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# THE CHALLENGES OF ADDRESSING TRANSNATIONAL ORGANIZED MARITIME CRIMES. A REVIEW OF CURRENT LAW AND PRACTICE IN DJIBOUTI

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**ABSTRACT:** The threat of transnational maritime crimes has grown significantly in the past few years, particularly in the Gulf of Aden, due to the ongoing armed conflicts in the Middle East and Africa combined with the concomitant deteriorated diplomatic relations between states in the region. This background context has enabled organized groups to commit their crimes largely with impunity, benefiting from poor international cooperation between states in criminal matters. This article sets out the international legal framework on transnational maritime crimes and the internationally recognized definitions of major maritime crimes. It then takes the Republic of Djibouti as a case example of how the international legal framework has been incorporated into domestic legislation and assesses its enforcement in practice. The article identifies an underlying lack of international cooperation in criminal matters in respect of prosecuting transnational maritime crimes, particularly with regard to mutual legal assistance and extradition not only in respect of Djibouti but also in the Gulf of Aden as a whole. Based also on evidence gathered by one of the authors during a United Nations Office of Drugs and Crime's workshop that took place in the Djibouti Regional Maritime Training Centre in November 2022, the article concludes that, in order to protect the peace and security of the region and implement the UN 2030 Agenda for Sustainable Development, states must enhance cooperation by entering into further bilateral as well as plurilateral agreements on cooperation in criminal matters. More importantly, in order to enhance mutual understanding, trust and the sharing of good practices, it is recommended that a judicial cooperation network in the Gulf of Aden and the Red Sea under the auspices of the United Nations Office of Drugs and Crime Global Maritime Crime Programme be established.

## KEY WORDS:

- Transnational Maritime Crimes
- UNCLOS
- Judicial Co-operation
- Djibouti Code of Conduct
- Mutual Legal Assistance
- UNODC GMCP

## 1. INTRODUCTION

Transnational organized crimes committed at sea pose numerous challenges to society, both locally and at the international level.<sup>1</sup> Generally rooted in poor socioeconomic conditions

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and/or domestic instability,<sup>2</sup> such crimes, including piracy, drug smuggling, and trafficking in persons, result in significant threats to international security and challenge the international legal order. Such crimes negatively impact on local societies in a myriad of ways, for example, an increase in availability of illegal substances to local populations and violence caused by piracy.<sup>3</sup> In addition, transnational crimes in general also ‘undermine the internal sovereignty of states by providing an alternative system of authority.’<sup>4</sup> In his ground breaking monograph on *Transnational Criminal Law*, Neil Boister observed that ‘[t]ransnational crimes harm a range of different private and public interests including security, human rights, social interests, religious beliefs and morality,’<sup>5</sup> adding that the ‘most obvious harm is to individuals and to the fabric of societies in which they live.’<sup>6</sup> Highlighting the significant negative impact of transnational organized crimes on various spheres of society as early as 2004, the report of the High Level Panel on Threats, Challenges and Change thus described transnational organized crime as ‘a menace to States and society, eroding human security.’<sup>7</sup>

While there is no universally accepted definition of transnational maritime crime,<sup>8</sup> it is generally recognized that acts of piracy, hostage-taking, terrorism, illicit trafficking in narcotic drugs and psychotropic substances, trafficking in persons, and the smuggling of migrants which

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objective was to initiate the establishment of a regional prosecutors’ network composed of senior legal officials from the participating countries that would play a significant role in combating transnational organized crime in the Red Sea region. The training sessions were developed based on the legal and gap analysis conducted during phase one of the UNODC GMCP intended for the support of regional maritime law enforcement authorities, which was compiled in the 120-page report titled, ‘Maritime Crimes and the Relevant Legal and Judicial Structure in Djibouti, Eritrea, Somalia, Sudan and Yemen’ authored by me with the assistance of a group of academics and practitioners. The report identified important gaps in the implementation of international standards in combating maritime crimes as well as a space to improve judicial cooperation in criminal matters, thus the workshop adopted a top-bottom approach in familiarizing the participants with international and regional instruments in the field of maritime crimes, as well as tools and best practices in mutual legal assistance and extradition. According to the participants, the workshop was a unique opportunity to share their challenges in applying international standards while combating and adjudicating maritime crime in their respective countries.

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<sup>1</sup> The High-Level Panel on Threats, Challenges and Change identified transnational organized crime as one of six groups of threats that the international community must face in the 21st century in its 2004 report, ‘A More Secured World: Our Shared Responsibility’ UN Doc A/ 59/ 565. See also Alexander Proelss and Tobias Hofmann, ‘Law of the Sea and Transnational Organised Crime’ in Pierre Hauck & Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016) 422. The Panel was created in 2003 to analyze threats and challenges to international peace and security, and to recommend action based on this analysis.

<sup>2</sup> See UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (3rd edn, United Nations 2020) 169 (UNODC *Maritime Crime*). See also Neil Boister, *An Introduction to Transnational Criminal Law* (2nd ed, OUP 2018) sec 1.2.2; UNODC, ‘Crime and instability: Case studies of transnational threats’ (2010) 12 Trends on Organized Crime 231; Cyrille Fijnaut, ‘Transnational Crime and the Role of the United Nations in its Containment through International Cooperation: A Challenge for the 21st Century’ (2000) 8(2) Eur J Crime Cr L Crim J 119, 123.

<sup>3</sup> See Carina Bruwer, ‘Transnational Organised Crime at Sea as a Threat to the Sustainable Development Goals: Taking Direction from Piracy and Counter-piracy in the Western Indian Ocean’ (2019) 28(3/4) African Security Law 172.

<sup>4</sup> Boister (n 2) 9. Boister provides a real example of the 2010 violence in Kingston, Jamaica, precipitated by the attempt to capture wanted drug trafficker Christopher ‘Dudus’ Coke in order to extradite him to the US.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> High-Level Panel on Threats, Challenges and Change (n 1), para 165.

<sup>8</sup> See Boister (n 2) 3–4.

happen via the sea all constitute modern manifestations of maritime criminality.<sup>9</sup> Transnational crimes committed at sea, described as ‘blue crimes,’ therefore consist of an array of crimes, which vary significantly in nature and threat level. Given the variety of crimes and the inherent difficulties in addressing any crime which crosses boundaries, it is clear that in order to adequately deal with such crimes the relevant legal framework must be comprehensive and cohesive, and must be effectively implemented.<sup>10</sup> However, the concept of transnational organized maritime crime is ‘uncertain and contested’ and,<sup>11</sup> unfortunately, the extant legal framework is complex and unwieldy, and ineffectively implemented. In addition, the lack of certainty with regard to the scope and nature of transnational maritime crimes, and transnational crimes in general, has left a gap in the research and academic commentary on this issue,<sup>12</sup> which has ‘stymied a concerted international policy response.’<sup>13</sup>

While several international legal instruments can apply to situations of transnational maritime crime, including, for example, the United Nations Convention on Transnational Organized Crime (UNTOC),<sup>14</sup> and its protocols,<sup>15</sup> and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (SUA Convention), and its protocols,<sup>16</sup> the overarching instrument which seeks to regulate maritime activity including crimes committed in a maritime context is the United Nations Convention on the Law of the Sea (UNCLOS),<sup>17</sup> which aims to systemize and codify the standards and principles of international maritime law.<sup>18</sup>

This article seeks to address the effectiveness of the extant legal regime in combatting transnational crimes at sea by analyzing the operation of these instruments. Section 2 seeks to

<sup>9</sup> Christian Bueger and Timothy Edmunds, ‘Blue crime: Conceptualising Transnational Organised Crime at Sea’ (2020) 119 *Marine Policy* (104067) <<https://doi.org/10.1016/j.marpol.2020.104067>> accessed 2 February 2023.

<sup>10</sup> See David Mugridge, ‘Malaise or Farce – The International Failure of Maritime Security’ (2009) 25(3) *Defense & Security Analysis* 305; Eve de Coning and Gunnar Stolsvik, ‘Current Legal Developments. United Nations Office on Drugs and Crime’ (2013) 28 *International Journal of Marine and Coastal Law* (2013) 189.

<sup>11</sup> Bueger and Edmunds (n 9) Abstract.

<sup>12</sup> Fijnaut (n 2) 121.

<sup>13</sup> Bueger and Edmunds (n 9) Abstract.

<sup>14</sup> (signed 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

<sup>15</sup> There are three Protocols to the UNTOC: Protocol to Prevent, Suppress, Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (signed 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Human Trafficking Protocol); Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (signed 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Migrant Smuggling Protocol); Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (signed 31 May 2001, entered into force 3 June 2005) 2326 UNTS 208 (Firearms Protocol). States must become parties to the Convention itself before they can become parties to any of the Protocols.

<sup>16</sup> 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 222 (SUA Convention); 1988 Protocol to the Convention of 10 March 1988 for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304 (1988 SUA Protocol); 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/21 (2005 SUA Protocol); 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/22.

<sup>17</sup> (signed 10 December 1982, entered into force 1994) 1833 UNTS 3.

<sup>18</sup> See International Maritime Association, ‘United Nations Convention on the Law of the Sea’ <<https://www.imo.org/en/OurWork/Legal/Pages/UnitedNationsConventionOnTheLawOfTheSea.aspx#:~:text=The%20United%20Nations%20Convention%20on,the%20oceans%20and%20their%20resources>> accessed 18 October 2022.

identify how the concept of transnational maritime crimes has been defined and discussed in the literature. Section 3 discusses how such crimes are dealt with under the international law regime. The transnational crimes focused on are piracy, kidnapping, and hostage-taking at sea, maritime terrorism, illicit trafficking in narcotic drugs and psychotropic substances, and smuggling of migrants by sea. These crimes are highlighted as the UNCLOS either specifically mentions them or applies to them in some way. Section 4 then provides an insight into how the Republic of Djibouti deals with transnational crimes and its efforts to suppress these offences in a region impacted by various international security issues including piracy and armed robbery.<sup>19</sup> The article takes a top-down approach to the question of regulation of transnational maritime crime by discussing how Djibouti has implemented international standards on transnational maritime crimes and the challenges that have arisen in suppressing and adjudicating these crimes. As Boister observes ‘transnational crime can only be suppressed by the co-operation of states and that the failure of states to do so provides an opportunity to transnational criminals to use the barriers of sovereignty to protect themselves and to operate with impunity.’<sup>20</sup> Extrapolating from the case study on Djibouti, the paper concludes with observations and recommendations for enhancing international cooperation in suppressing maritime crimes in the Gulf of Aden.

