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ORIGINAL ARTICLE

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Seizing stateless smuggling vessels on the Mediterranean High Seas

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Abstract

The EUNAVFOR MED anti-smuggling mission, Operation *Sophia*, ended in March 2020 and is largely viewed to have failed in its objective of 'disrupting the business model' of migrant smugglers in the Mediterranean region. The mission relied on purported enforcement powers in the 1982 United Nations Convention on the Law of the Sea and the 2000 Migrant Smuggling Protocol to seize and destroy stateless smuggling vessels on the high seas. Despite repeated claims to such powers by the European Union, neither treaty provides a strong jurisdictional basis for seizing stateless smuggling vessels outside territorial waters. However, ambiguous drafting in the Migrant Smuggling Protocol viably permits some claims to extraterritorial enforcement jurisdiction over stateless smuggling vessels on the high seas, and the European Union has relied on this ambiguity to tackle migrant smuggling. This article argues that the recent European Union anti-smuggling operations, most notably Operation *Sophia*, have reinterpreted the ambiguous term 'appropriate measures' in the Migrant Smuggling Protocol as permitting the states parties to exercise enforcement jurisdiction over stateless smuggling vessels at sea.

Keywords: interdiction; law of the sea; migrant smuggling; state jurisdiction; stateless vessels

1. Introduction

At midnight on 19 April 2015, an overcrowded fishing boat carrying hundreds of migrants and asylum seekers capsized on the high seas south of the Italian island of Lampedusa.[1] Several days after the tragic accident, which killed nearly 800 women, men, and children, the Council of the European Union met to discuss migration in the Mediterranean region.[2] The EU had been reluctant to support Italy's search and rescue operation, Operation *Mare Nostrum*, in recent years, fearing that it acted as a pull-factor for irregular migration.[3] Despite this, the rising death toll finally galvanized the EU member states into action to prevent further loss of life. Rather than

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[1]'Mediterranean Migrants: Hundreds Feared Dead after Boat Capsizes', *BBC News*, 19 April 2015, available at www.bbc.com/news/world-europe-32371348.

[2]Council of the European Union, 'Special Meeting of the European Council, 23 April 2015 – Statement', 23 April 2015, available at www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement.

[3]M. Gabrielsen Jumbert, 'The "Pull Factor": How it Became a Central Premise in European Discussions about Cross-Mediterranean Migration', *Border Criminologies*, 24 March 2020, available at blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/pull-factor-how; N. Nováky, 'The Road to Sophia: Explaining the EU's Naval Operation in Mediterranean', (2018) 17 *European View* 197, at 200.

fund a humanitarian search and rescue operation, however, the Council committed to 'strengthen its presence at sea, to fight the traffickers, to prevent illegal migrant flows and to reinforce internal solidarity and responsibility'.[4] To this end, the Council invited the High Representative of the EU for Foreign Affairs and Security Policy, Federica Mogherini, to begin preparations for a Common Security and Defence Policy naval operation to 'disrupt trafficking networks, bring the perpetrators to justice and seize their assets' in accordance with international law.[5]

Just two months later, on 22 June 2015, the EU launched the Common Security and Defence Policy mission EUNAVFOR MED, also known as Operation *Sophia*.[6] Although performing search and rescue functions, the operation's core mandate was to identify, capture, and destroy vessels and weapons used by migrant smugglers. By 'disrupting the business model' of human smuggling and trafficking networks, the Council Decision establishing the operation asserted, EUNAVFOR MED Operation *Sophia* would also 'save lives' and 'strengthen border control' at sea.[7] The operation was designed to take place in three phases.[8] The first phase was restricted to gathering intelligence on migrant smuggling networks in the Mediterranean region, while the second and third phases envisaged the interdiction and eventual destruction of migrant smuggling vessels on the high seas, and in Libyan territorial waters.[9]

Between its launch in 2015 and its closure in 2020, EUNAVFOR MED Operation *Sophia* seized and destroyed hundreds of migrant smuggling boats on the high seas in the Mediterranean Sea, and detained the persons on board these vessels. However, the Council of the European Union legal document underpinning the mission left the international legal basis for these actions unclear. Specifically, Council Decision 2015/778 left open whether authority for such actions derived from UNCLOS, the 2000 Migrant Smuggling Protocol, or an anticipated Security Council resolution.[10] Yet none of these instruments expressly permit states to seize stateless smuggling vessels on the high seas. UNCLOS contains no enforcement powers over stateless vessels beyond board and search, and the Migrant Smuggling Protocol only ambiguously permits a boarding state party to take 'appropriate measures' in respect of stateless vessels confirmed to be engaged in the smuggling of migrants by sea.[11] Moreover, the anticipated Security Council

[4]See Council of the European Union, *supra* note 2, para. 2.

[5]See Council of the European Union, ibid., para. 3(b); European Commission, 'Remarks by Commission Avramopoulos at the Press Conference in Castille Palace, Malta', 23 April 2015, available at www.ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4840.

[6]Council of the European Union, 'Council Launches EU Naval Operation to Disrupt Human Smugglers and Traffickers in the Mediterranean', Press Release, 2015, available at www.consilium.europa.eu/en/press/press-releases/2015/06/22/fac-naval-operation/.

[7]European Council, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31 (2015), at Art. 2 (Council Decision 2015/778).

[8]See Council of the European Union, *supra* note 6.

[9]Council of the European Union, 'Draft Crisis Management Concept', 2015, available at www.statewatch.org/news/2015/may/eu-med-military-op.pdf, para.1. See Council Decision 2015/778, *supra* note 7, Art. 2. As M. Ventrella explains, the 'EU Council Decision does not establish any rules on the apprehension, arrest and detention of smugglers of migrants ... because EUNAVFOR is a military task force and thus, they cannot carry out investigations on the smuggling of migrants. It is the police and prosecutors of EU Member States who have jurisdiction over investigations, not EUNAVFOR'. M. Ventrella, 'The Impact of Operation Sophia on the Exercise of Criminal Jurisdiction against Migrant Smugglers and Human Traffickers', (2016) 30 *Questions in International Law* 3, at 10.

[10]See Council Decision 2015/778, ibid., Art. 2; 1982 United Nations Convention on the Law of the Sea 1833 UNTS 3(UNCLOS); 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air 2241 UNTS 507 (Migrant Smuggling Protocol).

[11]See, for example, G. Butler and M. Ratcovich, 'Operation Sophia in Unchartered Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea', (2016) 85 *Nordic Journal of International Law* 235, at 247; M. Gestri, 'EUNAVOFR MED: Fighting Migrant Smuggling under UN Security Council Resolution 2240 (2015)', (2016) 25 *Italian Yearbook of International Law* 19, at 33; V. Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', (2011) 23 *International Journal of Refugee Law* 174, at 187–8; E. Papastavridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea, (2016) 2 *Maritime Safety and Security Law Journal* 57, at 70.

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resolution, Resolution 2240 (2015), referred only to boarding and inspecting vessels suspected of being without nationality and engaged in migrant smuggling, but not to arrest or seizure.

Operation *Sophia* closed down in March 2020,[12] yet the issue of maritime migrant smuggling has not faded from view. Since then, European states have continued to exercise extraterritorial coercive powers over stateless smuggling vessels at sea, despite the unsettled legal basis of these actions under international law.[13] This lack of clarity is problematic for several reasons. Firstly, without a valid legal basis, the legality of high seas arrests of migrant smugglers and seizure of smuggling vessels are challengeable before domestic courts and the European Court of Human Rights, which makes launching high seas multilateral counter-smuggling operations a high-risk strategy for states.[14] Secondly, the ambiguity surrounding high seas seizure creates a grey-zone for coastal states to take coercive action against boat migrants and asylum seekers, while avoiding domestic legal and political accountability processes.[15] Finally, the EU, as well as other destination states worldwide, continue to exercise enforcement powers extraterritorially in order to externalize migration control,[16] and avoid existing human rights and refugee

[12]Operation Sophia closed down largely due to disputes about the distribution of rescued migrants and asylum seekers among EU member states. Several member states objected to reviving the mission, fearing the presence of naval ships in the region acted as a 'pull-factor' to irregular migration. Instead, the replacement mission, Operation *Irini*, only involves the use of aerial, satellite, and maritime assets to monitor the UN arms embargo against Libya, with anti-smuggling actions reduced to 'information gathering and patrolling by planes': J. Barigazzi, 'Operation Sophia to Be Closed Down and Replaced: New Libya Naval Mission Will Have a Different Name and Area of Operation', *Politico*, 17 February 2020, available at www.politico.eu/article/operation-sophia-to-be-closed-down-and-replaced.

[13]Since then, to name just a few instances, Frontex has continued to interdict stateless smuggling 'motherships' in the Mediterranean Sea, the United Kingdom proposed pushing back migrant vessels across the Channel into French coastal waters, and Greek authorities have engaged in 'drift back' tactics in the Aegean Sea, placing rescued migrants aboard unnavigable rafts and towing them out to sea: ANSA, 'Italy Detains 8 Migrant Smugglers in International Waters', *InfoMigrants*, 8 June 2021, available at www.infomigrants.net/en/post/32785/italy-detains-8-migrant-smugglers-in-international-waters; S. Swinford and L. Brown, 'Royal Navy Rejects Priti Patel's "Illegal" Plan to Push Back Channel Migrant Boats', *Times*, 17 January 2022; T. Olsen, 'There is No End to the Cruelty', *Aegean Boat Report*, 31 January 2022, available at www.aegeanboatreport.com/2022/01/31/there-is-no-end-to-the-cruelty; I. Mann, 'A Lost Opportunity for Border Justice at the European Court of Human Rights', *EJIL:Talk!*, 3 February 2022, available at www.ejiltalk.org/a-lost-opportunity-for-border-justice-at-the-european-court-of-human-rights/.

[14]See *Medvedyev and Ors v. France*, Judgment of 10 July 2008 (Application No. 3394/03), [2008] ECtHR, confirmed by the Grand Chamber in its judgment in *Medvedyev and Others v. France*, Judgment of 29 March 2010 (Application No. 3394/03), [2010] ECtHR (Grand Chamber). The case concerned the interdiction by French authorities of a Cambodian flagged ship, the *Winner*, on the high seas, which the French authorities suspected of trafficking illicit drugs. In the context of high seas action, the Court noted that the term 'appropriate measures' in Art. 17(4)(c) of the 1988 Narcotics Convention permitted various forms of state co-operation to combat drug trafficking, including regional agreements and *ad hoc* interdictions. However, the term did not permit of itself the states parties to arrest and detain crewmembers on board a drug trafficking vessel on the high seas, without express flag state authorization. Instead, the right to liberty and security, codified in the European context under Art. 5(1) of the European Convention of Human Rights, required express provision for arrest, detention, and prosecution, such as found in Art. 105 of UNCLOS for piracy offences. Consequently, France could not reply on a diplomatic note, which only authorized France to 'intercept, inspect and take legal action' against the ship to arrest and detain the crewmembers of the *Winner* or transfer them to France.

