a duty on states to render assistance to vessels in distress.³⁷ Foreign law enforcement, may however actively avoid rescuing migrant vessels as they do not wish to take responsibility for those migrants (Neuman & Allafort-Duverger, 2018). Not only does this put migrants' lives at risk, but it fails to take action against smugglers. Migrant smuggling is perhaps the most vivid example of states neglecting their international law duties at sea, driven not by the lack of a framework allowing them to assist, but rather by politics and fear (International Chamber of Shipping, 2019). Many European states, for example, do not wish to allow the thousands of migrants who cross the Mediterranean in search of a better life into their states, thereby neglecting their duties towards them at sea. This has caused merchant vessels and non-governmental organizations to shoulder the responsibility of rescuing distressed migrants, rather than navies or coast guards (See, for example, Roche, 2016; Amnesty International, 2019; Tondo, & Stierl, 2020). This, however, does not solve the issue of few states agreeing to disembarkation of migrants at a place of safety and possible violations of the right to non-refoulement.

Some smuggling crews have also turned to setting their vessels alight (Rubira, 2019) or purposefully sinking vessels to avoid detection of illicit activities, thereby destroying evidence, endangering the crew and environment and forcing rescue operations (Bennett, 2012).

Opportunities in responding to smuggling at sea

While international legal frameworks allow states to act against certain smuggling activity at sea, states do not always have the resources or appetite to do so. This is why counter-responses are ideally implemented in partnership, such as by the naval coalitions collectively responding to migrant smuggling in the Mediterranean (Coventry, 2019: 9–10; EUNAVFOR MED Operation Sophia, n.d.) and heroin trafficking in the Western Indian Ocean (Bruwer, 2020: 67–68). Such cooperative efforts are increasingly seen as traditional maritime security threats have made way for non-state threats which individual states and their navies are unable to counter effectively. Where a state fails to respond to smuggling activity around its littoral, either due to an inability to counter it themselves, or perhaps due to other motivations, such as corrupt interests in the smuggling of a commodity, the international community often steps in. The smuggling of charcoal from Somalia is one such an example (see, for example, Rawlence, 2015). This, however, depends on whether the smuggling activity also threatens the interests of the responding states. A more recent, yet successful effort, is the contribution of non-state actors joining the response to smuggling at sea. Examples include NGOs like Global Fishing Watch

working on IUU fishing and NGO vessels rescuing migrants. While this illuminates the inability of states to address smuggling alone, it illustrates the success which can be achieved if a whole of society approach is taken to address a scourge which indeed harms all of society.

It must be noted that a typical response to increased law enforcement activity at sea is that criminal networks merely shift their activities to where there is less law enforcement scrutiny (see, for example, West African Commission on Drugs, 2014). Examples of law enforcement displacement are found in the South American cocaine trade. As the market for cocaine in Europe grew and law enforcement pressure on places like Mexico and the Caribbean became increasingly stringent, traffickers began to move cocaine via West Africa (see, for example, UNODC, 2007: 17–18; McGuire, 2010: 16; O'Regan, 2010). This was also seen in the heroin trade off eastern Africa. As traditional heroin trafficking routes across the Balkans became increasingly policed and unstable, traffickers shifted to the sea (Bruwer, 2020: 62).

Law enforcement measures alone, therefore, rarely have the desired effect of combatting smuggling activity. Instead, as with all forms of transnational crime motivated by profit-making, smuggling needs to be addressed at the level of demand, supply and the logistics facilitating the movement of these commodities. However, this is easier said than done. Supply reduction efforts are particularly challenging as supply often serves as a livelihood for people with few licit alternatives. In addition, if demand is not addressed, sources of supply are likely to continue to be found if the demand for an illicit commodity remains high. Demand reduction efforts, however, pose particular challenges, as they are not only neglected, but badly understood.

The need to address demand and supply on land in addition to the movement of illicit commodities at sea, also illustrates the disconnect often found in responding to criminal activity at sea. While seizing smuggled goods at sea indeed prevents large quantities from reaching shore, it does little to address demand apart from perhaps driving up the price of the commodity.

Conclusion

This chapter has illustrated that the oceans are not a lawless void. Instead, states, the shipping industry and criminals interact on the seas daily. Licit and illicit actors therefore compete for the use of the seas and are joined by those working to protect regular shipping and to counter illicit trades. As the traditional response to smuggling activity has been to step up security and law enforcement efforts, smugglers have not only shifted to the sea to evade such efforts on land, but they have also expanded their modus operandi by using a wider variety of vessels, with some even expanding their trade to other commodities in doing so. While these non-state criminal actors entering the maritime domain have given rise to previously unseen forms of inter-state and public–private cooperation, these actors, even when acting in unison, remain ill-equipped to successfully counter these activities at sea as criminal networks typically outsmart and out-resource them. Most importantly, maritime counter-efforts also fail to address demand and supply.

What should perhaps worry states most about smuggling activity is not necessarily the activity itself, but rather the corruption which nearly always facilitates smuggling activity. While the impact of some smuggled commodities might seem harmless, its potential to hollow out state institutions is a very real threat, especially in the developing world. No amount of law enforcement can rid states of endemic corruption and alternatives must therefore be sought to prevent law enforcement efforts from being bypassed by corrupt activities.