## 2. INTERNATIONAL REGULATION OF MARITIME CRIMES

### 2.1 Transnational Organized Crime

The focus of this article is on transnational crimes committed at sea and on how states are expected to deal with such crimes under the UNCLOS and other legal instruments. However, as mentioned above, the concept of transnational maritime crimes is unclear, and a universally accepted definition does not exist.<sup>21</sup> The lack of such a definition can impact on the way in which such crimes are dealt with and,<sup>22</sup> to date, this has negatively impacted on the development of a cohesive and effective international response.<sup>23</sup> Academic commentary underscores the need for additional research, especially as the UN has recently (2019) identified such crimes as a threat to international peace and security.<sup>24</sup> In addition, individual forms of maritime crimes have also been declared as threats to international peace and security.<sup>25</sup>

Before looking at transnational crimes in a maritime context, the more general concept of a transnational crime must first be addressed. The term ‘transnational crime’ was first used by the UN Crime Prevention and Criminal Justice Branch at the Fifth UN Congress on Crime Prevention and the Treatment of Offenders in 1975 ‘in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or

<sup>19</sup> As highlighted earlier, this article is based on research for a UNODC report undertaken by one of the article’s authors, the aim of which was to enhance the legal finish of maritime crimes in six of the Gulf of Aden’s states, namely Djibouti, Eritrea, Ethiopia, Puntland, Somaliland, and Yemen.

<sup>20</sup> Boister (n 2) 12.

<sup>21</sup> See Fijnaut (n 2). See also Pierre Hauck, ‘Transnational Organised Crime and International Criminal Law’ in Pierre Hauck & Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016) 448.

<sup>22</sup> Fijnaut (n 2) 119.

<sup>23</sup> Bueger and Edmunds (n 9) 1.

<sup>24</sup> United Nations. ‘High seas crime becoming more sophisticated, endangering lives, international security, speakers tell Council’ in: 8457th (AM) Meeting of the Security Council SC/13691, 2019 <<https://press.un.org/en/2019/sc13691.doc.htm>> accessed 24 October 2022.

<sup>25</sup> See, for example, Anton A Varfolomeev, ‘Piracy as a Threat to International Peace and Security’ National Research University Working Paper Series: International Relations WP BRP 14/IR/2015.

having an impact on another country.<sup>26</sup> This is, clearly, a broad approach to the definition of transnational crimes. This broad approach was replicated in the Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems undertaken in 1976, which defined transnational crimes as ‘offences whose inception, perpetration and/or direct or indirect effects involved more than one country.’<sup>27</sup>

The collective term ‘transnational crime’ covers organized crime, corporate crime, professional crime, political crime and others. Boister, Gless, and Jeßberger, use the terms transnational crime, transboundary crime, transborder crime, and extraterritorial crime interchangeably as they all consist of crimes that have one or more common elements: (i) actual, or (ii) potential transboundary effects, or (iii) transboundary moral impact.<sup>28</sup> These crimes can be committed by different types of entities, including terrorist groups,<sup>29</sup> criminal groups, and corporate entities, individuals, or a mix,<sup>30</sup> and, therefore, pose a serious challenge to the traditional framework of international law which is state-centric in nature.<sup>31</sup>

The ‘transnational’ element of transnational crimes implies that such crimes are committed across state boundaries. However, Fijnaut, comments that it is ‘extremely important to recognize that the term “transnational crime” is misleading and does no justice to the multiplicity of this type of crime or to its local and/or national dimension.’<sup>32</sup> A further criticism is that ‘transnational implies cross-border activity when in fact not all crimes understood to fall within this category actually cross borders.’<sup>33</sup> An example, given by Boister, is that transboundary drug supply, for example, is dependent on national production.<sup>34</sup> But there is a counterargument that a purely local criminal activity may be a legitimate concern of other states because it supports or creates conditions conducive to transnational criminality and criminal activity in those states.<sup>35</sup>

Proelss and Hofmann propose that the term transnational organized crime applies to ‘acts committed by an organized criminal group in order to obtain a financial or other material benefit, and that it is characterized by a transboundary element.’<sup>36</sup> They also assert that ‘the concept of transnational organized crime is not a priori limited to a few particular crimes’ but rather ‘any crime can principally fall within its scope.’<sup>37</sup> They, therefore, label the concept as ‘evolutionary.’<sup>38</sup> In a similar vein, Fijnaut describes the concept of a transnational crime as a general purpose ‘container’ idea,<sup>39</sup> as it covers a number of different crimes.

In recognition of the increasing occurrence of transnational crimes, the UN adopted the UNTOC and its three protocols, focusing, in turn, on trafficking in persons, smuggling of

<sup>26</sup> Boister (n 2) 4 citing GOW Mueller, ‘Transnational Crime: Definitions and Concepts’ in Phil Williams and Dimitri Vlassis (eds), *Combating Transnational Crime: Concept, Activities, Responses* (Frank Cass, 2001) 13.

<sup>27</sup> ‘Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems’ (1995) UN Doc A/CONF.169/15/Add.1.

<sup>28</sup> Neil Boister, Sabine Gless and Florian Jeßberger, ‘Introduction’ in Neil Boister, Sabine Gless and Florian Jeßberger (eds), *Histories of Transnational Criminal Law* (OUP 2021) 5.

<sup>29</sup> The inclusion of terrorism as a ‘regular’ transnational crime can be regarded as controversial, given that crimes of terrorism usually have a political motivation. However, some activities of terrorist groups may be solely undertaken for financial gain also and so may be regarded as a regular crime. See Pierre Thielbörger, ‘The International Law of the Use of Force and Transnational Organised Crime’ in Pierre Hauck & Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016) 361, 366. See also 1

<sup>30</sup> Fijnaut (n 2) 120.

<sup>31</sup> See Thielbörger (n 29) 361.

<sup>32</sup> Fijnaut (n 2) 120.

<sup>33</sup> Boister (n 2) 4.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.* 5.

<sup>36</sup> Proelss and Hofmann (n 1) 422–3.

<sup>37</sup> *ibid.* 423.

<sup>38</sup> *ibid.*

<sup>39</sup> Fijnaut (n 2) 120.

migrants, and trafficking of firearms, in 2000.<sup>40</sup> The UNTOC utilizes the term ‘transnational organized crime’ but does not provide an explicit definition of such a crime. The UNTOC does, however, define an ‘organized criminal group’ as:

... a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>41</sup>

The UNTOC proceeds to define ‘serious crime’ as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.<sup>42</sup> It also specifies that:

... an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.<sup>43</sup>

In this regard, Bueger and Edmunds note that the UNTOC definition of transnational crime has limitations in respect of crimes committed at sea.<sup>44</sup> First, they point out that the above definition focuses on the commission of a ‘serious crime,’ however, ‘[n]otions of serious crime are highly contingent across societies and dependent on appropriate legalisation and criminalisation processes.’<sup>45</sup> As many states have not enacted legislation in respect of crimes at sea, certain ‘transnational’ crimes according to the UNTOC definition, which are committed at sea, are either not prohibited or not punished. In addition, the UNTOC’s definition is limited as it is state-centric and has a two-state requirement. As Bueger and Edmunds highlight, while transnational organized crimes at sea often occur between states, such crimes:

... also include[s] crimes that take place in or between spaces of specific, partial or shared state authority, including areas of port state and flag state jurisdiction, territorial sea,<sup>46</sup> Contiguous Zones (CZs),<sup>47</sup> Exclusive Economic Zones (EEZs),<sup>48</sup>

<sup>40</sup> UNODC and Protocols (n 14 and 15).

<sup>41</sup> Art 2(a).

<sup>42</sup> Art 2(b).

<sup>43</sup> Art 3(2).

<sup>44</sup> Bueger and Edmunds (n 9) 2.

<sup>45</sup> *ibid.*

<sup>46</sup> The territorial sea is a narrow strip of water extending seaward from the baselines of a coastal State or the baselines of an archipelago State. Coastal States may regulate activities and take enforcement measures in the territorial sea because of concerns about security, communications, the marine environment, resources, smuggling, immigration, health, safety of navigation, and other uses of the area. See John E Noeyes, ‘The Territorial Sea and Contiguous Zone’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2017) 91.

<sup>47</sup> The contiguous zone is a narrow strip of water beyond the territorial sea that may be explicitly declared by the coastal State and comprises an area of limited control, rather than sovereignty or legislative jurisdiction (normally applicable to the territorial sea), usually related to security issues in connection with the State’s customs, fiscal, immigration, or health laws.

<sup>48</sup> EEZ is considered to be part of customary international law and can be traced back to the claims of coastal states to exercise national jurisdiction and control over marine resources in areas adjacent to the territorial sea and beyond. According to UNCLOS art 55, the EEZ is as an area beyond and adjacent to the territorial sea, subject to a ‘specific legal regime.’ The EEZ overlaps the initial maximum of 12 nm beyond the territorial sea

the high seas or international straits, or that are carried out by vessels sailing under multiple, indefinite, or weakly regulated flag state authority.’<sup>49</sup>

They also point out that, in general, transnational maritime crimes have a land-based element. They therefore define transnational maritime crimes as: ‘Serious organised crimes or offences that take place transnationally, on, in or across the maritime domain and cause or have the potential to inflict significant harms.’<sup>50</sup>

As highlighted by Bueger and Edmunds, it is the maritime context that distinguishes maritime transnational from other transnational crimes. In order to ascertain a full picture of how such crimes can be regulated, we must look to the most important instrument in respect of regulation of maritime activities, that is, the UNCLOS.<sup>51</sup>

## 2.2 United Nations Convention on the Law of the Sea: History and Purpose

Numerous international treaties, as well as international customary law principles, regulate activities which occur at sea, but the main instrument of this legal framework is the UNCLOS. Beckman and Sun describe the UNCLOS as being ‘widely viewed as a “constitutive” instrument that provides a legal framework that is being filled in, rounded out and complemented by existing and subsequently enacted international agreements and customary international law.’<sup>52</sup> United Nations Office on Drugs and Crime (UNODC) states that the UNCLOS ‘is considered to be the fundamental expression of the rules governing general relationships and jurisdictions at sea. In effect, it is a “constitution” for the sea.’<sup>53</sup>

The adoption of the UNCLOS is a recent development in the regulation of maritime activities but, as the UNODC comments, ‘[t]he need to have some agreed-upon rules that apply over the sea and in relation to conduct at sea was one of the earliest concerns of international law.’<sup>54</sup> Attempts were made in Ancient Rome to regulate the use of the seas. Later, during the Middle Ages, the Holy Roman Empire made attempts to divide the sea between Portugal and Spain.<sup>55</sup> With the beginnings of the state system and the adoption of the Peace of Westphalia in 1648, the need to regulate maritime activities increased and was addressed by international lawyers such as Grotius and Selden.<sup>56</sup> Grotius’s work *Mare Liberum* was published in 1609,<sup>57</sup> in which he set out the theory of the freedom of the seas, that is, the idea that the sea should be free from state authority because it is not susceptible, by its nature, to occupation.<sup>58</sup> Grotius did, nonetheless, maintain that coastal states should have a limited right to control waters near

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(in the contiguous zone), although the EEZ may extend up to 200 nm from the nearest point of the coastal State’s baselines, depending on State practice and unilateral declaration during this period.