[15]Western destination states have manipulated the developing field of transnational criminal law to expand their sovereign powers beyond national borders and domestic human rights controls: see, D. Guilfoyle, 'Transnational Crime and the Rule of Law at Sea', in V. Moreno-Lax and E. Papastavridis (eds.), *'Boat Refugees' and Migrants at Sea* (2016), 169, at 189; N. Boister, 'Further Reflections on the Concept of Transnational Criminal Law', (2015) 6 *Transnational Legal Theory* 9, at 26. Famously, the previous Australian Liberal Government, refused point-blank to discuss 'on-water matters': Australian Parliament House, Operation Sovereign Borders Update, Press Conference, Sydney, 8 November 2013, available at parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/3089102%22.

[16]The literature on this topic is extensive. See, for example, B. Frelick, I. Kysel and J. Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants', (2018) 4 *Journal on Migration and Human* Security 166; V. Moreno-Lax and M. Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization', (2019) 56 *Questions of International Law QIL, Zoom-in* 5; D. Scott FitzGerald, *Refugee Beyond Reach: How Rich Democracies Repel Asylum Seekers* (2019).

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protections.[17] In particular, high seas interdictions of smuggling boats, including push-backs and pull-backs, interfere with the internationally recognized right of all persons to leave a country, including their own.[18]

Despite these concerns, this article argues that the recent EU anti-smuggling operations, most notably Operation *Sophia*, have reinterpreted the ambiguous term 'appropriate measures' in the Migrant Smuggling Protocol. Arguably, now, Article 8(7) of the Migrant Smuggling Protocol authorizes states to take coercive measures over intercepted stateless smuggling vessels beyond the board and search powers contained in UNCLOS. This article begins by briefly recounting the history of EUNAVFOR MED Operation *Sophia* (Section 2), before explaining the ambiguity of the Migrant Smuggling Protocol towards high seas interdiction of stateless smuggling vessels (Section 3) and the interplay between the rules regulating the exercise of enforcement jurisdiction found in the law of the sea and the law of state jurisdiction. The final section explores how recent state practice, particularly the EU anti-migrant smuggling operations, have created a new jurisdictional rule authorizing the seizure and destruction of stateless smuggling vessels on the high seas (Section 5), and notes the urgent need to strengthen human rights and refugee protections for people escaping poverty, conflict, and persecution by sea.

2. EUNAVFOR MED Operation *Sophia:* A mission without an international legal mandate?

The Mediterranean migrant crisis has highlighted the legal uncertainty surrounding the right of states to seize and destroy stateless smuggling vessels on the high seas under international law.[19] Since 2015, over 1.5 million people escaping conflict or poverty have reached Europe by sea.[20] Increasing numbers of migrants and asylum seekers began making the perilous journey across the Mediterranean Sea after the Arab Spring protests began throughout North Africa in 2011, and the Syrian civil war.[21] Initially, most asylum seekers from Syria settled in neighbouring countries, but after Lebanon, Jordan, and Egypt stopped accepting refugees in 2014, greater numbers began crossing the Mediterranean Sea in an attempt to seek permanent settlement in Europe.[22] This increase in migrant movements overlapped with the collapse of the Libyan government after a coalition of Western states intervened in 2011, which left no police forces controlling border movements and Libya's maritime search and rescue zone ungoverned.[23]

[17]Although in 2021, the United Nations Human Rights Committee confirmed that human rights obligations still apply to interdictions and rescue operations at sea: see, *A.S. and others v. Malta*, Human Rights Committee, UN Doc. CCPR/C/128/D/3043/2017 (28 April 2021); *A.S. and others v. Italy*, Human Rights Committee, UN Doc. CCPR/C/130/D/3042/2017 (27 January 2021).

[18]1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art 12: 'Everyone shall be free to leave any country, including his own.' For discussions of right to leave in connection to EU migration policies see N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', (2016) 27 *European Journal of International Law* 591; E. McDonnell, 'Realizing the Right to Leave during Externalised Migration Control', *EJIL:Talk!*, 27 September 2021, available at www.ejiltalk.org/realising-the-right-to-leave-during-externalised-migration-control.

[19]For discussions of the issue see Butler and Ratcovich, *supra* note 11; Gestri, *supra* note 11; E. Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas', (2010) 25 *International Journal of Marine and Coastal Law* 569, at 583–5.

[20]UNHCR, Europe Situations: Data and Trends, Arrivals and Displaced Populations (2021), available at data.unhcr.org/en/documents/details/89857.

[21]P. Fargues, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence* (2017).

[22]J. Zaragoza Cristiani, 'Analysing the Causes of the Refugee Crisis and the Key Role of Turkey: Why Now and Why so Many?', (2015) 95 *RSC Working Papers* 2.

[23]E. Cusumano and M. Villa, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean Route', in IOM Publications, *Migration in West and North Africa and across the Mediterranean: Trends, Risks, Development and Governance* (2020), available at publications.iom.int/books/migration-west-and-north-africa-and-across-mediterranean, at 202; see Fargues, *supra* note 21; I. Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', (2018) 29 *European Journal of International Law* 347, at 353.

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From the early days of the crisis, migrant smugglers used unregistered and unflagged vessels to smuggle migrants and asylum seekers across the Mediterranean Sea to Europe.[24] Smugglers initially transported the migrants and asylum seekers on larger 'mother ships' across the high seas, before off-loading them onto smaller vessels when close to Italian or Maltese shores.[25] The smugglers adopted this method to avoid arrest and prosecution, under the belief that local police authorities had no jurisdiction to seize stateless vessels operating on the high seas.[26] The smuggler's tactic proved tragically perilous, however, with the small boats and inflatable dinghies used for the final stage of the journey often capsizing at sea.[27]

In response to the rising death rate, the Italian government launched Operation *Mare Nostrum* in October 2013.[28] Designed as a search and rescue mission, Operation *Mare Nostrum* deployed assets on the high seas reaching beyond Italy's search and rescue zone.[29] In this respect, the operation relied on international search and rescue powers to intercept stateless smuggling vessels at sea. However, the Italian government was unable to sustain the exorbitant costs of the domestically unpopular operation and closed it down in October 2014.[30] The Frontex-led operation, Operation *Triton*, replaced Operation *Mare Nostrum*, but with a different mandate and reduced geographical scope.[31] Rather than provide search and rescue services, Operation *Triton* was mandated to aid EU member states in achieving 'effective border control in the Mediterranean region' and tackle other forms of cross border crime around Italy's coastal waters.[32] Thus, in contrast to Operation *Mare Nostrum*, Operation *Triton* did not include search and rescue within its core mandate. Foreseeably, the number of deaths at sea increased under the new law enforcement mission, climaxing in the 'black week' of April 2015 when more than 1,200 adults and children drowned in the Mediterranean Sea between Libya and Sicily.[33]

This tragedy finally drove the Council of the European Union to take action to prevent further loss of life.[34] However, rather than fund a humanitarian search and rescue mission, the EU decided to launch a 'military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean'.[35] Given the Council designed the operation as a law enforcement operation, rather than a humanitarian search and rescue mission, the EU legislator could not rely on international search and rescue duties to interdict stateless smuggling vessels on the high seas, or apprehend smugglers

[24]Commission of the European Communities, Study on the International Law Instruments in Relation to Illegal Immigration by Sea, SEC (2007) 691 (2007), para 1(5).

[25]ARCI Porco Rosso and Alarm Phone, 'From Sea to Prison: The Criminalization of Boat Drivers in Italy', 2021, available at www.fromseatoprison.info. According to the House of Lords report on Operation *Sophia*, an 'unintended consequence of Operation Sophia's destruction of vessels has been that the smugglers have adapted, sending migrants to sea in unseaworthy vessels': House of Lords, European Union Committee, Operation Sophia: A Failed Mission? 2nd Report of 2017-19(2017), para. 45, at 14.

[26]See ARCI Porco Rosso and Alarm Phone, ibid., at 21. This belief reflects the fact that stateless vessels fall outside the jurisdiction of any flag state: see UNCLOS, *supra* note 10, Art. 92(1).

[27]See House of Lords, European Union Committee, *supra* note 25, para. 45.

[28]Italian Ministry of Defence, 'Mare Nostrum Operation', available at www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx.

[29]The Italian mission *Mare Nostrum* saved over 140,000 migrants in distress at sea between October 2013 and October 2014: European Council on Refugees and Exiles, 'Mare Nostrum to End – New Frontex Operation Will Not Ensure Rescue of Migrants in International Waters', 10 October 2014, available at www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters.

[30]See Nováky, *supra* note 3, at 202.

[31]See European Council on Refugees and Exiles, *supra* note 29.

[32]European Commission, 'Memo: Frontex Joint Operation "Triton"- Concerted Efforts for Managing Migratory Flows in the Central Mediterranean', 2014, available at www.ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566.

[33]C. Heller and L. Pezzani, *Death by Rescue* (2016), available at content.forensic-architecture.org/wp-content/uploads/2023/04/2016_Report_Death-By-Rescue.pdf, at 57.

[34]See Nováky, *supra* note 3, at 202.

[35]See Council Decision 2015/778, *supra* note 7, Art. 1.

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aboard.[36] Instead, the EU legislator needed an alternative international legal basis to seize and destroy stateless smuggling vessels outside the territorial seas of its member states in the Mediterranean Sea.[37]

Notably, however, Council Decision 2015/778, which legally underpinned Operation *Sophia*, did not concretely specify the international legal basis enabling the operation's naval ships to seize and destroy stateless smuggling vessels on the high seas of the Mediterranean Sea. When read closely, Article 2(2) of Council Decision 2015/778 does not actually assert that international law authorizes Operation *Sophia* to seize and destroy stateless smuggling vessels.[38] Rather, the wording only notes that any action taken against smuggling vessels, with or without nationality, would be taken in accordance with international law. The preamble to Council Decision 2015/778 claimed that 'on the high seas ... states may interdict vessels suspected of smuggling migrants ... where the vessel is without nationality, and may take appropriate measures against the vessel, persons and cargo'. More specifically, Article 2(2) of the Council Decision stated that EUNAVFOR MED would conduct the 'boarding, search, seizure and diversion 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', or any applicable United Nations Security Council Resolution.