Notes

- 1 There is a difference between trafficking and smuggling, as trafficking refers to the trade in prohibited commodities, such as humans, while smuggling refers to trade in commodities which themselves are not prohibited but their trade in contravention of laws is, such as illegally traded cigarettes. For the purpose of this chapter, any reference to 'smuggling' may be assumed to also refer to 'trafficking' if the commodity being traded is illegal, like humans or narcotics.
- 2 UNCLOS Article 98; Regulation V-33 of *International Convention on the Safety of Life at Sea of 1974*.
- 3 UNCLOS Article 2: "1. Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."
- 4 UNCLOS Article 94: "1. Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. In particular every state shall: (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. [...] 6. A state which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state. Upon receiving such a report, the flag state shall investigate the matter and, if appropriate, take any action necessary to remedy the situation."
- 5 UNCLOS Article 8: "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State".
- 6 UNCLOS Article 32: "With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."
- 7 UNCLOS Article 2 (1): "The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."; UNCLOS Article 3: "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."
- 8 UNCLOS Article 46: "'archipelagic state' means a state constituted wholly by one or more archipelagos and may include other islands; (b) 'archipelago' means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."; UNCLOS Article 47: "An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1."; UNCLOS Article 49 (1): "The sovereignty of an archipelagic state extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast."
- 9 UNCLOS Article 33:
 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal state may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.
- 10 UNCLOS Article 73:
 1. The coastal state may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention. 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other

security. 3. Coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any other form of corporal punishment. 4. In cases of arrest or detention of foreign vessels the coastal state shall promptly notify the flag state, through appropriate channels, of the action taken and of any penalties subsequently imposed.

11 UNCLOS Article 55:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of this Convention.” Article 57: “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

12 UNCLOS Article 56:

1. 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.

13 UNCLOS Article 111:

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. 2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone [...]. 3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state. 4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

14 UNCLOS Article 86:

The provisions of this part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic

waters of an archipelagic state. This article does not entail any abridgement of the freedoms enjoyed by all states in the exclusive economic zone in accordance with article 58.

15 UNCLOS Article 94.

16 UNCLOS Article 110:

1. Except where acts of interference derive from powers conferred by treaty, 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. 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

17 Vienna Convention Article 2.

18 Vienna Convention Article 17(3):

A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag state, request confirmation of registry and, if confirmed, request authorization from the flag state to take appropriate measures in regard to that vessel.

19 Vienna Convention Article 17(4):

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag state may authorize the requesting state to, *inter alia*: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

20 The term 'organized crime' is debated. See, for example, Varese, F. 2010. What is organized crime? In: F. Varese F, ed. *Organized crime: critical concepts in Criminology*. London: Routledge; Von Lampe, K. 2016. *Organized crime: analysing illegal activities, criminal structures, and extra-legal governance*. Thousand Oaks: Sage.

21 UNTOC Article 2(a): "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

22 UNTOC Article 3(2):

An offence is transnational in nature if: (a) It is committed in more than one state; (b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) It is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or (d) It is committed in one state but has substantial effects in another state.

23 UNTOC Article 2 (b).

24 UNCLOS Article 15(1):

Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when: [...]

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

25 UNTOC Migrant Smuggling Protocol Article 8 (2):

A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag state, request confirmation of registry and, if confirmed, request authorization from the flag state to take appropriate measures with regard to that vessel. The flag State may authorize the requesting state, inter alia: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag state.

26 UNTOC Migrant Smuggling Protocol Article 8(7):

A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel 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.

27 UNTOC Migrant Smuggling Protocol Article 5.

28 UNSC Resolution 2240 Para 7:

Decides, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorise, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel's flag state prior to using the authority outlined in this paragraph.

29 Council of Europe Agreement Article 5:

1. A Party which has reasonable grounds to suspect that a vessel without nationality, or assimilated to a vessel without nationality under international law, is engaged in or being used for the commission of a relevant offence, shall inform such other Parties as appear most closely affected and may request the assistance of any such Party in suppressing its use for that purpose. The Party so requested shall render such assistance within the means available to it. 2 Where a Party, having received information in accordance with paragraph 1, takes action it shall be for that Party to determine what actions are appropriate and to exercise its jurisdiction over any relevant offences which may have been committed by any persons on board the vessel. 3 Any Party which has taken action under this article shall communicate as soon as possible to the Party which has provided information, or made a request for assistance, the results of any action taken in respect of the vessel and any persons on board.

30 UNCLOS Article 91.

31 UNCLOS Article 92(2):

A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

- 32 In the case of a mother vessel using smaller vessels to smuggle commodities ashore, constructive presence can form the basis for interception. This however falls outside the limited scope of this chapter.
- 33 Article 110(1)(d).
- 34 Article 8(7).
- 35 Misuse of Drugs Act.
- 36 Article 52 (1) of the Misuse of Drugs Act of Seychelles, Act 5 of 2016, for example, allows Seychellois courts to prosecute crimes of drug trafficking on board vessels displaying no flag.
- 37 UNCLOS Article 98; SOLAS Regulation 33; Chapter 2 International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS 27.

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