<sup>49</sup> Bueger and Edmunds (n 9) 2.

<sup>50</sup> *ibid* 3.

<sup>51</sup> See (n 17). See also 1988 SUA Convention, 2005 SUA Protocol and UN General Assembly, and 1988 SUA Fixed Platforms Protocol, all at (n 16).

<sup>52</sup> Robert Beckman and Zhen Sun, ‘The Relationship between UNCLOS and IMO Instrument’ (2017) 2 *Asia-Pacific Journal of Ocean Law and Policy* 201, at 201.

<sup>53</sup> UNODC *Maritime Crime* (n 2) 86.

<sup>54</sup> *ibid* 6.

<sup>55</sup> In relation to the history of the regulation of the oceans, see Anil Jai Singh, ‘UNCLOS: Facilitating ocean governance and maritime security’ (2022) 18(1) *Maritime Affairs: Journal of the National Maritime Foundation of India* 72.

<sup>56</sup> UNODC *Maritime Crime* (n 2) 6. See also Singh (n 57).

<sup>57</sup> See Helen Thornton, ‘Hugo Grotius and the Freedom of the Seas’ (2004) 16(2) *International Journal of Maritime History* 17. See also Alison Reppy, ‘The Grotian Doctrine of the Freedom of the Seas Reappraised’ (1950) 19(3) *Fordham L Rev* 243.

<sup>58</sup> The concept of *mare liberum* should be considered in respect of the concept of *mare clausum*, that is, the law of the closed sea, ‘under the sovereignty of a power and restricted in terms of use by other states.’ See Bo Johnson Theutenberg, ‘Mare Clausum et Mare Liberum’ (1984) 37(4) *Arctic* 481, at 481.



their mainland.<sup>59</sup> However, it was not until the 20th century that the first real attempts to codify the international law of the sea began. One important step were the Geneva Conventions on the Law of the Sea, adopted in 1958, which consist of four inter-connected instruments, that is, the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.<sup>60</sup> These instruments ultimately failed to regulate maritime activities for various reasons, including the fact that states could choose which of the four instruments they would sign and ratify, and the fact that the conventions did not specify the limits of territorial seas and fishery zones.<sup>61</sup>

After the adoption of the 1958 conventions, it was recognized that a new regulatory framework was needed and therefore, negotiations on what would become the UNCLOS began in 1973. The drafting was by consensus, which led to long and complex negotiations, with the final text being adopted in 1982.<sup>62</sup> Learning from the faults in the previous Geneva regime, the UNCLOS consists of a single, unified text and so states which ratify it cannot pick and choose which regulatory regime suits them best. The treaty is extensive, with 320 articles and nine annexes. Currently, there are 168 States Parties to the Convention, comprised of 164 members of the UN, in addition to the European Union, the Cook Islands, Niue, and Palestine. However, some powerful states such as the United States, have declined to ratify it and others only implement it in a limited way. For example, Singh comments that China ‘has ratified it but pays scant attention to its provisions when its own interests are affected.’<sup>63</sup> On the other hand, states which have not ratified the Convention may recognize that some of the instrument’s provisions are reflective of customary law, and are, therefore, binding. This is the situation with the United States, which considers most of the UNCLOS’ provisions, with the exception of Part IX, to reflect customary law.<sup>64</sup>

### 2.3 Maritime Zones

The UNCLOS establishes a framework of maritime zones that depict the delimitation of the seas: internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, continental shelf and extended continental shelf, high seas, and the deep seabed. The Convention also describes the rights and obligations of actors that exist in each of these zones and establishes different rules of jurisdiction depending on the zone in which an alleged crime is committed.

In respect of the territorial sea, according to article 2 of the UNCLOS, ‘the sovereignty of a State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’ Following on from this, article 3 provides that ‘every State has the right to establish the

<sup>59</sup> Hugo Grotius, *De Iure Belli ac Pacis*, Lib II, Cap III, Sec XIII.2.

<sup>60</sup> A copy of the texts of these instruments, in addition to an Introductory Note to their history, is available at: <<https://legal.un.org/avl/ha/gclos/gclos.html#:~:text=Under%20article%20311%2C%20paragraph%201,Sea%20of%2029%20April%201958%E2%80%9D>> accessed 2 November 2022.

<sup>61</sup> See UNODC *Maritime Crime* (n 2) 6.

<sup>62</sup> See Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017); Myron H Nordquist, Satya N Nandan, and James Kraska (eds), *UNCLOS 1982 Commentary: Supplementary Documents* (Brill 2012).

<sup>63</sup> Singh (n 55) 75. China recently adopted domestic legislation which many States believed was in violation of UNCLOS. See Maria Oliveira, ‘Safety and Sovereignty: The Legal Controversies Surrounding China’s New Maritime Traffic Safety Law’ (1 October 2021) BJIL <<https://www.berkeleyjournalofinternationallaw.com/post/safety-and-sovereignty-the-legal-controversies-surrounding-china-s-new-maritime-traffic-safety-law>> accessed 9 January 2023.

<sup>64</sup> See: UNCLOS Debate, ‘U.S. already abides by UNCLOS as a matter of customary international law and domestic policy’ <<https://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy>> accessed 9 January 2023.

breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.’

Under the UNCLOS, states may also proclaim a ‘contiguous zone’ beyond the territorial waters, defined in article 33(2) as ‘a narrow belt of water lying seaward of the territorial sea ... [which] may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.’ The UNCLOS thus recognizes the contiguous zone as a maritime area where the coastal state has limited control and, therefore, does not have full sovereignty.<sup>65</sup> However, its authority over foreign vessels can be exercised for the purpose of preventing or pursuing some specific violations that have been committed on the state’s territory or within its territorial sea.

Beyond the above-mentioned 12 and 24 nautical mile (nm) limits in respect of territorial sea and contiguous zone limits, the seas are considered international waters. However, the UNCLOS acknowledges that coastal states can enjoy some exclusive economic rights for exploiting natural resources beyond these limits and recognizes the EEZ, which is ‘an area beyond and adjacent to the territorial sea,’<sup>66</sup> to which a *sui generis* legal regime attaches.<sup>67</sup> Article 57 provides that the EEZ ‘shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.’ Within this zone, the coastal state has the right to exploit, conserve, and manage fisheries and other natural resources, and has jurisdiction with regard to i) the establishment and use of artificial islands, installations, and structures; ii) marine scientific research; iii) the protection and preservation of the marine environment.<sup>68</sup> The coastal state can legislate for a number of issues within the EEZ, including fishing limits. It should be noted that, under article 58 of the UNCLOS High Seas’ rules (including rights of states) are applied equally in the EEZs of coastal states.

The high seas are dealt with in article 86 of the UNCLOS, which provides that the rules on the high seas apply to ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state’ and also provides that these same rules ‘do not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone.’ Article 87 sets out the ‘paramount rule’ of the freedom of the high seas which means,<sup>69</sup> *inter alia*, freedom of navigation, freedom of fishing, freedom of scientific research, freedom to construct islands and other installations, provided that all these freedoms are in line with other UNCLOS provisions and other rules of international law. Of central importance to dealing with transnational maritime crimes is article 92 of the UNCLOS, which provides that a flag state (the state of registration of a vessel) has exclusive jurisdiction over ships on the high seas. The loosely phrased and undefined ‘exclusive flag state jurisdiction’ principle as provided for in article 92 has been subject to criticism by scholars as ‘it has arguably proved to be a red herring for States and academia, in its being raised as a limiting factor to extra-territorial prescription by non-flag states.’<sup>70</sup> Article 94 of the UNCLOS also sets out the duties of flag states. Article 94(1) provides that ‘[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’ Additional detail on this is provided in article 94(2), which states that:

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<sup>65</sup> See Daniele Fabris, ‘Crimes Committed At Sea And Criminal Jurisdiction: Current Issues Of International Law Of The Sea Awaiting The ‘Enrica Lexie’ Decision’ (2017) 9(2) Amsterdam Law Forum 5.

<sup>66</sup> UNCLOS art 55.

<sup>67</sup> See Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989).

<sup>68</sup> UNCLOS arts 60–2.

<sup>69</sup> Fabris (n 65) 17.

<sup>70</sup> Aron N Honniball, ‘The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?’ (2016) 31 *The International Journal of Marine and Coastal Law* 499, at 499.

In particular every State shall: (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

Additional details on the duties of flag states can be gleaned from case law of the International Tribunal on the Law of the Sea.<sup>71</sup>

## 2.4 Innocent Passage and Criminal Jurisdiction of Coastal States

The right of innocent passage is the general rule of the law of the sea and only in certain circumstances and under very specific conditions is it possible to suspend this right. Articles 17–32 of the Convention deal with ‘innocent passage’ on territorial seas. Article 17 provides that ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. Article 19(1) expands on the concept of innocent passage, providing that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Such passage shall take place in conformity with the UNCLOS and with other rules of international law. Article 19(2) provides that certain activities do not constitute innocent passage, including the loading or unloading of any commodity, currency, or person contrary to the fiscal, immigration, sanitary or customs (FISC) laws and regulations of the coastal state, and any other activity not having a direct bearing on passage.

One of the most important provisions in respect of how states can deal with transnational crimes is found in article 27 of the UNCLOS. This provision deals with criminal jurisdiction of coastal states in respect of foreign ships. This is important for the purposes of this article as it sets out the powers of coastal states to deal with activities which can amount to transnational crimes at sea. Article 27(1), which only applies in respect of the territorial sea, states:

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

Article 27(2) provides that paragraph 1 of the present article does not affect the right of the coastal state ‘to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.’ With regard to arrest, article 27(4) provides that ‘[i]n considering whether or in what manner an

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<sup>71</sup> See, for example, Case No 21 Advisory Opinion in response to request from the Sub-Regional Fisheries Commission (SRFC) of the International Tribunal for the Law of the Sea, 2 April 2015, available at <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion\\_published/2015\\_21-advop-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf)> accessed 9 January 2023.

arrest should be made, the local authorities shall have due regard to the interests of navigation,' and article 27(5) provides that the coastal state:

... may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Given the different jurisdictional rules which apply to different zones in the maritime space, it is imperative that states must be clear on the limits of each of these zones to be fully aware of their rights and obligations in respect of transnational crimes. Furthermore, they must enact effective legislation and establish competent bodies to deal with such crimes. In addition, in respect of some crimes committed at sea which fall under the definition of piracy, states can utilize universal jurisdiction and, regarding instances of maritime terrorism, a duty to prosecute or extradite will arise for states which have ratified the SUA. It is therefore necessary that domestic legislation is enacted to facilitate such prosecution.