According to the Politico-Military Group, who advised the Council of the European Union on the international legal issues for Operation *Sophia*, international law does not directly provide enforcement powers over stateless vessels on the high seas, beyond board and search. However, the Politico-Military Group advised that seizure of stateless smuggling vessels would nevertheless be possible under international law '*provided that* the warship conducting the seizure is so authorized under its own national law'.[39] In other words, according to the Politico-Military Group, Article 8(7) of the Migrant Smuggling Protocol permits states to authorize the seizure of stateless smuggling vessels, which can form the basis of high seas action. Even so, a UN Security Council mandate would still be necessary to enable EUNAVFOR MED warships to seize stateless vessels where domestic authorization was lacking. In other words, the Council of Europe needed a Security Council resolution to fill the jurisdictional gap surrounding stateless vessels in the law of the sea.[40]

On 11 May 2015, High Representative Federica Mogherini requested the Security Council to authorize the Common Security and Defence Policy operation under Chapter VII of the UN Charter.[41] Despite the predominant use of unflagged and unregistered vessels in migrant smuggling in the Mediterranean region,[42] Resolution 2240 (2015) did not authorize the seizure and destruction of stateless vessels. For a period of one year, the Security Council only authorized member states to inspect, seize and take further action, including disposal, of flagged vessels being used for migrant smuggling or human trafficking from Libya, provided that the boarding member state had made good faith efforts to obtain flag state consent.[43] In contrast, the single paragraph referring to stateless vessels only called upon member states to:

[36]1974 International Convention for the Safety of Life at Sea 1184 UNTS 278 (SOLAS); 1979 International Convention on Maritime Search and Rescue 405 UNTS 97 (SAR); D. Guilfoyle, 'The High Seas', in D. Rothwell and A. Oude (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 203, at 217; V. Moreno-Lax, 'Policy Brief 4 – The Interdiction of Asylum Seekers at Sea: Law and (Mal)Practice in Europe and Australia', (2017) *Kaldor Centre for International Refugee Law*, at 5.

[37]See Butler and Ratcovich, *supra* note 11, at 247.

[38]See Gestri, *supra* note 11, at 33.

[39]See Council of the European Union, *supra* note 9, paras. 7, 12.

[40]Ibid., at 12.

[41]Security Council Report (What's in Blue), 'Briefing and Informal Interactive Dialogue on the Smuggling of Migrants in the Mediterranean', 8 May 2015, available at www.securitycouncilreport.org/whatsinblue/2015/05/briefing-and-informal-interactive-dialogue-on-the-smuggling-of-migrants-in-the-mediterranean.php.

[42]Operation Commander E. Credendino, 'EUNAVFOR MED Op Sophia, Six Monthly Report', 22 June to 31 December 2015, *Wikileaks*, 17 February 2016, at 6, available at wikileaks.org/eu-military-refugees.

[43]UNSC, Resolution 2240 (2015) Adopted by the Security Council at its 7531st meeting, on 9 October 2015, UN Doc. S/RES/2240/2015 (2015), paras. 7–8.

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> Inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organized criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts or dinghies.[44]

Markedly, the Security Council did not expressly authorize the seizure and destruction of unflagged vessels on the high seas.[45] Instead, paragraph 5 merely repeated the right to visit vessels that a warship suspects of being without nationality, actions that UNCLOS and the Migrant Smuggling Protocol already permit.[46] This left EUNAVFOR MED warships without direct authorization to seize and destroy stateless smuggling vessels on the high seas, and arrest any suspected smugglers aboard. Instead, The Council of the EU had to rely on the ambiguous wording of the Migrant Smuggling Protocol for seizure powers over stateless smuggling vessels on the high seas.

Operation *Sophia* closed down in March 2020, yet the question of the legality of high seas interdictions of stateless smuggling vessels under international law remains. Since 2020, European destination states have proposed, planned, and executed numerous coercive actions against migrants and asylum seekers trying to reach Europe by sea. Frontex missions, along with co-operating EU member states, continue to interdict stateless smuggling 'motherships' in international waters.[47] The United Kingdom planned to 'push-back' migrant boats from British coasts into French waters in the Channel, until stopped by public outcry, while Greek authorities have engaged in 'drift-back' actions in the Aegean Sea, towing rescued migrants out to sea on unnavigable rafters.[48] And Italy and Malta have co-operated with the Libyan Coast Guard to 'pull-back' migrant boats in distress to Libya, where the migrants onboard were subject to human rights violations.[49] Additionally, Italy has repeatedly prosecuted migrants and asylum seekers forced by smugglers to navigate smuggling boats across the Mediterranean Sea for aiding and abetting migrant smuggling.[50] These on-going practices stress the urgent need to clarify which enforcement powers exactly fall within the scope of the vague term 'appropriate measures', and ensure robust accountability measures exist to prevent states from using instruments designed to combat transnational crime to externalize migration control.

3. Boarding and seizure in UNCLOS and the Migrant Smuggling Protocol

The EUNAVFOR MED mission relied on enforcement powers allegedly provided by UNCLOS and the Migrant Smuggling Protocol to board, seize and destroy stateless smuggling vessels on the high seas. However, as noted above, Council Decision 2015/778 does not explicitly state the international legal basis for high seas seizure of stateless smuggling vessels. While both UNCLOS and the Migrant Smuggling Protocol permit the states parties to board suspect vessels, neither treaty provides a strong jurisdictional basis for exercising enforcement jurisdiction over stateless smuggling vessels outside territorial waters. Neither instrument provides prescriptive criminal jurisdiction over high seas smuggling offences nor expressly permits the states parties to seize suspect vessels. Despite this, it is likely that the Council of the European Union sought to justify the seizure of stateless smuggling vessels through Article 8(7) of the Migrant Smuggling Protocol, which

[44]Ibid., para. 5.

[45]See Gestri, *supra* note 11, at 32.

[46]See UNCLOS, *supra* note 10, Art. 110(1)(d).

[47]See ANSA, *supra* note 13.

[48]See Swinford and Brown, *supra* note 13; Olsen, *supra* note 13; Mann, *supra* note 13.

[49]ASGI and Cairo Institute for Human Rights Studies, 'Press Release: Complaint to the UN Human Rights Committee over the Role of Italy, Malta and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights of Asylum Seekers', 24 July 2020, available at www.statewatch.org/media/1267/un-asgi-cihrs-complaint-libya-pull-backs-pr-24-7-20.pdf.

[50]See F. Patanè et al., 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of *Scafisti* in Italy', (2020) 39 *Refugee Survey Quarterly* 123.

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permits a boarding state party to take unspecified 'appropriate measures' in respect of stateless smuggling vessels.

UNCLOS codifies the foundational principle of *mare liberum*, the freedom of the seas, that has governed the high seas for almost half a millennium.[51] This principle is found in Article 87 (the high seas are open to all states) and Article 89 (no state may acquire or claim sovereignty over any part of the high seas).[52] As a general rule, the law of the sea prohibits states from exercising enforcement powers over non-national vessels located on the high seas,[53] and within the Exclusive Economic Zones (EEZ) of states.[54] However, the law of the sea provides several exceptions to this general rule, which have been relied upon by states to claim jurisdictional powers over stateless vessels.[55] However, none of these exceptions clearly authorizes the extraterritorial seizure of stateless smuggling vessels on the high seas or within the EEZ.[56]

Most relevantly under the general law of the sea, UNCLOS permits any state to board a non-national ship suspected of being engaged in piracy, unauthorized broadcasting, the slave trade, or where the ship is suspected of being without nationality, or concealing its nationality from its flag

[51]The International Tribunal for the Law of the Sea had occasion to consider the question of high seas jurisdiction in the recent M/V *'Norstar'* case. Discussing whether Italy had violated Art. 87(1) of UNCLOS by arresting and detaining the Panamanian-flagged vessel, the Tribunal noted that 'the notions of the invalidity of claims of sovereignty over the high seas and of exclusive flag State jurisdiction on the high seas are inherent in the legal status of the high seas being open and free': *The M/V 'Norstar' Case (Panama v. Italy),* Judgment of 10 April 2019, [2019] ITLOS Rep. 2018–2019 10, at 73, para. 218.

[52]See UNCLOS, *supra* note 10, Arts. 87, 89; 1958 Convention on the High Seas 450 UNTS 11, Art. 2. The second aspect of this long-standing principle, as Oppenheim noted in the early twentieth century, holds that 'no state has as a rule a right to exercise it legislation, administration, jurisdiction or police over parts of the Open Sea': L. Oppenheim, *International Law: A Treatise* (1912), at 324.

[53]W. de Burgh, *Elements of Maritime International Law* (1868), at 2; I. Churchill and V. Lowe, *The Law of the Sea* (1999), at 205; N. Klein, *Maritime Security and the Law of the Sea* (2011), at 107; M. Nordquist, S. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, (1995), vol. III, at 96; D. P O'Connell, *The International Law of the Sea* (1982), at 800; J. Westlake, *International Law: Peace* (1910), at 164. As observed by Sir W. Scott in the *Le Louis* case, in 'places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another': '*Le Louis*, Judgment of 15 December 1817', in G. Minot (ed.), *Reports of Cases Argued and Determined in the High Court of Admiralty* (1853), vol. I, 210, at 243.

[54]Historically, most of the Mediterranean Sea falls under this high seas regime, with coastal states only claiming territorial waters. However, in recent years, coastal states have increasingly claimed exclusive economic zones (EEZ), although these jurisdictional claims have often proved controversial. In practice, however, the establishment of EEZs in the Mediterranean Sea does not change the right of boarding states to seize stateless smuggling vessels in the Mediterranean Sea. For the reason that Art. 58(2) of UNCLOS maintains the high seas regime in the EEZ, including the law enforcement powers, to the extent that the exercise of enforcement powers does not affect the sovereign rights of coastal states to explore, exploit, conserve, and manage the natural resources of these waters. See Klein, ibid., at 89.

[55]No definition of stateless vessel exists under international law, partly because of the ambiguity inherent in the notion of ship nationality itself. However, stateless vessels are generally understood as ships that lack any claim to nationality under Art. 91 of UNCLOS, whether via state registration or some other right to fly the ship's flag: D. Guilfoyle, *Shipping Interdiction in the Law of the Sea* (2009), at 16. Customary international law recognizes the nationality of the owner as attracting flag state jurisdiction, which was recognized, although obliquely, in Art. 94(2)(a) of UNCLOS. Thus, technically most unregistered smuggling vessels would fall under the jurisdiction of the national state of the owner of the vessel: see D. P O'Connell, *supra* note 53, at 750–7. However, the notion of flag state jurisdiction also contains an element of recognition by the flag state, such that where the purported flag state denies the claim of nationality the ship in question is treated as stateless: see Westlake, *supra* note 53, at 169. UNCLOS also treats vessels sailing interchangeably under two flags as stateless (Art. 92(2)), however this provision is of recent origin and its import not entirely clear. Writing in the mid-1990s, McDorman observed that '[r]emarkably little has been written about the stateless vessel phenomenon in international law and the 1982 LOS Convention and its 1958 predecessors are silent about the consequences of being a stateless vessel': T. McDorman, 'Stateless Fishing Vessels: International Law and the U.N. High Seas Fisheries Conference', (1994) 25 *Journal of Maritime Law and Commerce* 531, at 540.

[56]Besides the right of visit, states may exercise enforcement powers over their own national ships and pursuant to the right of hot pursuit: see UNCLOS, *supra* note 10, Arts. 92, 111.