### 3. DEFINITIONS OF MARITIME CRIMES UNDER THE UNCLOS

#### 3.1 Introduction

The UNCLOS explicitly deals with some transnational maritime crimes. It places an obligation upon all states to cooperate in the suppression of piracy, maritime terrorism, and offences that relate to illicit traffic in narcotic drugs and psychotropic substances by sea, among other offences.

#### 3.2 Piracy

Piracy is one of the crimes with which the UNCLOS deals explicitly and the instrument includes an internationally recognized definition of piracy. In addition, it codifies the law in respect of repression of the crime and also includes an obligation on states to cooperate in respect of repression. It is important to note that piracy is also dealt with under customary international law, which applies to all states whether they have ratified the UNCLOS or not.<sup>72</sup>

Articles 100–7 and article 110 of the UNCLOS deal with piracy, with article 100 placing an obligation on all states to 'cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.' Piracy is then defined in article 101 as:

... any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

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<sup>72</sup> UNODC *Maritime Crime* (n 2) 114.

Universal jurisdiction attaches to the crime of piracy, which is reflected in article 105 of the UNCLOS, which states that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The UNODC comments that '[t]here is no set format or manner in which the article 101 piracy offences must be incorporated into national law.'<sup>73</sup> However, it stresses that '[i]t is vital that any such offence be coherent within the general criminal or penal law scheme of the relevant State so that the offence can be investigated, interpreted and applied readily by the law enforcement agents and within the courts of that State.'<sup>74</sup>

While piracy has been condemned and prohibited for centuries,<sup>75</sup> with the principle of universal jurisdiction being applicable to it, the recent wave of piracy emanating from Somalia has tested the international legal framework on this issue. While incidents of piracy in this region have reduced recently, commentators have attributed this decrease to nation-building rather than to effective enforcement of a legislative framework, including UNCLOS provisions.<sup>76</sup>

### 3.3 Kidnapping and Hostage-Taking at Sea

The UNCLOS does not deal explicitly with the transnational crimes of kidnapping and hostage-taking at sea. However, such crimes can overlap with piracy and thus trigger the application of UNCLOS. In the former case, the law in relation to piracy, discussed above, will apply. When the law on piracy does not apply, other international legal instruments can apply, for example, the 1979 International Convention against the Taking of Hostages,<sup>77</sup> the SUA Convention, or the UNTOC. The terms 'kidnapping' and 'hostage-taking' both refer to the action of taking a person hostage for the purpose of achieving some form of personal or organizational gain and are often used interchangeably. While hostage-taking is defined in the Hostage Taking Convention,<sup>78</sup> and is thus considered an act of terrorism, kidnapping is not defined in international law. However, references to kidnapping are found in national anti-terrorism legislation. The fact that kidnapping and hostage-taking can sometimes fall under the UNCLOS framework on piracy and sometimes fall under a different framework can lead to confusion, and it is suggested that the crime should be clarified under the UNCLOS framework and covered in all of its manifestations. However, even if a criminal or terrorist group, rather than a pirate group, are responsible for kidnapping and/or hostage-taking, states can still have jurisdiction over the crime in certain circumstances, that is, if (a) the offence is committed within their territory (territorial principle); (b) the offence is committed by a national of that

<sup>73</sup> UNODC *Maritime Crime* (n 2) 121.

<sup>74</sup> *ibid.*

<sup>75</sup> See Daud Hassan and Sayed M Hasan, 'Origin, Development and Evolution of Maritime Piracy: A Historical Analysis' (2017) 49 *International Journal of Law, Crime and Justice* 1.

<sup>76</sup> See Tamsin Phillipa Paige, 'The Impact and Effectiveness on UNCLOS on Counter-Piracy Operations' (2017) 22(1) *JC&SL* 97.

<sup>77</sup> (signed 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89 (Hostage Taking Convention).

<sup>78</sup> Art 1.

State Party (active nationality principle); or (c) the offence is committed against their nationals (passive personality principle).<sup>79</sup>

### 3.4 Terrorism at Sea

Terrorism at sea or maritime terrorism is not explicitly mentioned in the UNCLOS. The UNODC comments that ‘maritime terrorism is not a single specific legal offence, but rather is often used as an umbrella term for a range of criminal activity at sea or from the sea.’<sup>80</sup> When acts of terrorism correspond with acts of maritime piracy, the piracy framework of the UNCLOS can apply. In distinguishing between acts of piracy and acts of terrorism, the motivation for the acts is highlighted, with acts of piracy being undertaken for private ends, according to the UNCLOS,<sup>81</sup> and terrorism being regarded as being undertaken for political ends.<sup>82</sup> It should also be noted that there are two other key differentiators between situations of piracy and maritime terrorism. First, piracy involves the two-ship rule, as set out in article 101 of the UNCLOS, quoted above, and, second, maritime terrorism can be committed in national as well as international waters.<sup>83</sup> However, there can be disagreement with regard to the application of these concepts in practice.<sup>84</sup>

In other situations, which do not fall under the concept of maritime piracy, other international instruments can apply to acts of terrorism at sea, including the SUA Convention and its protocols. In addition, some international treaties on terrorism make specific reference to acts of terrorism committed in the maritime domain.<sup>85</sup> Furthermore, some international instruments dealing with the security of materials that can be used by terrorists also refer to a maritime context.<sup>86</sup>

It is submitted that for an effective prosecution of crimes which may be committed both in territorial waters or the high seas, or a combination of both, it is vital that territorial as well as extraterritorial jurisdiction be established.

### 3.5 Illicit Trafficking in Narcotic Drugs and Psychotropic Substances by Sea

Illicit trafficking in narcotic drugs at sea is one of the few transnational crimes that the UNCLOS explicitly addressed in its text. Article 108 requires states parties to cooperate and empowers them to offer assistance in the suppression of drug trafficking, specifically

<sup>79</sup> See UNODC *Maritime Crime* (n 2) 130.

<sup>80</sup> See UNODC *Maritime Crime* (n 2) 134.

<sup>81</sup> UNCLOS art 101.

<sup>82</sup> With regard to the muddying of waters between piracy and maritime terrorism, see Douglas Guilfoyle, ‘Political Motivation and Piracy: What History Doesn’t Teach us about Law’ (*EJIL:TALK!*, 17 June 2013) <<https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>> accessed 10 January 2023.

<sup>83</sup> See Dana Dillon, ‘Maritime Piracy: Defining the Problem’ (2005) 25(1) *The SAIS Review of International Affairs* 155.

<sup>84</sup> See, for example, the *Achille Lauro* incident, where there were disagreements concerning the characterization of seizure of an Italian-flag cruise ship by members of the Palestinian Liberation Front (PLF), during which members of the PLF held the ship’s crew and passengers hostage, threatened to kill passengers, and threatened to blow up the ship. They also threw one passenger overboard. There was disagreement with respect to the characterization of the incident as piracy. See, for example, Malvina Halberstam, ‘Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety’ (1988) 82(2) *AJIL* 269.

<sup>85</sup> For example, 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (signed 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 art 3(1)(a) requires States to establish jurisdiction over offences, as set out in art 2 of the Convention, when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State.

<sup>86</sup> See, for example, 1980 Convention on the Physical Protection of Nuclear Material (signed 3 March 1980, entered into force 8 February 1987), 1456 UNTS 101 art 3.

addressing other-state flagged vessels. This provision is supplemented by other international rules, particularly the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention), some of whose provisions deal with the maritime context.<sup>87</sup> The UNODC comments that '[t]he requirement of cooperation laid down in article 108, when combined with the near-universal acceptance of the 1988 Convention, signals that States consider countering illicit traffic in drugs by sea to be a matter of significant concern.'<sup>88</sup> Article 2 of the instrument provides that the purpose of the Convention is to address the international dimension of the illicit traffic. However, as highlighted by Boister, this provision also asserts state sovereignty and territorial inviolability. He comments that:

The latter provision reveals tensions between states where drugs are produced and those where they are consumed about which states bears most responsibility for the problem, and in particular the fears of the former that the latter would use the Convention as an excuse to police drugs within their territories without their consent.<sup>89</sup>

Parties to the Vienna Convention are required to: (a) Criminalize drug trafficking;<sup>90</sup> (b) Take measures to ensure that they have jurisdiction over their flag vessels in drug trafficking;<sup>91</sup> and (c) Co-operate with other parties to suppress illicit traffic by sea.<sup>92</sup> There seems to be little consensus on coastal states' authority to stop and board, and take enforcement action against a suspected drug trafficking vessel flagged by another state in the absence of that state's consent while that vessel claims to be exercising the right of innocent passage, thus limiting the effectiveness of the treaty.<sup>93</sup> There is also a lack of consensus with regard to the extent to which a coastal state may prevent a potential breach of FISC laws in its contiguous zone.<sup>94</sup> Given the lack of clarity on these issues, a lot of discretion is left up to states with regard to dealing with this transnational crime, which can lead to inconsistent practice, which is far from ideal.

Supporting both the UNCLOS and the Vienna Convention, the UNTOC also covers the illicit trafficking in drugs and the 1961 Single Convention on Narcotic Drugs,<sup>95</sup> the 1972 Protocol thereto,<sup>96</sup> as well as the 1971 Convention on Psychotropic Substances, all cover aspects of the sale of narcotics.<sup>97</sup>

### 3.6 Smuggling of Migrants by Sea

The UNCLOS does not explicitly address the crime of migrant smuggling. However, according to the UNODC:

... through its expression of the rules governing relationships and jurisdiction at sea, UNCLOS provides the essential legal background for the application of the primary legal instrument related to the smuggling of migrants by sea: the Protocol

<sup>87</sup> (signed 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

<sup>88</sup> UNODC *Maritime Crime* (n 2) 148.

<sup>89</sup> Boister (n 2) 92. See also Neil Boister, 'Waltzing on the Vienna Consensus or Drug Control? Tensions in the International System for the Control of Drugs' (2016) 29(2) *Leiden Journal of International Law* 389.

<sup>90</sup> See Article 3.

<sup>91</sup> See Article 4.

<sup>92</sup> See Article 17.

<sup>93</sup> See UNODC *Maritime Crime* (n 2) 146.

<sup>94</sup> *ibid.*

<sup>95</sup> (signed 30 March 1961, entered into force 13 December 1964) 520 UNTS 151.