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state.[57] Some scholars assert that this right of visit in Article 110 of UNCLOS implies subsequent seizure powers over stateless vessels.[58] However, the text of UNCLOS provides little support for this claim.[59] The Convention regulates boarding and seizure separately, as they constitute different exercises of enforcement jurisdiction.[60] That is to say, that while the exercise of any boarding rights proceeds the exercise of any seizure rights, the one does not entail the other. The right of visit, as set out in UNCLOS, is investigatory and does not depend upon or grant further criminal jurisdiction over the suspect vessel.[61] This is demonstrated by the fact that UNCLOS only provides further enforcement powers over vessels engaged in piracy or unauthorized broadcasting despite permitting board and search for piracy, unauthorized broadcasting, the slave trade, and suspected statelessness.[62]

Instead, the asymmetrical allocation of boarding rights and enforcement jurisdiction in UNCLOS reflects the evolution of enforcement powers in the law of the sea in response to new threats and challenges.[63] Historically, customary international law restricted the right of visit

[57]The five grounds set out in Art. 110 of UNCLOS are not exhaustive, and states may extend them by agreement. However, states have been generally hesitant about extending enforcement powers at sea. The Soviet Union iterated this view during the 1958 United Nations Conference on the Law of the Sea, nothing that: 'the principle of the freedom of the high seas had been for centuries reaffirmed in the effort to combat attempts by states to secure mastery over large maritime areas. The freedom of the high seas meant that they were open to all states on an equal footing and that no state could claim sovereignty over them to the detriment of others': United Nations Conference on the Law of the Sea (Official Records), Volume VI: Second Committee (High Seas: General Régime), UN Doc. A/CONF.13/40 (1958), at 9 (USSR). States rejected the opportunity to extend the right of visit to vessels suspected of drug trafficking or migrant smuggling during the negotiations of UNCLOS and the 1988 Narcotics Convention in the late 1970s and 1980s. In particular, negotiating states expressed strong concerns repeatedly throughout the negotiation of the 1988 Narcotics Convention about disturbing the jurisdictional balance achieved in UNCLOS: see, for example, United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Official Records), Vol. II, UN Doc. E/CONF.82/16/Add.1 (1988), at 25–6 (6th plenary meeting), 34–5 (7th plenary meeting), 267–71 (17th meeting), 309–10 (29th meeting).

[58]For views in favour of this argument see, for example, D. Warner-Kramer and K. Canty, 'Stateless Fishing Vessels: The Current International Regime and a New Approach', (2000) 5 *Ocean and Coastal Law Journal* 227, at 230; R. Rayfuse, *Non-flag State Enforcement in High Seas Fisheries* (2004), at 57; M. den Heijer, *Europe and Extraterritorial Asylum* (2012), at 237; G. Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities', in G. Andreone (ed.), *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (2017), 165, at 173. For contrary views see Churchill and Lowe, *supra* note 53, at 214; Guilfoyle, *supra* note 55, at 17; McDorman, *supra* note 55, at 538–41; V. Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', (2011) 23 *International Journal of Refugee Law* 174, at 186; Papastavridis, *supra* note 19, at 583–5.

[59]Little interpretative guidance can be found in the jurisprudence, as international court cases are non-existent and domestic cases very limited. While ITLOS considered the question of nationality of ships in *M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, [1999] ITLOS Rep. 1999 10, the Tribunal did not offer an opinion on non-flag state enforcement over stateless vessels. Few domestic cases have considered the issue either, with the exception of the 1940s British case, *Naim Molvan v. Attorney-General for Palestine* [1948] 81 Ll L Rep 277 and the 1980s United States Federal court case, *US v. Marino-Garcia* [1982] 679 F2.d 1373. Both cases relied on policy considerations to affirm enforcement powers over stateless vessels on the high seas rather than any widely recognized international legal principle. Similar policy considerations in favour of interdicting stateless ships are often found in the literature: see, for example, A. Murdoch, 'Ships Without Nationality: Interdiction on the High Seas', in M. D. Evans and S. Galani, *Maritime Security and the Law of the Sea* (2020), 157, at 179.

[60]Boarding is provided for under Art. 110 of UNCLOS, while seizure and arrest are provided only for piracy and unauthorized broadcasting under Arts. 105 and 109 respectively. R Barnes, 'The International Law of the Sea and Migration Control', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 100, at 133.

[61]Failure to find evidence of the suspected activity or status does not make the interference with a non-national ship on the high seas unlawful under international law, although the boarding state can be liable to pay compensation: see UNCLOS, *supra* note 10, Art.110(3).

[62]See UNCLOS, ibid., Arts. 105, 109.

[63]As Douglas Guilfoyle has observed, '[v]iewed in anything but an historical light the law of the sea appears inconsistent – if not morally incoherent – in allocating boarding rights and enforcement jurisdiction. What we can observe is a long accretive history of experiments in designing jurisdictional regimes to deal with given problems': see *supra* note 55, at 24.

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to vessels suspected of piracy on the high seas.[64] States extended this right to vessels suspected of the slave trade during the drafting of the 1958 High Seas Convention to reflect the wide-ranging number of bilateral treaties on the subject,[65] and again to vessels suspected of unauthorized broadcasting and vessels suspected of being without nationality during the drafting of UNCLOS in the late 1970s and early 1980s.[66] The right to seize pirate vessels, found in Article 105 of UNCLOS, also derives from customary international law, which permits all states having asserted universal prescriptive jurisdiction over piracy offences to seize pirate vessels and prosecute any captured pirates.[67] Additionally, the drafters of UNCLOS included a novel, and now largely redundant, right to arrest vessels and persons engaged in unauthorized broadcasting on the high seas to certain affected states and prosecute the alleged offenders before their domestic courts in response to pirate radio stations broadcasting from ships moored outside the territorial waters of European coastal states in the late 1950s and early 1960s.[68]

In contrast, the Migrant Smuggling Protocol does permit some enforcement action over stateless smuggling vessels beyond boarding. However, the drafting of the relevant provision leaves the scope of permissible enforcement action unclear. The Protocol establishes a co-operation regime between the states parties to combat migrant smuggling by sea. For stateless smuggling vessels, Article 8(7) provides 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 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.

Unlike piracy and unauthorized broadcasting in UNCLOS, Article 8(7) does not expressly grant the boarding state the right to seize a stateless vessel on the high seas, or arrest any suspected smugglers on board that vessel and prosecute them before its national courts. Instead, Article 8(7) merely notes that the boarding state party shall 'take appropriate measures' in accordance with relevant domestic and international law. This leaves the intended scope of permissible action ambiguous and open to interpretation.

According to the Politico-Military Group, who advised the Council of the European Union on the international issues underpinning EUNAVFOR MED, the Migrant Smuggling Protocol does not directly authorize states to seize, disable or destroy stateless smuggling vessels.[69] However, it does permit states to adopt laws authorizing the seizure of stateless smuggling vessels on the high seas.[70] In other words, the measures taken against stateless vessels depend upon domestic

[64]See Oppenheim, *supra* note 52, at 336.

[65]International Law Commission, 'Articles Concerning the Law of the Sea with Commentaries', in *Yearbook of the International Law Commission, vol. II* (1956), 264, at 284; International Law Commission, 'Summary Records of the Seventh Session, 2 May–8 July 1955', in *Yearbook of the International Law Commission, vol. I* (1955), 30.

[66]The unofficial records of the drafting sessions reveal that a novel right of visit over stateless vessels first appeared in a 'blue paper' from an informal consultative group in Geneva in 1975, were then removed, before finally settling in the final text of Art. 110 of UNCLOS. No evidence suggests that further enforcement powers were contemplated by the drafters: C.2/Blue Paper No. 5, C.2/Blue Paper No.9, and C.2/Blue Paper No.9.Rev, in R. Platzöder, *The United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (1982).

[67]See Oppenheim, *supra* note 52, at 346.

[68]See UNCLOS *supra* note 10, Art. 109. For a discussion of pirate broadcasting see J. C. Woodliffe, 'Some Legal Aspects of Pirate Broadcasting in the North Sea', (1965) 12 *Nederlands tijdschrift voor international recht* 365; N. March Hunnings, 'Pirate Broadcasting in European Waters', (1965) 14 *International and Comparative Law Quarterly* 410.

[69]See Council of the European Union, *supra* note 9, paras. 7, 12.

[70]Ibid. This accords with the view of Meyers, the leading authority on the legal consequences of statelessness. According to Meyers, no state may assert exclusive jurisdiction over a stateless vessel, since exclusivity derives from flag state jurisdiction. Moreover, since international law does not forbid stateless vessels, no state may deem statelessness unlawful. However, to

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authorization. However, this view implies a revision of the standard rules governing jurisdiction at sea, explained below, which limit extraterritorial exercises of prescriptive and enforcement jurisdiction.[71] Although the vague drafting leaves space open for this interpretation, nothing in the text or preparatory documents to the Migrant Smuggling Protocol suggests that the drafters intended to extend extraterritorial criminal jurisdiction to stateless smuggling vessels on the high seas.

Firstly, the *travaux préparatoires* and the non-authoritative interpretative guides make no mention of seizure powers over stateless smuggling vessels.[72] The Migrant Smuggling Protocol does not contain a definition of the term 'appropriate measures' or specify that enforcement actions, such as seizure and arrest, fall within its scope. Nor do the preparatory works or interpretative guides explain the term, or throw any light on its intended meaning. As noted above, UNCLOS does not provide seizure powers over stateless smuggling vessels, and while UNCLOS does permit its states parties to modify its jurisdictional rules by agreement,[73] nothing in the *travaux préparatoires* indicate that the drafters intended to create a new legal rule permitting high seas enforcement action. The avoidance of express seizure and arrest powers in Article 8(7) instead suggests that no such powers exist under the law of the sea, and that the negotiating states were not yet prepared to extend enforcement jurisdiction to stateless vessels at the time of drafting.[74]

Secondly, the Migrant Smuggling Protocol does not oblige or encourage the states parties to establish prescriptive criminal jurisdiction over migrant smuggling offences committed on board stateless vessels on the high seas. The Protocol only requires each state party to criminalize migrant smuggling when committed inside its territory, on board a vessel flying its flag, or an aircraft registered under its domestic laws.[75] Nor does the Protocol even encourage the states parties to establish jurisdiction over high seas smuggling offences, as it does for offences committed by or against a national of the state party. The silence of the Protocol towards stateless vessels is notable given the inclusion of an obligation to establish prescriptive jurisdiction over offences committed on board stateless vessels in the 1995 Council of Europe Agreement on Illicit Traffic at Sea, which was drafted just a few years previously.[76] Had the drafters intended to provide high seas enforcement powers over stateless vessels, it is likely they would have clearly provided prescriptive jurisdiction as well, as done by the drafters of the 1995 Council of Europe Agreement on Illicit Traffic at Sea.

Finally, as Article 8(7) is not restricted to the high seas, it could be argued that the drafters selected the vague term 'appropriate measures' to encompass the range of enforcement powers already existing under the law of the sea. Unlike Article 110 in UNCLOS, Article 8(7) is not

avoid high seas impunity, Meyers declares that 'every state may declare its law applicable to any stateless ship': H. Meyers, *The Nationality of Ships* (1967), at 318–21.

[71]See *M/V 'Norstar'*, *supra* note 51, at 75, para. 225.

[72]See, UNODC, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2006), at 495–506; UNODC, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2004), at 386–8; UNODC, Model Law against the Smuggling of Migrants (2010), at 83–92.