<sup>96</sup> (signed 25 March 1972, entered into force 8 August 1975) 976 UNTS 3.

<sup>97</sup> (signed 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (the Smuggling of Migrants Protocol).<sup>98</sup>

This is the case because the UNCLOS ‘prescribes which actions can be taken by States in which maritime zone and therefore lays the jurisdictional foundation for the maritime interdiction of migrant smuggling activities at sea.’<sup>99</sup> It should be noted that the smuggling of migrants by sea is not generally considered to cover slave trafficking or trade in slaves. This activity is included in the UNCLOS article 110, which permits the right of visit without flag state consent. Rescue operations in respect of migrants at sea are governed by the UNCLOS, as well as the International Convention on Maritime Search and Rescue of 1979 (SAR Convention),<sup>100</sup> and the International Convention for the Safety of Life at Sea of 1974 (SOLAS Convention).<sup>101</sup>

### 3.7 Enforcement Rights

The UNCLOS provides states with a number of enforcement rights. Of particular importance are article 110 and article 111. Article 110 codifies the ‘right of visit’ on the high seas, and ‘represents one attempt to address the tension between the principles of freedom of navigation and exclusive flag state jurisdiction, on the one hand, and the common interest in ensuring effective enforcement of laws against certain serious offenses on the other.’<sup>102</sup> The right of visit allows for a minimal interference with a vessel’s navigation rights in the interests of effective law enforcement. While not all illegal activities are serious enough to justify interference with a vessel’s navigation on the high seas, article 110 allows for the right of visit in respect of piracy and the slave trade. The right of visit has been implemented in respect of acts of piracy off the coast of Somalia.<sup>103</sup> Allen comments that ‘[n]ow, as maritime trafficking in drugs, weapons and persons become more common and widespread, the right of visit will be put to new uses.’<sup>104</sup>

Also in respect of enforcement, article 111 of the UNCLOS codifies the right of hot pursuit.<sup>105</sup> This right recognizes that a vessel, if it has committed a violation of the laws of a foreign state while in that state’s sovereign or territorial waters, can be pursued onto the high seas and can be seized. Hot pursuit can begin when the foreign ship ‘is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.’<sup>106</sup> The right of hot pursuit, therefore, is an exception to the principle of the freedom of navigation on the high seas and to the principle that a ship is only subject to the sovereignty of the state whose flag it flies. As Randall highlights, ‘there has been only a limited

<sup>98</sup> UNODC *Maritime Crime* (n 2) 158.

<sup>99</sup> *ibid.*

<sup>100</sup> (signed 27 April 1979, entered into force 22 June 1985) 1403 UNTS.

<sup>101</sup> (signed 1 November 1974, entered into force 1 July 2004) 1184 UNTS 3.

<sup>102</sup> Craig H Allen, ‘The Peacetime Right of Approach and Visit and Effective Security Council Sanctions Enforcement at Sea’ (2019) 95 *International Law Studies* 400, 414.

<sup>103</sup> Tullio Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’, 20(2) *EJIL* (2019) 399–414.

<sup>104</sup> Craig Allen, ‘The Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices’ (1989) 20(4) *Ocean Dev & Intl L* 309, 414–5.

<sup>105</sup> Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland UL Rev* 194.

<sup>106</sup> UNCLOS art 111. This article also provides: ‘It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.’



expansion of the right since its initial formulation well over a century ago when the principles of freedom of navigation and exclusive flag state jurisdiction were of paramount importance.<sup>107</sup> The right of hot pursuit ends when the escaping vessel enters the territorial waters of its flag state or those of a third state.<sup>108</sup> A vessel that pursues a fleeing vessel into another state's territorial waters has traditionally been considered to be in violation of that state's sovereignty.<sup>109</sup> Therefore, 'the right of hot pursuit is seen as a pragmatic balance between the coastal state's interest in enforcing its laws and the interests of the international community in the freedom of the oceans and the integrity of territorial jurisdiction.'<sup>110</sup> This right has been criticized as being outdated, and in need of amendment, especially with advancements in modern technology. For example, Allen states:

Unfortunately, aspects of the traditional doctrine of hot pursuit are largely founded on assumptions better suited to the era of local fisheries, three-mile territorial seas, and observation by long glass than to the current era characterized by distant-water fleets of factory trawlers, 200-mile exclusive economic zones, and observation by radar, aerial photography, underwater sensors, and satellites. The traditional doctrine contains procedural requirements that might be invoked to limit or preclude the use of these essential technologies.<sup>111</sup>

In a similar vein, Randall states that the requirements set out in article 111 of the UNCLOS 'are too restrictive if they are not given a liberal interpretation or allowed to develop and evolve for the modern context.'<sup>112</sup> However, he suggests that states have interpreted the provision liberally in their practice, which facilitates them in attempting to deal with transnational maritime crimes.

### **3.8 Other Relevant International Instruments Complementing the UNCLOS on Transnational Organized Crimes at Sea**

As can be seen from the above discussion, the UNCLOS supplements and works in tandem with other international legal instruments in the sphere of transnational crimes. In addition, the UNCLOS provides that other international law provisions apply to activities at sea in conjunction with its own provisions. As mentioned above, one important instrument in relation to transnational crimes at sea is the SUA Convention. This is mainly focused on certain types of dangers to ships and navigation and establishes an 'extradite or prosecute' regime for offenders apprehended by those states which had ratified it.<sup>113</sup> The 2005 SUA Protocol criminalizes the transport of terrorists and biological, chemical, and nuclear weapons, among other things. The 2005 SUA Protocol also facilitates cooperation between states and provides a comprehensive framework for boarding suspect vessels. It is important to note, therefore, that in order to adequately address transnational crimes at sea, not only must the UNCLOS be ratified but so too must other international instruments which seek to regulate transnational maritime crimes. However, it is implementation of international rules, rather than mere ratification of international treaties, which is paramount.

The UNODC comments that effective domestic incorporation of international treaties 'allows that State to give its organs – such as maritime law enforcement officials, prosecutors

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<sup>107</sup> Walker (n 105) 194.

<sup>108</sup> UNCLOS art 111(3).

<sup>109</sup> See DP O'Connell, *The International Law of the Sea* (vol 2, OUP 1982–1984), 1077.

<sup>110</sup> Walker (n 105) 197.

<sup>111</sup> Allen (n 104) 310.

<sup>112</sup> Walker (n 105) 199.

<sup>113</sup> SUA Convention arts 6–7.

and judges – the power and jurisdiction to do the things the State has agreed (with other States) that it can or will do.’<sup>114</sup> When deciding on how best to give expression to international rules on transnational crimes at sea in domestic law, the UNODC highlights some best practices. It states that domestic laws must (a) ‘validly assert its jurisdiction over specific activities or conduct in the specific maritime zone’; (b) ‘give its maritime law enforcement agents the necessary powers to assert that jurisdiction, such as laws regarding boarding, detention, arrest, search and seizure at sea;’ and (c):

... allow its courts and other actors in the criminal justice system to deal with such cases, even if they fall outside of the traditional limits of its territorial jurisdiction (which includes internal waters, territorial sea and archipelagic waters), by ensuring that a State’s relevant domestic laws have extraterritorial application.<sup>115</sup>

Domestic law enforcement agencies which have responsibility for the regulation of activities at sea must be aware of the domestic laws states have adopted implementing international law which applies (a) within their state’s maritime zones; (b) to people and vessels of their state; and (c) to vessels without nationality in some circumstances. This knowledge is needed by law enforcement agencies ‘so as to enable their State to engage in maritime law enforcement and prosecutions in relation to breaches of those laws.’<sup>116</sup>

It can be seen from the UNCLOS provisions discussed above that states have a number of rights which they can exercise in an attempt to combat transnational crimes at sea. However, it is also clear from this discussion that there is a lot of discretion left up to individual states in implementing the UNCLOS. States must adopt effective domestic legislation and set up efficient and well-functioning law enforcement and judicial bodies to give adequate expression to the principles set out in the UNCLOS and other international treaties. While the fact that the UNCLOS was drafted by consensus has advantages, it also caused some vague, undefined, and/or ambiguous concepts to be included in the final text, when states could not agree on their meaning or definition. This constructive ambiguity means that states may interpret provisions differently, depending on context and situation.<sup>117</sup>

The discussion above provides an overview of the law on transnational maritime crimes and illustrates the importance of states adopting legislation in respect of their jurisdiction and the need for international cooperation in respect of maritime crimes. We now attempt to analyze how one state, which has been very negatively impacted by transnational maritime crimes (Djibouti) has dealt with the international legal provisions in respect of such crimes and how these are reflected in its national laws and practice.

## 4. CASE STUDY: DJIBOUTI

### 4.1 Introduction

This section examines the challenges of, and response to, maritime crimes in the context of the Republic of Djibouti, located in the Horn of Africa. It lays out the maritime space of the country, its judicial system/structure relevant to maritime criminal law, as well as a legal and gap analysis of respective legislations pertaining to extradition, transfers, and handovers; and

<sup>114</sup> UNODC *Maritime Crime* (n 2) 5.

<sup>115</sup> *ibid* 52.

<sup>116</sup> *ibid* 2.

<sup>117</sup> *ibid* 6.

core maritime crimes, including applicable international law. It further considers capacity building, cooperation in criminal matters and human rights implications where relevant. Our discussion considers piracy and armed robbery; maritime terrorism; illicit trafficking in narcotic drugs and psychotropic substances; trafficking in persons; and the smuggling of migrants.

As noted above, information on Djibouti was gathered as part of a larger project and report undertaken by one of the authors for the UNODC Global Maritime Crime Programme.<sup>118</sup> The report also included an investigation of Eritrea, Ethiopia, Sudan, Somaliland, Puntland, and Yemen. However, information on significant issues covered in this article was not publicly available in the latter states and so they were excluded from this discussion. The authors have been unable to obtain any case law or relevant statistics to prosecutions of maritime crimes by the Djiboutian authorities as it does not currently have any publicly accessible databases on prosecutions, extraditions, sentencing, or human rights concerns raised in proceedings dealing with maritime crime.

## 4.2 Djibouti's Maritime Space

Djibouti is located in the Horn of Africa on the western Indian Ocean and has direct access to the strategic Bab-el-Mandeb Strait which controls southern access to the Red Sea and the Suez Canal. The Bab-el-Mandab Strait is known to be one of the busiest commercial channels in the world with over 100 ships per day passing through the recently expanded Suez Canal.<sup>119</sup> Djibouti claims a 12 nm territorial sea, a 24 nm contiguous zone and a 200 nm EEZ, which extends into strategic sea-lines of communication.<sup>120</sup> Djibouti has challenged the geographical coordinates claimed by Somalia as its EEZ, claiming that they include waters under the jurisdiction of Djibouti.<sup>121</sup> It also has a long-standing territorial and maritime border dispute with Eritrea.