[73]UNCLOS permits the states parties to modify its jurisdictional rules by agreement between themselves, so long as the agreement does not affect the application of their conventional rights or the performance of their obligations, or derogate fundamentally from the object and purpose of the Convention. Given this, the Migrant Smuggling Protocol could feasibly represent such an agreement, modifying the jurisdictional rules governing the exercise of enforcement jurisdiction at sea. However, if this was the case, it is likely that the treaty text or preparatory works to the Protocol would explicitly establish or confirm such an intention. Yet nothing in the Protocol text, the *travaux préparatoires* or the interpretative guides suggests that the drafters intended to create a new legal rule creating seizure rights over stateless smuggling vessels: see UNCLOS, *supra* note 10, Art. 311(3).

[74]A. Gallagher and F. David, *The International Law of Migrant Smuggling* (2014), at 245.

[75]2000 United Nations Convention Against Transnational Organized Crime, 2225 UNTS 209, Art.15(1) (UNTOC).

[76]1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS No. 156, Art. 3(3).

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restricted to the high seas.[77] States parties can make use of different enforcement powers depending on the location of the suspect vessel. For example, on the high seas, the term appropriate measures might refer to an obligation to inform other affected states parties about the location and direction of the suspect vessel; to continue surveillance of the suspect vessel; or to fulfil rescue obligations for smuggling vessels in distress.[78] At the same time, beyond the high seas, the term might denote the right of coastal states to refuse stateless vessels access to their ports; to prevent non-innocent passage into territorial waters; or to prevent infringements of immigration regulations in the contiguous zone.[79] Had the drafters intended to provide wide-ranging enforcement jurisdiction in Article 8(7), they could have copied the drafting of Article 105 or Article 108 of UNCLOS for piracy and unauthorized broadcasting, which provide unequivocal high seas seizure and arrest powers. Overall, the absence of express seizure and arrest powers in Article 8(7) suggests that the negotiating states were not yet prepared to extend enforcement jurisdiction to stateless vessels at the time of drafting.

Historically, states have been reluctant to expand extraterritorial state power at sea or to disturb the delicate jurisdictional balance established in UNCLOS.[80] However, at the same time, states have been occasionally willing to fill jurisdictional gaps at sea by creating new enforcement powers, as seen in the treatment of unauthorized broadcasting in UNCLOS.[81] Thus, while the Migrant Smuggling Protocol does not provide any express seizure powers, the ambiguous term 'appropriate measures' arguably still leaves space for the future expansion of high seas enforcement powers. However, whether the term 'appropriate measures' can entail seizure powers depends not just upon the Migrant Smuggling Protocol or the law of the sea, but also upon the international law of state criminal jurisdiction.

4. Extraterritorial criminal jurisdiction over stateless smuggling vessels

Since the early 2000s, scholars have debated whether the Migrant Smuggling Protocol creates a new right of action in respect of stateless smuggling vessel on the high seas beyond the powers permitted under the UNCLOS right of visit.[82] However, scholars have struggled to explain how the term 'appropriate measures' in Article 8(7) can provide seizure rights over stateless vessels while remaining consistent with the general law of the sea and state criminal jurisdiction.[83] Scholarly accounts fall into two broad categories, which each describe a different view of the interaction between state criminal jurisdiction and the law of the sea. However, this article argues that neither

[77]In contrast, Art. 110 of UNCLOS explicitly limits the enforcement powers permitted by the provision to the high seas.

[78]1974 International Convention for the safety of Life at Sea, 1184 UNTS 278; 1979 International Convention on Maritime Search and Rescue, 405 UNTS 97; International Maritime Organization (Maritime Safety Committee), Interim Measures for Combatting Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO Doc. MSC/Circ.896 (1998).

[79]See UNCLOS, *supra* note 10, Arts. 19, 25, 33. Customary international law also recognizes the right of port states to refuse entry to stateless vessels, except in cases of distress: see International Law Commission, Report on the High Seas by J. P. A François, UN Doc. A/CN/4/17 (1950), at 7.

[80]During the drafting of the 1958 High Seas Convention, for example, Special Rapporteur J. P. A. François proposed a new provision granting states the right to board and search vessels suspected of being without nationality on the high seas. However, other International Law Commission members rejected his proposal on the grounds that it would undermine freedom of navigation, and lead to states exercising generalized police powers at sea: International Law Commission, 'Summary Records of the Seventh Session, 2 May–8 July 1955', in *Yearbook of the International Law Commission, vol. 1* (1955), at 11–12. For a general discussion of the historical interplay between the concepts of *mare liberum* and maritime security see Klein, *supra* note 53, Ch. 1.

[81]D. Guilfoyle, 'Part VII – High Seas', in A. Proelss et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 779.

[82]See, for example, Butler and Ratcovich, *supra* note 13; Gallagher and David, *supra* note 74, at 244–6; Guilfoyle, *supra* note 55, at 16–18; Moreno-Lax, *supra* note 36, at 5.

[83]This has been highlighted by several international law scholars, such as Guilfoyle, ibid., at 17, 185; and Gallagher and David, ibid., at 238–9, 244–6.

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of these accounts can satisfactorily explain the recent EU anti-smuggling operations in the Mediterranean Sea coherently with the orthodox view of prescriptive jurisdiction.[84] Instead, this article proposes a new theory of state criminal jurisdiction, which allows for a coherent explanation of state practice in the application of the Migrant Smuggling Protocol.

International law regulates the exercise of jurisdiction by states. For international lawyers, jurisdiction refers to the allocation of competences normally aligned to state authority.[85] Legal theory standardly divides state jurisdiction into two, or sometimes three, categories of jurisdiction.[86] The first category, prescriptive jurisdiction, refers to the authority of a state under international law to determine the substance and scope of regulating norms through legislation or court rulings. Put simply, the right to regulate. The second category, enforcement jurisdiction, refers to the right of states under international law to execute those rules through police, judicial or other executive action. The final category, adjudicatory jurisdiction, encompasses the authority of states (more specifically, of national courts) under international law to adjudicate disputes between parties and to adjudge violations of domestic laws. This general framework applies to all exercises of state criminal jurisdiction both on land and at sea, although several special rules additionally regulate the high seas.[87]

Despite this agreed framework, the question whether international law permits states to exercise enforcement jurisdiction over stateless vessels remains controversial, and divides scholarly opinion.[88] Some scholars argue that any boarding state may seize stateless vessels on the high seas, as stateless vessels lack the protection of a flag state.[89] More commonly, international legal scholars suggest that boarding states must justify any exercise of high seas jurisdiction according to a special permissive rule, as exists for piracy and unauthorized broadcasting.[90] Additionally, scholars holding this view often note that boarding states require a prescriptive jurisdictional nexus to any offences committed on board a stateless vessel in order to validly exercise enforcement jurisdiction over such vessels.[91] Although not immediately obvious, these positions depend upon different views of state criminal jurisdiction, which reflects the unsettled nature of the existing theory underpinning this topic of international law.

As noted, the first view argues that any state may seize a stateless vessel on the high seas as it lacks flag state protection.[92] Two presumptions underlie this view, relating firstly to the law of the sea and secondly to state criminal jurisdiction respectively. Firstly, this view presumes that any state may exercise enforcement jurisdiction on the high seas, unless barred by the principle of exclusive flag state jurisdiction.[93] According to this view, the right of visit creates an exception to the principle of exclusive flag state jurisdiction, which prevents interference by non-national ships on the high seas. If boarding reveals that no flag state exists, then the boarding state may take

[84]For a nuanced summary of the orthodox view of state criminal jurisdiction see R. O'Keefe, *International Criminal* Law (2015), at 6–29.

[85]I. Brownlie, *Principles of Public International Law* (2002), at 106.

[86]American Law Institute, *Restatement of the Law Fourth, The Foreign Relations Law of the United States* (2018), at 140–1, 143.

[87]Y. Tanaka, 'Jurisdiction of States and the Law of the Sea', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015), 110, at 138–47.

[88]See Moreno-Lax, *supra* note 11, at 186–7.

[89]See, for example, A. Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law', (1982) 13 *Journal of Maritime Law and Commerce* 323, at 335–7; F. Attard, 'Combatting the Smuggling of Persons by Sea under the UNCLOS High Seas Regime', (2016) 6 *ELSA Malta Law Review* 34, at 47; Rayfuse, *supra* note 58, at 57. See also, *Naim Molvan v. Attorney-General for Palestine*, *supra* note 59; *US v. Marino-Garcia*, *supra* note 59.

[90]See Churchill and Lowe, *supra* note 53, at 214; Guilfoyle, *supra* note 55, at 17, 24.

[91]See, for example, Gallagher and David, *supra* note 74, at 246; P. Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (2009), at 114.

[92]For this view see Rayfuse, *supra* note 58, at 57.

[93]A. Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law', (1982) 13 *Journal of Maritime of Law and Commerce* 323, at 335–6.

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further enforcement action against the stateless vessel. This explanation supposedly explains the silence of UNCLOS and the ambiguity in the Migrant Smuggling Protocol to seizure rights, as these treaties only need to authorize the initial interference in a vessel suspected of being without nationality. However, this view ignores that the principle of freedom, which governs the high seas, prohibits states from exercising jurisdiction or control over the high seas unless expressly permitted by international law.[94]

Secondly, this view presumes that a state may exercise enforcement jurisdiction despite lacking prescriptive jurisdiction under international law. The United States Federal Court of Appeal affirmed this position in *US* v. *Marino-Garcia*, famously claiming that 'international law permits any nation to subject stateless vessels on the high seas to its jurisdiction'.[95] According to the Court, '[j]urisdiction exists *solely* as a consequence of the vessel's status as stateless'.[96] This runs against the grain of prevailing scholarly opinion, which holds that states need valid prescriptive jurisdiction under international law to exercise enforcement jurisdiction. As Brownlie has emphasized, '[i]f the substantive jurisdiction is beyond lawful limits, than any consequent enforcement jurisdiction is unlawful'.[97] In other words, even if international law permitted boarding states to seize stateless vessels on the high seas, international law would still require the boarding state to have valid prescriptive jurisdiction over any smuggling offences committed on board the stateless vessel, [98] which neither customary international law or the Migrant Smuggling Protocol provide.[99]

According to the second view, most notably elaborated by Churchill and Lowe, the law of the sea prohibits states from exercising any enforcement authority on the high seas unless justified by a specific permissive customary or conventional rule.[100] Such rules can entail either a right of visit

[94]This reflects the advice of the Politico-Legal Group, who advised the Council of Europe on the international legal issues surrounding EUNAVFOR MED. According to the Draft Crisis Management Concept, international law only provides limited powers over stateless vessels on the high seas, and does not directly authorize a warship to 'seize the vessel, make it unusable or destroy it': see Council of the European Union, *supra* note 9, para. 7.

[95]See *US v. Marino-Garcia, supra* note 59, para. 1383.