## 4.3 Djibouti's Judicial System / Structure for Maritime Criminal Law

It is the Djiboutian National Navy that has jurisdiction over maritime crimes (and offences).<sup>122</sup> Responsible for enforcing Djiboutian and international law,<sup>123</sup> the Navy is directed by the Public Prosecutor for legal matters at sea.<sup>124</sup> However, before a case of piracy (among other maritime crimes and offences detailed in Law No. 212/AN/82 on the Maritime Affairs Code) reaches the Public Prosecutor, it shall first be investigated – and a written record drawn up – by:<sup>125</sup>

<sup>118</sup> UNODC GMCP, *Maritime Crimes and the relevant legal and judicial structure in Djibouti, Eritrea, Ethiopia, Somalia, Sudan and Yemen* (2022) (Unpublished Report drafted by the first author of the present article – on file with the authors).

<sup>119</sup> Mowlid Aden and Robert McCabe, 'Djibouti: Ports, Politics and Piracy' in Christian Bueger and others (eds.) *Capacity Building for Maritime Security: The Western Indian Ocean Experience* (Palgrave Macmillan 2021) 223, 225.

<sup>120</sup> *ibid* 226.

<sup>121</sup> Permanent Mission of the Republic of Djibouti to the United Nations, 1701545E (31 January 2017) English translation from French available online:

<[https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/djibouti\\_re\\_so\\_m\\_310117\\_ENG.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/djibouti_re_so_m_310117_ENG.pdf)> accessed 2 February 2023.

<sup>122</sup> *Décret n°2003-0033/PR/MDN Portant réorganisation de la Marine nationale djiboutienne*, (Decree on the Reorganization of the Djiboutian National Navy), art 31 (on file with the authors).

<sup>123</sup> *ibid* art 32.

<sup>124</sup> *ibid* art 33.

<sup>125</sup> *Loi No 212/AN/82 portant Code des affaires maritimes*, *Journal officiel de la République de Djibouti*, 15 March 1982 <<http://faolex.fao.org/docs/pdf/dji1135.pdf>> accessed 2 February 2023.

1. the captain(s) of the vessel(s) on board which they were committed;
2. qualified representatives of the maritime authority;
3. the officers of the judicial police (which are, in turn, under the authority of the Public Prosecutor); or
4. officers and non-commissioned officers commanding ships or boats of the Republic of Djibouti, gendarmes, officers and harbour masters, customs officers, or other officials specially authorised for this purpose.<sup>126</sup>

Under article 34 of Decree No. 2003-0033/PR/MDN on the reorganization of the Djiboutian National Navy, this written record is to be transmitted to the commander of the Navy, who, in turn, communicates it to the Public Prosecutor and the maritime authority (*l'autorité maritime*, defined for the purpose of Law No 212/AN/82 on the Maritime Affairs Code as 'the minister in charge of the port and the officials to whom he may delegate all or part of his powers').<sup>127</sup> Article 35 of the same Decree enumerates the following procedural steps:

When the maritime authority is seized by one of the officers or non-commissioned officers under the conditions below, it shall carry out a preliminary investigation, either by its own personnel or by the competent personnel of the Navy. It shall refer the matter to the Public Prosecutor if it deems it necessary in accordance with Articles 214 to 219 of the Maritime Code. If the Commander of the Navy deems it necessary, he refers the matter directly to the Public Prosecutor.<sup>128</sup>

The Djiboutian Coast Guard comprises one branch of the Djiboutian National Navy.<sup>129</sup> Notably for the purpose of the present analysis, in 2018 Djibouti created a special rapid intervention commando unit within the Djiboutian Coast Guard.<sup>130</sup> The Coast Guard Rapid Intervention Group (or GIRGC), is empowered, pursuant to article 5 of the Decree No 2018-170//PRE/MET establishing the Rapid Intervention Group of the Djiboutian Coast Guard, as follows:

This highly specialized unit has a national competence in intervention and protection in the maritime domain (territorial waters, exclusive economic zone and port areas).

Intervention missions:

- Intervention in all territorial waters;
- Resolution of hostage taking in the Djiboutian maritime domain (territorial waters, exclusive economic zone and port areas);
- Technical interrogation at sea within the framework of an operation.

Protection missions:

- Security of sensitive port sites during special events;
- Security and escort of high ranking civil and military personalities during sea trips.

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<sup>126</sup> *ibid.*

<sup>127</sup> Decree on the Reorganization of the Djiboutian National Navy (n 122) art 2.

<sup>128</sup> *ibid* art 35.

<sup>129</sup> Decree on the Reorganization of the Djiboutian National Navy (n 122) art 4. Other branches include a chief of staff, a naval force intended for military operations, a marine commando, an administrative service, a technical service in charge of maintenance, and a Marine Operations and Training Centre.

<sup>130</sup> *Décret N° 2018-170//PRE/MET portant création du Groupe d'Intervention Rapide de la Garde-Côtes Djiboutienne*

<<https://www.presidence.dj/texte.php?ID=2018-170&ID2=2018-05-07&ID3=D%E9cret&ID4=9&ID5=2018-05-15&ID6=n>> accessed 2 February 2022.

The GIRGC might therefore have a role to play in the event of suspected maritime crime in, for example, the domain of boarding, search, seizure, and the collection of evidence at sea.

Law No 212/AN/82 on the Maritime Affairs Code is unequivocal that: ‘It is the responsibility of the Public Prosecutor to prosecute, where appropriate, crimes and offences committed on board Djiboutian vessels.’<sup>131</sup> At the same time: ‘The Public Prosecutor's Office may not initiate proceedings until it has received the conclusions of the maritime authority, or the expiry of a period of 15 days after these conclusions have been requested by registered letter.’<sup>132</sup> As for the investigation, a preparatory investigation is compulsory for crimes (*en matière de crime*), though optional for less serious offences (*en matière de délit*).<sup>133</sup> Only after the Public Prosecutor has issued an indictment,<sup>134</sup> does an investigating judge (*juge d’instruction*) proceed to examine all information that they deem valuable for establishing the truth, acting pursuant to the duty to investigate both on behalf of the prosecution and the defence.<sup>135</sup>

Regarding the judicial system, article 1 of Organic Law No 9/AN/01/4th L on the Status of the Judiciary stipulates: ‘the judiciary includes the judges and prosecutors of the Supreme Court, the Court of Appeal, the Court of First Instance and the Justices of the Peace, the magistrates of the Chartered Courts and those of the Chamber of Accounts and Budgetary Discipline.’<sup>136</sup>

The Supreme Court (*Cour Suprême*) sits at the apex of the judicial system in Djibouti. Under article L.132-1 of the Code of Civil Procedure, its function is limited to ruling on ‘appeals in cassation lodged against decisions, rulings and judgments rendered at last instance by all the courts of the Republic.’<sup>137</sup>

The Court of Appeal, which is divided into eight divisions,<sup>138</sup> hears appeals against decisions rendered by the Court of First Instance,<sup>139</sup> which is, in turn, divided into five divisions and an examining body (*jurisdiction d’instruction*).<sup>140</sup> For cases involving maritime crimes, the Public Prosecutor is empowered to appeal to the indictment division (*chambre d’accusation*) of the Court of Appeal against all orders (at first instance) of the investigating judge.<sup>141</sup>

The Court of First Instance (*Tribunal de première instance*) also serves as an appellate court in relation to decisions rendered by District Courts (*Tribunaux d’arrondissement*).<sup>142</sup>

<sup>131</sup> Law on the Maritime Affairs Code (n 125) art 217 (authors’ translation).

<sup>132</sup> *ibid.*

<sup>133</sup> *Code de procédure pénale du 5 janvier 1995* (Code of Penal Procedure), art 72 <<https://acjr.org.za/resource-centre/penal-code-of-djibouti-1995/view>> accessed 2 February 2022.

<sup>134</sup> *ibid* art 73.

<sup>135</sup> *ibid* art 74.

<sup>136</sup> *Loi Organique n° 9/AN/01/4ème L portant Statut de la Magistrature*, art 1 <<https://www.presidence.dj/texte.php?ID=9&ID2=2001-02-18>> accessed 2 February 2023, [authors’ translation].

<sup>137</sup> *Code de Procédure Civile de la République de Djibouti*, art L.132-1 <<https://www.presidence.dj/AnnexeTextes/Annexe5ad35519cf8d820180415033521.pdf>> (Code of Civil Procedure) accessed 2 February 2023.

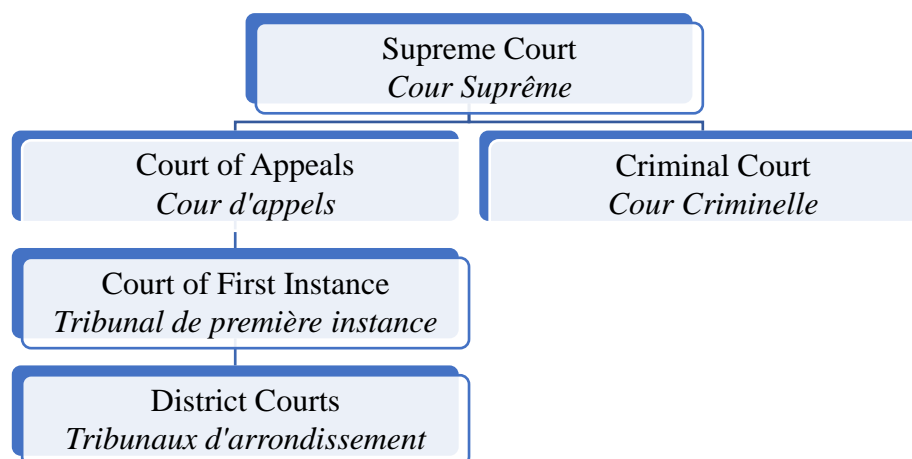
<sup>138</sup> See ‘*La Cour d’Appel*’ (*République de Djibouti*) <<https://justice.gouv.dj/pages/DetailPages/21>> accessed 2 February 2023.

<sup>139</sup> *Loi n°52/AN/94/3e L portant création d’une Cour d’Appel et d’un Tribunal de Première Instance* art 9 <<https://www.presidence.dj/PresidenceOld/LES%20TEXTES/loi52an94.htm>> accessed 2 February 2023.