[96]The Federal Court's view in *Marino-Garcia* appears mainly to have been driven by policy considerations, rather than legal doctrine. The Court argued that any state could subject a stateless vessel to its jurisdiction because '[v]essels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas ... Moreover, flagless vessels are frequently not subject to the laws of a flag-state. As such, they represent "floating sanctuaries from authority" and constitute a potential threat to the order and stability of navigation on the high seas': see *US v. Marino-Garcia*, ibid., para. 1382. While there is a definite need to avoid jurisdictional lacunae at sea, the Court's argument does not necessarily reflect the state of the law. Firstly, 'flagless' vessels are not necessarily without nationality, as there is no requirement to display a flag while navigating the high seas. Moreover, many states automatically ascribe unregistered small vessels with the nationality based upon the nationality of the majority owner. Thus, for unflagged vessels the issue is not one of nationality but of identification. Furthermore, as McDorman notes, it is not clear that international law restricts the right to freely navigate the seas to registered vessels: see McDorman, *supra* note 55, at 538. Rather, the right is open to all states, which would appear to delegate the issue to the national state of the owner of the vessel. Australia, for example, requires all Australian owned vessels, irrespective of the size, to be registered in the Australian shipping registry before making international voyages: Shipping Registration Act 1981 (Cth) [Australia], s. 68.

[97]See Brownlie, *supra* note 85, at 311.

[98]Commentators generally explain transnational crime treaties as functioning to 'extend' criminal prescriptive jurisdiction over the treaty offences between the states parties to the treaty in question. For this view see N. Boister, *An Introduction to Transnational Criminal Law* (2018), at 250; A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', (2003) 1 *Journal of International Criminal Justice* 589, at 594; Gallagher and David, *supra* note 74, at 233; R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 63–5; C. Kress, 'Universal Jurisdiction over International Crimes and the *Institut de Droit international*', (2006) 4 *Journal of International Criminal Justice* 561, at 566; R. Liivoja, 'Treaties, custom and universal jurisdiction', in R. Liivoja (ed.) *International Law-making: Essays in Honour of Jan Klabbers* (2014), 303; C. Ryngaert, *Jurisdiction in International Law* (2015), at 46.

[99]See the Legislative Guide to the Migrant Smuggling Protocol, which stipulates that the establishment of jurisdiction over smuggling at sea is a prerequisite for the effective implementation of Part II 'Smuggling of Migrants by Sea' of the Protocol, at 386.

[100]See Churchill and Lowe, *supra* note 53, at 214. This second view seems most consonant with the law of the sea, as the principle of freedom of the sea prohibits any state from subjecting any part of the high seas to its authority or control.

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over suspect vessels or a right of seizure of vessels engaged in certain prohibited activities, such as piracy and unauthorized broadcasting. Applied to stateless vessels, this view restricts general enforcement powers to boarding and inspection under Article 110 of UNCLOS, unless the boarding state can prove a right of seizure derived from another treaty. While this view excludes a right of seizure over stateless vessels under customary international law, it leaves the door open for states to extend high seas enforcement jurisdiction to stateless smuggling vessels through international treaty-making. While Churchill and Lowe make no mention of prescriptive jurisdiction, they presumably still meant that any exercise of state jurisdiction would need to be valid under international law.[101]

For many scholars, this second view still excludes most boarding states from taking further enforcement action against vessels confirmed to be stateless and engaged in the smuggling of migrants at sea, as most boarding states lack prescriptive jurisdiction over high sea smuggling offences.[102] According to the orthodox view of state criminal jurisdiction, international law only permits states to exercise prescriptive jurisdiction upon a number of grounds or 'heads' of jurisdiction.[103] Drawing on the 1935 Harvard University research reports on 'Jurisdiction with respect to crime', most commentators agree that international law recognizes only several heads of jurisdiction to prescribe, namely territoriality and flag state jurisdiction, active nationality, passive personality, the protective principle, and universality.[104] These heads of jurisdiction are often coalesced into a general principle that states require a 'genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question' to assert prescriptive jurisdiction.[105] According to this view, any exercise of enforcement jurisdiction not based upon a valid head of prescriptive jurisdiction will be unlawful under international law.[106]

[101]According to F. A. Mann, 'a State may lack enforcement jurisdiction, although it has properly exercised its legislative jurisdiction. On the other hand, it is hardly possible for it to enjoy enforcement jurisdiction, when it is without legislative jurisdiction': F. A. Mann, 'The Doctrine of Jurisdiction in International Law', (1964) 111 *Collected Courses of the Hague Academy of International Law* 126.

[102]See Gallagher and David, *supra* note 74, at 221, 422; Guilfoyle, *supra* note 55, at 17; Klein, *supra* note 53, at 63; Mallia, *supra* note 91, at 214.

[103]M. Shaw, *International Law* (2014), at 649–50. Gallagher and David clearly express the standard view: 'For prescriptive jurisdiction, the test is a multifaceted one, and multiple alternative principles may be invoked . . . If assertion of jurisdiction is not available on the basis of territoriality, international law recognizes four alternative bases for claiming prescriptive jurisdiction over a matter or situation': see Gallagher and David, *supra* note 74, at 212.

[104]Harvard Law School, 'Research in International Law: Jurisdiction with Respect to Crime', (1935) 29 *American Journal of International Law Supplement* 435; O'Keefe, *supra* note 84, at 9–25; Brownlie, *supra* note 85, Ch. 15. This view can be contrasted to the report on 'Criminal Competence of States in Respect of Offences Committed outside their Territory' drawn up by Brierly and De Visscher for the Committee of Experts for the Progressive Codification of International Law: J. L. Brierly and C. De Visscher, 'Criminal Competence of States in Respect of Offences Committed outside their Territory', (1926) 20 *American Journal of International law* 252, at 253.

[105]J. Crawford, *Brownlie's Principles of Public International Law* (2019), at 441. This view is widely accepted in the literature. To name a few: American Law Institute, *supra* note 86; D. Costelloe, 'Conceptions of State Jurisdiction in the Jurisprudence of the International Court of Justice and the Permanent Court of International Justice', in S. Allen et al. (eds.), *The Oxford Handbook of Jurisdiction in International Law* (2019), 455; Mann, *supra* note 101; International Law Commission, 'Extraterritorial Jurisdiction', in *Yearbook of the International Law Commission: vol. II* (2006), at 229; Ryngaert, *supra* note 98; O. Schachter, 'International Law in Theory and Practice: General Court in Public International Law', (1982) 178 *Collected Courses of the Hague Academy of International Law*; B. Simma and A. Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford and M. Koskenniemi, *The Cambridge Companion to International Law* (2012), 134; C. Staker, 'Jurisdiction', in M. D. Evans (ed.), *International Law* (2014), 309.

[106]See Brownlie, *supra* note 85, at 311. According to the Fourth Restatement of the Foreign Relations Law of the United States: 'if a state exercises jurisdiction beyond the limits of international law, the state in question will violate international law, and such a violation will entail international responsibility': see American Law Institute, *supra* note 86, at 142. For a discussion of state responsibility in the context of jurisdiction see K. Trapp, 'Jurisdiction and State Responsibility', in Allen et al., ibid., at 355.

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However, pursuant to this interpretation, few EU member states participating in the EUNAVFOR anti-smuggling operations would be able to take action against stateless smuggling vessels, as neither customary international law nor the Migrant Smuggling Protocol clearly provide prescriptive jurisdiction over high seas migrant smuggling offences. The offence of migrant smuggling does not fall within the scope of the universality principle under customary international law, which is generally recognized to be limited to a handful of heinous crimes.[107] Furthermore, the drafters did not remedy this gap by providing prescriptive jurisdiction over migrant smuggling offences committed on board stateless vessels, similar to flag state jurisdiction over offences committed on board national vessels.[108] Thus, even presuming that Article 8(7) of the Migrant Smuggling Protocol provides seizure rights over stateless vessels, this theory of state jurisdiction would still exclude most states from exercising enforcement powers over stateless vessel on the high seas as they lack prescriptive jurisdiction under international law.[109]

However, high seas enforcement action against stateless smuggling vessels is feasible under a different account of state jurisdiction. Contrary to the prevailing scholarly opinion, this article argues that state jurisdiction simply mirrors the basic international principles of territorial integrity, equality of states and non-interference in domestic affairs.[110] Under this account, a state has the presumptive right to exercise jurisdiction unless prohibited by a general principle of international law. For prescriptive jurisdiction, the principle of non-interference limits states in extending their prescriptive jurisdiction beyond their borders, rather than the notion of permissive 'heads' of jurisdiction. That is to say, while states may legislate extraterritorially, states may not validly enact laws directly or indirectly interfering in the international or external affairs of any other state, without that state's consent.[111] This account matches the rules already accepted as regulating jurisdiction to adjudicate and enforce. That is, the law of state immunity, which embodies the equality of states under international law, constrains the exercise of adjudicatory jurisdiction by states, and the principle of territorial integrity restricts any exercise of enforcement jurisdiction by states.[112]

This account harks back to the obiter discussion of state criminal jurisdiction by the Permanent Court of International Justice in the *S.S Lotus* case.[113] The case concerned whether Turkey's

[107]The universality principle, though famously contentious, refers to 'prescriptive criminal jurisdiction in the absence of any other internationally-recognized head of prescriptive criminal jurisdiction': see O'Keefe, *supra* note 84, at 17. In her dissenting opinion in the *Arrest Warrants* case before the International Court of Justice, Judge *ad hoc* Van Den Wyngaert noted that '[t]here is no generally accepted definition of universal jurisdiction in conventional or customary law': *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment of 14 February 2002, [2002] ICJ Rep. 3, 165, para. 44 (Judge *ad hoc* Van Den Wyngaert, Dissenting Opinion). However, most scholars recognize only piracy, genocide, crimes against humanity, grave war crimes, and sometimes slavery, as attracting universal jurisdiction under customary international law: see, for example, 'The Princeton Principles on Universal Jurisdiction, "Principle 2 – Serious Crimes Under International Law"', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004), 15, at 29. For the continuing debate on the scope of universal jurisdiction among states see UNGA, The Scope and Application of the Principle of Universal Jurisdiction; Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, UN Doc. A/65/181 (2010).

[108]See UNTOC, *supra* note 75, Art. 15.

[109]Adopting a different view, Mallia suggests that migrant smuggling is increasingly recognized as falling within the scope of the universality principle: see Mallia, *supra* note 91, at 114.

[110]Shaw made this observation in his classic monograph on international law, but still continued on to expound a permissive rule theory of prescriptive jurisdiction: see Shaw, *supra* note 103, at 645, 652–73.

[111]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 202. For the principle of non-interference see M. Jamnejad and M. Wood, 'The Principle of Non-intervention', (2009) 22 LJIL 345. This explanation of prescriptive jurisdiction appears to be coherent with the recent decision of ITLOS in the *M/V 'Norstar'* case, where the Court observed about the principle of freedom of navigation that the 'principle prohibits not only the exercise of enforcement jurisdiction on the high seas by states other than the flag state but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas': see *M/V 'Norstar'*, *supra* note 51, at 75, para. 225.

[112]See American Law Institute, *supra* note 86, at 138.

[113]*Case of the S.S 'Lotus' (France v. Turkey)*, Judgment of 7 September 1927, [1927] PCIJ Rep Series A No 10.

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prosecution of a French national for criminal negligence, which led to the collision between the Turkish steamer the *Boz-Kourt* and the French steamer the *Lotus* on the high seas, conflicted with a principle of international law. While the *ratio* centred on the specific jurisdictional rule governing collisions at sea, the Permanent Court also offered its opinion on the general structure of state criminal jurisdiction. The Permanent Court's reasoning is notoriously vague and convoluted,[114] but appears to follow a three-step structure of general permission, prohibitive rule, and specific exceptions. Firstly, the Permanent Court explained, 'restrictions upon the independence of states cannot therefore be presumed'.[115] For this reason, a state remains free under international law to exercise jurisdiction in its own territory, 'over acts which have taken place abroad'.[116] However, this presumptive right is subject to certain prohibitive rules. While the Permanent Court did not specify the prohibitive rules applicable to prescriptive or adjudicative jurisdiction, it noted that the principles of territorial integrity and freedom of the seas limit the enforcement jurisdiction of states. Finally, the Permanent Court observed, certain 'permissive rule[s] derived from international custom or from a convention' provide exceptions to this secondary level of prohibitions,[117] such as the right of visit in UNCLOS or *aut dedere aut judicare* obligations found in international treaties addressing serious crime.

Under this view, any exercise of enforcement jurisdiction based upon an invalid exercise of prescriptive jurisdiction will still be unlawful under international law, but not because prescriptive and enforcement jurisdiction are logically dependent upon each other.[118] Rather, any exercise of enforcement jurisdiction by a state based upon a claim to prescriptive jurisdiction that unjustifiably interferes in the internal or external affairs of another state will be invalid, even if the state exercises that jurisdiction in its own territory or according to the law of the sea. Applied to the Migrant Smuggling Protocol, this account of jurisdiction leaves the states parties free to establish prescriptive jurisdiction over high seas migrant smuggling offences committed on board stateless vessels, unless that criminalization would interfere in the domestic affairs of any other state. In other words, states do not need to rely upon a customary or conventional 'head' of jurisdiction to criminalize extraterritorial migrant smuggling offences.

Under this account of state criminal jurisdiction, the term 'appropriate measures' in Article 8(7) of the Migrant Smuggling Protocol arguably extends the scope of enforcement action permitted to the states parties beyond the UNCLOS right of visit over stateless vessels. Firstly, the states parties remain free under international law to establish prescriptive criminal jurisdiction over offences committed by non-nationals on board stateless vessels on the high seas, as this is unlikely to interfere in the domestic affairs of other states.[119] Secondly, the phrase 'appropriate measures in accordance with relevant domestic and international law' permits any state party to take enforcement action against stateless smuggling vessels on the high seas or in a EEZ, as long as the enforcement action is properly authorized under its domestic law and compliant with international human rights norms.[120] Thus, while the absence of express seizure and arrest powers suggests that the negotiating states were not yet prepared to extend enforcement jurisdiction

[114]For commentary on the case see H. Handeyside, 'The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', (2007) 29 *Michigan Journal of International Law* 71; A. Hertogen, 'Letting Lotus Bloom', (2016) 26 *European Journal of International Law* 901.

[115]See *Case of the S.S 'Lotus'*, *supra* note 113, at 18.

[116]Ibid., at 19.

[117]Ibid.

[118]R. O'Keefe argues that international law regulates exercises of prescriptive and enforcement jurisdiction separately: R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 *Journal of International Criminal Justice* 735, at 741.

[119]This view is coherent with Art. 15(6) of the UNTOC, which provides that '[w]ithout prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law': see UNTOC, *supra* note 75, Art. 15(6).

[120]For an outline of applicable human rights at sea see, generally, T. Scovazzi, 'Human Rights and Immigration at Sea', in R. Rubio-Marín (ed.), *Human Rights and Immigration* (2014), 212.

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expressly to stateless vessels at the time of drafting, the vague drafting of Article 8(7) arguably left space for the states parties to expand the meaning of the term 'appropriate' measures through subsequent practice.

5. Subsequent practice to the Migrant Smuggling Protocol

Over the last 20 years, the Western destination states, most notably the EU member states, have relied on the ambiguity in the Migrant Smuggling Protocol to claim extraterritorial enforcement powers over stateless smuggling vessels on the high seas, and have substantiated these claims through enforcement action, law reform and inter-state agreements.[121] Subsequent practice is an accepted tool of treaty interpretation that can shed light on the original intention of the drafters or evidence their evolving intentions.[122] Given international law recognizes this interpretive tool, this article argues that the recent EU anti-smuggling operations, most notably Operation *Sophia*, have reinterpreted the ambiguous term 'appropriate measures' in the Migrant Smuggling Protocol as permitting the states parties to exercise enforcement jurisdiction over stateless smuggling vessels at sea.

Subsequent practice is a well-established tool of treaty interpretation, codified in Article 31(3)(b) of the Vienna Convention of the Law of Treaties, which consists of conduct by one or more parties in the application of the treaty, after its conclusion, which clarifies the meaning of a treaty.[123] While subsequent practice can illuminate the original intentions of the drafters, it can also evidence the evolving intentions of the parties to a treaty over time.[124] In this way, subsequent practice allows treaty rules and obligations to adapt to changing technological, social and normative conditions, as well as redressing deficiencies in the treaty text or ineffective compromises made by the drafters.[125] Subsequent practice is standardly accepted as interpreting and adjusting a treaty, although scholars debate whether it can legitimately amend or modify the original meaning.[126] In any event, subsequent practice by the states parties to the Migrant Smuggling Protocol can clarify or adjust the meaning of the term 'appropriate measures' in Article 8(7).

Vague treaty drafting allows for even greater interpretative flexibility, as the line between interpretation of a previously unclear term and reinterpretation contrary to the original meaning of the drafters is blurred.[127] As noted above, the *travaux préparatoires* do not indicate what the drafters

[121]See, e.g., USA Navy, *The Commander's Handbook on the Law of Naval Operations* (2007), at 3–12; Commission of the European Communities, Study on the International Law Instruments in Relation to Illegal Immigration by Sea, SEC (2007) 691 (2007), para. 2.2.2; *Maritime Powers Act 2013* (Cth) [Australia], ss. 17, 21(1); *Policing and Crime Act 2017* [United Kingdom], ss. 84, 96; Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, Arts. 7(1) and (11).

[122]I. Buga, *Modification of Treaties by Subsequent Practice* (2018), at 4.

[123]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b): 'There shall be taken into account . . . any subsequent practice in the application of the treaty which establishes the intention of the parties regarding its interpretation.'

[124]ILC Draft Articles on the Law of Treaties with Commentaries, 1966 YILC, *vol. II*, at 222; C. McLachlan, 'The Evolution of Treaty Obligations in International Law', in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013), 69.

[125]J. Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation of Time and Their Diverse Consequences', (2010) 9 *Law and Practice of International Courts and Tribunals* 443, at 461; I. Buga, 'Subsequent Practice and Treaty Modification', in M. Bowman and D. Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018), 363, at 364.

[126]ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, 2018 YILC, vol. II, conclusion 7.

[127]See Draft Articles on the Law of Treaties with Commentaries, *supra* note 124, at 236; Arato, *supra* note 125, at 457.

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of the Migrant Smuggling Protocol meant by the term 'appropriate measures'.[128] However, the drafters used the same term in Article 8(2) of the Migrant Smuggling Protocol to signify any coercive actions authorized by the flag state. While the repetition of the same term does not necessarily entail that the drafters intended to grant a right of action over stateless vessels, it does indicate that seizure falls within the ordinary meaning of the term. Furthermore, this interpretation accords with the object and purpose of the Protocol, which is to 'prevent and combat the smuggling of migrants land, sea and air' and to 'deny safe havens to those who engage in transnational crime'.[129] Given that no flag state has jurisdiction over stateless vessels, an interpretation of 'appropriate measures' as permitting seizure would guard against impunity for smugglers.

The EU legislator has repeatedly claimed that Article 8(7) of the Migrant Smuggling Protocol entitles the states parties to take enforcement action against stateless smuggling vessels on the high seas, and substantiated this claim through legislation and enforcement action.[130] The 2014 Frontex Regulation, and the 2010 Council Decision before it, assert that the member states are entitled to seize stateless smuggling vessels on the high seas, and apprehend any person on board the vessel. According to the 2014 Frontex Regulation, the Migrant Smuggling Protocol permits EU member states to conduct the following actions: to seize stateless vessels and apprehend any persons on board; to order a stateless vessels to modify its course towards a destination outside the territorial waters or the contiguous zone; to escort the stateless vessels onto another navigational course; and to conduct the stateless vessels to a third country and hand over the persons on board to the authorities of that state.[131]

Frontex missions subsequently relied on this EU legislation to stop and seize stateless smuggling 'motherships' on the high seas, and arrest the smugglers on board.[132] Since its establishment in 2004, the powers and competencies of the EU Border and Coast Guard Agency (Frontex) has expanded dramatically, such that Frontex now holds the largest budget of all EU agencies.[133] Frontex currently supports various member states with border control, surveillance and search and rescue in the Mediterranean Sea, with Operation Poseidon covering the Greek sea borders with Turkey, Operations Minerva and Indalo assisting Spain in the Western Mediterranean, and Operation Themis assisting Italy in the Central Mediterranean.[134] Over the last few years, these operations have enhanced their law enforcement focus, with an emphasis on 'combating of cross-border crime'.[135] To this end, these operations frequently intercept suspected stateless smuggling vessels on the high seas, and transfer detained smugglers to the co-ordinating member states.[136]

Furthermore, recent Italian and Spanish case law has upheld the claim that the Migrant Smuggling Protocol permits Frontex-operated warships to seize stateless smuggling vessels on

[128]See UNODC, 'Travaux Préparatoires', *supra* note 72, at 495–506; UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', *supra* note 72, at 386–8; UNODC, 'Model Law against the Smuggling of Migrants', *supra* note 72, at 83–92.

[129]See UNTOC, *supra* note 75, Preamble; Migrant Smuggling Protocol, *supra* note 10, Preamble.

[130]See Regulation (EU) No 656/2014, *supra* note 121; Council Decision of 26 April 2010 Supplementing the Schengen Borders Code as Regards the Surveillance of the Sea External Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, Annex.

[131]See Regulation (EU) No 656/2014, *supra* note 121, Art. 7(1) and (11).

[132]See ANSA, *supra* note 13.

[133]M. Gkliati and J. Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in Frontex Joint Operations', (2022) 17 *Utrecht Law Review* 57, at 60.

[134]Frontex Operations, 'Main Operations', *FRONTEX*, available at frontex.europa.eu/we-support/main-operations/operation-poseidon-greece-.

[135]Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, Art. 1; S. Hartwig, 'Frontex: From Coordinating Controls to Combating Crime', (2020) 2 EUCRIM 134, at 136.

[136]See, e.g., ARCI Porco Rosso, Alarm Phone, *supra* note 25.