<sup>140</sup> See ‘*Le Tribunal de Première Instance*’ (*République de Djibouti*) <[https://justice.gouv.dj/pages/Tribunal\\_premiere\\_instance/18](https://justice.gouv.dj/pages/Tribunal_premiere_instance/18)> accessed 2 February 2023,

<sup>141</sup> Code of Penal Procedure (n 133) art 191. See also Code of Civil Procedure (n 137) art L.122-6, providing that the indictments division, among other duties, is ‘competent to rule on appeals decisions rendered by the investigating judges’ [authors’ translation].

<sup>142</sup> Michael Bogdan, ‘Legal Pluralism in the Comoros and Djibouti’ (2000) 69(2) *Nordic Journal of International Law* 195–208, at 206.



#### 4.4 Approach to International Law

According to article 70 of the Djibouti Constitution, the negotiation and approval of the international conventions and treaties is a competency of the President of the Republic who then submits them to National Assembly for their ratification.<sup>143</sup> Article 70 also provides that:

The treaties or agreements regularly ratified have, on their publication, an authority superior to that of the laws under reserve, for each agreement or treaty, to its application by the other party and of its conformity with the relevant provisions of the law of treaties. Without prejudice to the previous paragraph, the ratification or the approval of an international engagement containing a clause contrary to the relevant provisions of the Constitution may intervene only after the revision of it.<sup>144</sup>

The provision also states that treaties and agreements that are ratified by the National Assembly are superior to that of the laws under reserve. However, the ratification or the approval of an international agreement that contains a clause contrary to the relevant provisions of the Constitution may be implemented only after the revision of it.<sup>145</sup>

It is important to note that after its independence, the Republic of Djibouti did not accede to any of the four treaties concluded in 1958 at the first United Nations Conference on the Law of the Sea (UNCLOS I), including the Convention on the Territorial Sea and the Contiguous Zone. However, articles 5 and 8 of Law No 52/AN/78 of 9 January 1979 include in its texts the basic principles contained in the 1958 Convention on the Right of Innocent Passage:

Article 5 provides that foreign ships enjoy the right of innocent passage through the waters of the territorial sea of the Republic. The passage is considered as harmless as long as it does not affect the security of the Republic, its territorial integrity and its independence. The passage must be continuous and rapid. Article 8 then provides that foreign vessels exercising the right of innocent passage in the territorial sea must comply with the laws and regulations in force in the Republic, as well as with all international regulations relating to maritime transport and navigation.

<sup>143</sup> Constitution of Djibouti (1992) <[https://www.constituteproject.org/constitution/Djibouti\\_2010?lang=en](https://www.constituteproject.org/constitution/Djibouti_2010?lang=en)> accessed 15 November 2022.

<sup>144</sup> *ibid.*

<sup>145</sup> Art 62.

Djibouti has acceded to all four international legal instruments governing illicit trafficking in narcotic drugs and psychotropic substances, namely the 1961 Single Convention on Narcotic Drugs, the 1972 Protocol thereto, the 1971 Convention on Psychotropic Substances, and the 1988 Vienna Convention.<sup>146</sup> Djibouti also ratified the SUA Convention, the 1998 Protocol thereto, and the 2005 Protocol. Djibouti also acceded to the UNTOC and the Protocol on Smuggling of Migrants on 20 April 2005, without any objection or reservation. As far as regional instruments are concerned, Djibouti acceded to the 1999 Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism on 16 May 2004,<sup>147</sup> while it is also party to the 1988 Arab Convention on the Suppression of Terrorism,<sup>148</sup> and the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism.<sup>149</sup>

On a regional level, Djibouti has also signed the Djibouti Code of Conduct (DCoC) and the Jeddah Amendment.<sup>150</sup> The 20 signatories to the DCoC have agreed to cooperate in accordance with international law primarily in the investigation, arrest, and prosecution of persons suspected of having committed acts of piracy and armed robbery against ships, including those who intentionally incite or facilitate such acts. This Code was recently amended through a revision called Jeddah Amendment,<sup>151</sup> which obliges states to cooperate to the fullest possible extent to repress transnational organized crimes such as trafficking in narcotics and psychotropic substances in the maritime domain, among other organized crimes. A 2020 study shows that the:

... effect of the DCoC provisions in minimizing criminal activities around the Somalia territorial waters is massive considering that the cases of piracy have reduced within the area in the last few years. For instance, only less than five piracy attempts and attacks have been documented in the last 8 years compared to over 100 incidences documented in 2011.<sup>152</sup>

## 4.5 Maritime Crimes under Domestic Legislation

### 4.5.1 Maritime piracy

Prior to the adoption of the DCoC, the only legislation on piracy in Djibouti was to be found

<sup>146</sup> Djibouti acceded to all four instruments on 22 February 2001.

<sup>147</sup> See African Union (AU), 'List of Countries Which Have Signed, Ratified/Acceded to the OAU Convention on the Prevention and Combating of Terrorism' (AU) <[https://au.int/sites/default/files/treaties/37289-sloau\\_convention\\_on\\_the\\_prevention\\_and\\_combating\\_of\\_terrorism\\_1.pdf](https://au.int/sites/default/files/treaties/37289-sloau_convention_on_the_prevention_and_combating_of_terrorism_1.pdf)> accessed 24 August 2021.

<sup>148</sup> See *Loi n°49/AN/99/4ème L portant approbation de l'adhésion à la Convention Arabe de Lutte contre le Terrorisme* (On file with authors). Djibouti acceded to the Convention on 24 October 2001.

<sup>149</sup> See *Loi N° 173/AN/12/6ème L portant ratification de la convention de l'Organisation de la Conférence Islamique sur la lutte contre le Terrorisme International* (On file with authors).

<sup>150</sup> The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden

<<https://dcoc.org/#:~:text=The%20Code%20of%20Conduct%20concerning,Maldives%2C%20Seychelles%2C%20Somalia%2C%20the>> accessed 2 February 2023.

<sup>151</sup> Revised Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in the Western Indian Ocean and the Gulf of Aden Area (2017) (Jeddah Amendment), available at

<<https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/DCOC%20Jeddah%20Amendment%20English.pdf>> accessed 1 February 2023.

<sup>152</sup> Abdullah Mohammed Mubarak, 'A Comparative Study of the Combined Maritime Force and the Djibouti Code of Conduct aimed at Maintaining Maritime Security in the Area of the Western Indian Ocean and the Gulf of Aden' (2020) World Maritime University Dissertations 1386 <[https://commons.wmu.se/all\\_dissertations/1386](https://commons.wmu.se/all_dissertations/1386)> accessed 2 February 2023.



in article 208 of the Code of Maritime Affairs (Law No 212/AN/82 of 18 January 1982). This provision limits the definition of piracy to (i) piratical acts committed by a crew member (both nationals and non-nationals) of a ship flying the Djiboutian flag or (ii) a foreign ship who commits such acts against either Djiboutian ships, crew, or cargo; or ships, crew, or cargo belonging to a state with which Djibouti is not at war.<sup>153</sup> The Djibouti 1982 Code of Maritime Affairs, section 4 defines piracy and sets out the punishment for the crime as follows:

Article 208 – The following shall be prosecuted and tried as pirates

1. Any individual belonging to the crew of a vessel flying the Djibouti flag who commits acts of armed damage or violence against Djibouti vessels or vessels of a power with which the Republic of Djibouti is not in a state of war, or against the crews or cargo of such vessels;
2. Any individual forming part of the crew of a foreign vessel which, outside the state of war and without being provided with a letter of marque or a regular commission, commits the acts referred to in the preceding paragraph against Djiboutian vessels, their crews or cargoes.
3. Any individual who is part of the crew of a vessel of the Republic of Djibouti who attempts to seize the said vessel by fraud or violence against the captain.

Article 209 – Anyone found guilty of the crime of piracy shall be punished with hard labour or imprisonment.

Being a signatory to the DCoC is a significant step for the Republic of Djibouti in its efforts in combating and adjudicating on piracy as the provision included in the DCoC is more elaborate.

While paragraph c) of article 101 of the UNCLOS and article 1 of the DCoC refer to any act which facilitates the commission of the piratical acts on the high seas defined in paragraphs a) and b) it is not entirely clear whether this covers individuals who do not actually *physically* participate in said acts, for example those who provide financial support as ‘investors’ or act as ‘negotiators’ for ransom money. Such roles are important in the overall success of the piracy ‘business’ as it involves an intricate network of both the actual pirates and their backers, who provide the necessary finance to enable the former to obtain the equipment and weaponry to carry out the piratical operation. The UN Security Council (UNSC) pointed out in S/RES/2020 (2011) of 22 November 2011:

... the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks.<sup>154</sup>

It is clear that modern piracy networks include, at least, organizers, planners, leaders, financiers, facilitators, and ransom negotiators, who almost always act on land.<sup>155</sup> For example, during a Djiboutian investigation conducted with the help of Interpol and other specialized agencies it was revealed that ransom proceeds from piracy were smuggled from Somalia into

<sup>153</sup> Edwin Egede, ‘Piracy and the East African region’ in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2015) 249, 262.

<sup>154</sup> UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 para 4.

<sup>155</sup> Jing Jin and Erika Techera, ‘Strengthening Universal Jurisdiction for Maritime Piracy Trials to Enhance a Sustainable Anti-Piracy Legal System for Community Interests’ (2021) *Sustainability* 13, 6.



Djibouti and then out of the country via a money transfer service.<sup>156</sup> Article 26 of the Djibouti Penal Code describes an accomplice to a crime or offence as ‘a person who knowingly, by aiding or assisting, facilitated its preparation or commission. An accomplice to an offence is liable to the same penalties as the offender.’

The UNCLOS does not explicitly criminalize attempts to commit piracy, but the Djibouti 1982 Code of Maritime Affairs includes attempt in the definition of piracy in paragraph 3 of article 208 in the context of a seizure of a vessel by fraud or violence against the captain by individuals who are part of the crew of the vessel. The UN Division of Ocean Affairs and Law of the Sea (UN-DOALOS) has stated that attempts do not meet the definition of piracy in the UNCLOS.<sup>157</sup> However, the UNSC has called for all states to emphasize the importance of criminalizing attempts to commit acts of piracy, and the DCoC states declared in article 2(c) their intention to ensure that persons either committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted, consistent with their available resources and related priorities,<sup>158</sup> their respective national laws and regulations, and applicable rules of international law.

It is to be noted that Djibouti has followed a unique route to address the issue of foreign pirates in its jurisdiction. According to Aden and McCabe, Djibouti has refused to accept Somali pirates for prosecution or imprisonment, but it has allowed suspected pirates to be held in the country while awaiting extradition to other countries in accordance with international law, and it has collaborated with other regional countries during the investigation of suspect cases of piracy.<sup>159</sup>

The Djibouti Code of Maritime Affairs includes acts of fraud or violence against the captain by individuals who are part of a Djibouti crew or vessel in order to seize the same vessel. It is obvious that there is no two-ship requirement in this regard. Article 385 of the Djiboutian Penal Code does not include two ships in the definition of hijacking either and thus would seemingly allow for the same scenario involving only one ship.