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the high seas, and transfer suspected smugglers to the participating EU member states for trial.[137] Most notably, the Italian Court of Cassation found that the seizure of an unflagged and unregistered smuggling vessel on the high seas within the Mediterranean Sea, and the transfer of its crew to Italy, fell within the scope of Article 8(7) of the Migrant Smuggling Protocol.[138] According to the Court, Article 110(1)(d) of UNLCOS did not provide Italy with the sufficient legal basis to assert criminal jurisdiction over the alleged migrant smuggler, Egyptian national Harabi Hani.[139] Yet, the Court reasoned, the term 'appropriate measures' in the Migrant Smuggling Protocol did permit the boarding state, in this case Italy, to take coercive action against smuggling vessels and any suspects aboard.[140]

The recent EUNAVFOR MED Operation *Sophia* has further buttressed this interpretation of Article 8(7) of the Migrant Smuggling Protocol by seizing and destroying hundreds of stateless vessels found on the high seas. Between 2015 and 2017, Operation *Sophia* seized and destroyed 452 smuggling boats, and apprehended over 140 smugglers.[141] Migrant Smugglers adapted to 'people being detained and the boats being apprehended' by Operation *Sophia*, by sending out the migrants and asylum seekers alone on inflatable dinghies onto the high seas in the anticipation of rescue.[142] This meant that, in the end, the majority of seizures and arrests took place under international search and rescue powers, with Operation *Sophia* rescuing an estimated 45,000 migrants and asylum seekers during its operating time from June 2015 to March 2020.[143] By 2018, the Operation began to fall apart.[144] Italy threatened to block Operation *Sophia*'s naval assets from off-loading rescued migrants in its ports, and Germany subsequently suspended the involvement of its ships.[145] However, by this time, the public and multilateral nature of the EU operation had arguably cemented the interpretation of the Migrant Smuggling Protocol as permitting high seas seizure.[146]

[137]EUROJUST, 'Italian Jurisprudence on Illegal Immigrant Smuggling: Asserting Jurisdiction on the High Seas', March 2016, at 8, available at www.eurojust.europa.eu/sites/default/files/assets/eurojust_italian_jurisprudence_illegal_immigrant_smuggling_en.pdf; EUROJUST, 'Spanish Jurisprudence on Illegal Immigrant Smuggling', March 2016, at 8, available at www.eurojust.europa.eu/sites/default/files/assets/eurojust_spanish_jurisprudence_illegal_immigrant_smuggling_2016_en.pdf.

[138]*Harabi Hani Abdal Qadir Saad v. Tribunale di Catania*, Corte di Cassazione (*Sez. I penale*) No 36052 (23 May 2014).

[139]M. Bo, 'In the Matter of Criminal Proceedings Against Hani, Final Appeal Judgment No 36052/2014', (2014) *Oxford Reports on International Law* 1, at 5.

[140]Ibid.

[141]B. Knight, 'Germany Pulls Out of Mediterranean Migrant Mission Sophia', *Deutsche Welle*, 23 January 2019, available at www.dw.com/en/germany-pulls-out-of-mediterranean-migrant-mission-sophia/a-47189097.

[142]See House of Lords, European Union Committee, *supra* note 25, para. 19.

[143]G. Mantini, 'A EU Naval Mission without a Navy: The Paradox of Operation Sophia', (2019) *IAI Commentaries*, 13 May 2019, at 1, available at www.iai.it/en/pubblicazioni/eu-naval-mission-without-navy-paradox-operation-sophia.

[144]A. Jacopo Barigazzi, 'Operation Sophia to Be Closed Down and Replaced: New Libya Naval Mission Will Have a Different Name and Area of Operations', *Politico*, 17 February 2020, available at www.politico.eu/article/operation-sophia-to-be-closed-down-and-replaced; Operation *Sophia* was ultimately closed down following fears that the mission acted as a 'pull-factor' to migrants and disputes over the distribution of rescued migrants and asylum seekers among member states. The replacement mission, Operation *Irini*, focuses on effectively implementing the UN arms embargo on Libya through the use of aerial, satellite, and maritime asserts. While the mission is mandated to carry out inspections of vessels on the high seas off the coast of Libya suspected to be carrying arms or related material to and from Libya in accordance to UN Security Council Resolution 2292 (2016), Operation *Irini* has not performed any search or rescue actions since commencing operation on 31 March 2020: EUNAVFOR MED Operation Irini, 'Mission at a glance', available at www.operationirini.eu/mission-at-a-glance; E. Wallis, 'Irini Mission: One Year, No Migrant Rescues', *InfoMigrants*, 7 April 2021, available at www.infomigrants.net/en/post/31367/irini-mission-one-year-no-migrant-rescues.

[145]See Knight, *supra* note 141.

[146]The United Nations Security Council renewed the authorization to inspect vessels outside Libya's territorial waters on suspicion of Smuggling Migrants for five years in a row: UNSC, Resolution 2312 (2016) Adopted by the Security Council at its 7783rd meeting, on 6 October 2016, UN Doc. S RES/2312/2016 (2016); UNSC, Resolution 2380 (2017) adopted by the Security Council at its 8061st meeting, on 5 October 2017, UN Doc. S/RES/2380/2017 (2017); UNSC, Resolution 2437 (2018) adopted by the Security Council at its 8365th meeting, on 3 October 2018, UN Doc. S/RES/2347/2018 (2018); UNSC, Resolution 2491 (2019) adopted by the Security Council at its 8631st meeting, on 3 October 2019, UN Doc. S/RES/2491/2019 (2019); UNSC,

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Few, if any, states parties have objected to this interpretation of the Migrant Smuggling Protocol, which suggests widespread acceptance of, or acquiescence, to high seas seizure. Subsequent practice in the application of a treaty requires the active practice of at least some states parties to the treaty in question and acquiescence by the other states parties.[147] While only some EU member states participated in Operation *Sophia*, no other states parties have publicly opposed the seizure and destruction of stateless smuggling vessels by EUNAVFOR MED warships. Notably, the Security Council did not expressly confirm this interpretation of the Protocol by calling upon member states to seize stateless smuggling vessels on the high seas, which, had they done so, would have crystalized the term 'appropriate measures' as granting high seas enforcement powers. Yet, at the same time, the Security Council meeting records do not evidence any objections by its member states concerning this interpretation at the time or subsequent to the extension of the mandate.[148] Given the multilateral and public nature of the EU actions, the absence of objections from states parties not participating in Operation *Sophia* suggests that they have tacitly agreed to the interpretation of 'appropriate measures' as permitting seizure powers.[149]

Finally, it should be noted that valid jurisdiction under international law is not sufficient for an exercise of enforcement jurisdiction to be lawful under international law. International law still requires the boarding state party to have validly established prescriptive jurisdiction over high seas migrant smuggling offences in its domestic criminal code before taking enforcement action against stateless smuggling vessels. From an inter-state perspective, international law only requires that states do not interfere in the internal or external affairs of any other state, or breach any other prohibitive rule of international law, when establishing or exercising criminal jurisdiction. However, international human rights law adds another layer of protection for individuals. In particular, the principle of legality prohibits states from taking enforcement action in respect of any act or omission that did not constitute a criminal offence under national or international law at the time it was committed.[150] In regards to high seas migrant smuggling, this means that states may not rely directly on the vague term 'appropriate measures' in Article 8(7) of the Migrant Smuggling Protocol to seize stateless smuggling vessels or arrest suspected smugglers aboard. Instead, any boarding state party needs to first establish prescriptive jurisdiction over the relevant extraterritorial offences and clearly authorize its law enforcement agencies to take high seas action before seizing stateless smuggling vessels on the high seas or in an EEZ.

6. Conclusion

EUNAVFOR MED Operation *Sophia* closed down in March 2020, leaving the question of the mission's legality under international law unanswered. The UN Security Council did not authorize the high seas seizure of stateless vessels, which left the Council of the European Union reliant on existing enforcement powers in the law of the sea. Yet neither customary international law nor UNCLOS provide enforcement jurisdiction over stateless vessels, and the existence of seizure powers in the Migrant Smuggling Protocol remains debateable. While the drafting history of the Migrant Smuggling Protocol does not reveal an intention on behalf of the drafters to provide

Resolution 2546 (2020) adopted by the Security Council at its 8763rd meeting, on 2 October 2020, UN Doc. S/RES/2546/2020 (2020).

[147]See 'Draft Articles on the Law of Treaties with Commentaries', *supra* note 124, at 222, para. 15; M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), at 431.

[148]UN SCOR, 7531st meeting, UN Doc. S/PV.7531 (9 October 2015).

[149]However, it should be borne in mind, when treating silence as acquiescence, that not all states have 'perfect knowledge of state practice' and unlimited resources to counter the state practice of other states, or are aware that the 'failure to respond would have legal consequences': P. Kelly, 'The Twilight of Customary International Law', (2000) 40 *Virginia Journal of International Law* 449, at 453.

[150]1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 9; 1950 European Convention on Human Rights, ETS 5, Art. 5.

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new jurisdictional powers beyond UNCLOS, this article has argued that the ambiguity of Article 8(7) left space for Western destination states to modify the meaning of 'appropriate measures' through state practice.

New maritime threats require flexible interpretation of the law of the sea.[151] UNCLOS provides the legal framework for combatting illicit activities at sea, but the legal rules contained therein do not provide comprehensive enforcement powers against all forms of transnational organized crimes committed at sea. Thus, some level of ambiguity, both in customary rules and treaty drafting, allows for international law to adapt to a constantly changing international environment, whether technological innovations, new social or political norms, or security threats. In the context of migrant smuggling, the EU legislator has repeatedly claimed that the Migrant Smuggling Protocol authorizes high seas enforcement actions against stateless smuggling vessels, and substantiated such claims through enforcement action, law reform and inter-state agreements.[152] Arguably, however, it was only the actions surrounding recent EUNAVFOR MED anti-smuggling mission, Operation *Sophia*, that finally crystalized the meaning of the term 'appropriate measures' as entailing seizure and arrest.

Yet the extraterritorial expansion of coercive state power is not without risks, even when done to combat transnational maritime crime. Over the last twenty years, Western destination states have positioned irregular migration by sea as a security threat in order to justify greater maritime enforcement powers, and relied on this logic of securitization to avoid human rights and refugee protections for boat migrants.[153] While Operation *Sofia* closed down in 2020, EU member states, as well as other Western destination states world-wide, continue to take or facilitate coercive actions against migrants and asylum seekers on the high seas. These ongoing practices highlight the urgent need to clarify the scope of the term 'appropriate measures' in Article 8(7) of the Migrant Smuggling Protocol and to strengthen human rights and asylum protections for people escaping poverty, conflict, and persecution by sea.

[151]See Klein, *supra* note 53, at 327. In recent years, the UN Security Council has highlighted that increasing levels of transnational organized crime committed at sea are undermining global maritime security: UNSC, 'Statement by the President of the Security Council', UN Doc. S/PRST/2021/15 (2021).

[152]See, for example, Council Decision 2015/778, *supra* note 7; Regulation (EU) 656/2014, *supra* note 121.

[153]For a discussion of the 'logic of securitization' in migration control see V. Moreno-Lax, 'The EU Humanitarian Border and Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without Protection" Paradigm', (2018) 56 *Journal of Common Market Studies* 119; see Gkliati and Kilpatrick, *supra* note 133.

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