Article 105 of the UNCLOS does not set out the penalties for piracy but leaves it to states to decide the appropriate sentence. Sentences for piracy vary greatly between states, ranging from life-imprisonment to significantly shorter sentences, mainly in European legislations. It is, however, important that states respect the principle of proportionality when they decide on the penalties.

According to article 209 of the Djibouti 1982 Code of Maritime Affairs, the sentence for piracy is hard labour or imprisonment. This formulation is not sufficiently precise as it is unclear just how long or short the imprisonment can be, whereas human rights concerns may be raised regarding sentencing to hard labour. In the Penal Code article 386, however, the penalty for the hijacking of a ship by violence or threat thereof, carries a fixed penalty of 20 years’ imprisonment and life imprisonment if this was accompanied by torture or acts of barbarism, or if it has resulted in the death of one or more persons.

Considering that the Rome Statute of the International Criminal Court in article 77(1)(a) sets 30 years maximum penalty for core international crimes, and life imprisonment only when justified by the extreme gravity of the crime and the individual circumstances of the convicted

<sup>156</sup> Stuart Yikona and others, *Pirate Trails: Tracking Illicit Financial Flows from Pirate Activities off the Horn of Africa* (World Bank 2013) 49  
<<https://documents1.worldbank.org/curated/en/408451468010486316/pdf/Pirate-trails-tracking-the-illicit-financial-flows-from-pirate-activities-off-the-Horn-of-Africa.pdf>> accessed 2 February 2023.

<sup>157</sup> UN-DOALOS, Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, Doc LEG 98/8/1 and LEG 98/8/3, annexed to IMO ‘Circular Letter concerning information and guidance on the International Law relating to Piracy’, IMO Circ Letter No 3180, 17 May 2011  
<[https://www.un.org/depts/los/piracy/circular\\_letter\\_3180.pdf](https://www.un.org/depts/los/piracy/circular_letter_3180.pdf)> accessed 2 February 2023.

<sup>158</sup> UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976.

<sup>159</sup> Aden and McCabe (n 119) 232.

person (article 77.1.b), life imprisonment may be considered disproportionate in the context of hijacking, particularly when death does not result from the actions. Furthermore, what constitutes ‘torture or barbarism’ would need to be elaborated in order to avoid arbitrariness in sentencing.

Likewise, the fixed penalty of 20 years’ imprisonment for any hijacking of a ship using force or threat thereof, can be considered disproportionate. Individuals are mainly driven to piracy due to extreme poverty and foreign exploitation, and destruction of natural resources on which communities previously relied for survival. In this context it is thus inappropriate to pursue an overly punitive approach to the phenomenon.

The UNCLOS and DCoC are unclear as to whether the threat of violence equals violence for the purpose of the definition of piracy.<sup>160</sup> The DCoC however does away with this ambiguity in the definition of armed robbery where it includes the phrase ‘or threat thereof’ after ‘any unlawful act of violence or detention or any act of depredation.’ The inclusion of the phrase here and its omission in the context of piracy would indicate, however, that threats are not to be understood as being included in the definition of violence.

The Djibouti 1982 Code of Maritime Affairs does not specifically mention threats of violence, however the Penal Code in article 385, regarding the crime of ‘hijacking of aircraft, ships or any other means of transport,’ specifically equates seizing or taking control by *violence, or threat of violence.*

It is unclear, however, whether the broader definition found in the Penal Code applies only to Djiboutian territory or also to universal jurisdiction on the high seas, since article 385 makes no mention of ‘piracy’ as such.

#### 4.5.2 Armed robbery

Some countries have expanded the scope of piracy to include acts committed within their national jurisdiction. Seychelles, for example, extend the definition of piracy over any act which would have constituted piracy ‘except for the fact that it was committed within a maritime zone of’ those states.<sup>161</sup> Similarly, the Penal Code of Kenya provided that the offence of piracy is committed when the piratical acts are committed either in the territorial sea or upon the high seas.<sup>162</sup> This has however been repealed by the Kenyan Merchant Shipping Act of 2009, which states that for such piratical acts to constitute piracy they must be committed ‘in a place outside the jurisdiction of any state.’<sup>163</sup> The DCoC, on the other hand, in article 1(2) characterizes such acts as ‘armed robbery against ships.’ Article 5(2) clearly subjects any operations to suppress armed robbery to the authority of the state whose territorial sea and airspace it is committed in, including in the case of hot pursuit in the territorial sea or archipelagic waters of that participant in accordance with article 111 of the UNCLOS. Importantly in paragraph 3 of the same article, participants stress their intent to communicate alerts, notifications, and information related to armed robbery to other participants and interested parties as soon as possible through their respective contact points and centres (designated in accordance with article 8).

Not all forms of armed robbery, kidnapping, and hostage taking at sea fall within the purview of the UNCLOS. In such cases, Djibouti might wish to rely on its ratification of (or accession to) and domestication of other international instruments, including the Hostage

<sup>160</sup> See Robert Jennings & Arthur Watts, *Oppenheim’s International Law* (vol 1, 9th edn, Longman 1992) 752–3, noting that piracy is carried out by unauthorized acts of violence, whether such violence is the direct use of force or threat.

<sup>161</sup> See, for example, the Seychelles Penal Code s 65(4)(c).

<sup>162</sup> Penal Code (Kenya) ch 63.

<sup>163</sup> Merchant Shipping Act 2009, s 369.

Taking Convention, to which Djibouti acceded on 1 June 2004.<sup>164</sup> For instance, it is in article 1 of this treaty, that the term ‘hostage taking’ is defined.<sup>165</sup> As previously noted, Djibouti has also ratified the 1998 SUA Convention, and its 1998 and 2005 Protocols.

As also noted above, Djibouti acceded to the 1999 OAU Terrorism Convention on 16 May 2004,<sup>166</sup> while Djibouti is also party to the 1998 Arab Convention on the Suppression of Terrorism,<sup>167</sup> and the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism.<sup>168</sup>

#### 4.5.3 Kidnapping and hostage-taking

Djibouti does not have specific legislation in respect of the transnational crime of kidnapping at sea, and as seen above, not all forms of armed robbery, kidnapping, and hostage taking at sea fall within the purview of the UNCLOS. Djibouti might wish to rely on its ratification of (or accession to) and domestic implementation of other international instruments, including the 1979 Hostage Taking Convention, to which Djibouti acceded on 1 June 2004.<sup>169</sup> For instance, article 1 defines the term ‘hostage taking.’ In addition, articles 385 and 387 of the Penal Code of Djibouti 1995 use the concept of the hijacking of an airplane or ship, or any other means of transport but do not specify whether it applies also to the high seas or only the territorial waters of Djibouti. Article 385 provides that ‘[S]eizing or taking control by violence or threat of violence of an aircraft, ship or any other means of transportation on board which there are persons, shall be punishable by twenty years’ imprisonment.’ Law no 111/AN/11/6th L on the fight against terrorism and other serious crimes provides for the same penalty concerning navigation facilities in article 21:

Title IV – Hijacking of Aircraft, Ships or any other Means of Transport

Article 21: Any person who commits an act of violence against a person on board a ship or fixed platform,

- Destroys or causes serious damage to a ship, its cargo or a fixed platform;
- Places or causes to be placed on a ship or fixed platform or of causing damage to the ship, its cargo or the fixed platform;
- Destroys or seriously damages maritime navigation facilities or services or seriously disrupts their operation shall be punishable by 20 years’ imprisonment and a fine of FD 20,000,000 if any of these acts jeopardise or are likely to jeopardise the safety of the ship or fixed platform;
- Any person who threatens to commit any of the offences provided for in the above paragraphs aimed at compelling a natural or legal person to perform or refrain from performing any act shall be punished by 10 years’ imprisonment or 10,000,000 FD fine.

<sup>164</sup> See also *Loi n°49/AN/04/5ème L Portant adhésion aux Conventions internationales relatives à la lutte contre le terrorisme*.

<sup>165</sup> *ibid.*

<sup>166</sup> See (n 147).

<sup>167</sup> (adopted 22 April 1998) available at <<https://www.refworld.org/docid/3de5e4984.html>> accessed 3 February 2023; for Djibouti see *Loi n°49/AN/99/4ème L portant approbation de l'adhésion à la Convention Arabe de Lutte contre le Terrorisme* (on file with the authors). Djibouti acceded to the Convention on 24 October 2001.

<sup>168</sup> (adopted 1 July 1999) Annex to Res 59/26P <<https://www.refworld.org/docid/3de5e6646.html>> accessed 2 February 2023; for Djibouti see *Loi N° 173/AN/12/6ème L portant ratification de la convention de l'Organisation de la Conférence Islamique sur la lutte contre le Terrorisme International* (on file with authors).

<sup>169</sup> See UNTS Depository Notifications, available at <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-5&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-5&chapter=18&clang=_en)>; for Djibouti see also *Loi n°49/AN/04/5ème L Portant adhésion aux Conventions internationales relatives à la lutte contre le terrorisme* (On file with authors).

However, article 21 of Law no 111/AN/11/6th L read together with article 385 of the Penal Code still provide for a less complete definition than that of article 3 of the SUA Convention, to which Djibouti is signatory.

#### 4.5.4 Maritime terrorism

Terrorism at sea, widely known as ‘maritime terrorism,’ is ‘the systematic use or threat of violence against international shipping and maritime services by an individual or group to instil fear and intimidation in a civilian population in order to achieve political aims or objectives.’<sup>170</sup> Djibouti has a legal framework for investigating and prosecuting terrorism related crimes, and bringing terrorism cases to its criminal courts using its penal code.<sup>171</sup> In Law No 111/AN/11/6 L on the fight against terrorism and other serious crimes, there are three provisions that provide broad definitions of terrorism but only one paragraph refers directly to terrorism that can be committed at sea. Article 2 (2) provides:

Acts of terrorism are also constituted when they are related to an individual or collective enterprise aimed at seriously disturbing the peace through intimidation or terror or aimed at compelling a government or an international organisation to perform or refrain from performing any act, leading to the commission of a number of crimes or offences listed below:

1. ...
2. Kidnapping and hijacking of aircraft, ships or any other means of transport;

In addition to the above provision, this crime of kidnapping and hijacking of aircraft and ships is also punished by the Penal Code of Djibouti.

Article 14 of Law No 111/AN/11/6 L on the fight against terrorism and other serious crimes regulates the territorial competencies or jurisdiction by stating that national courts are competent to judge the offenses committed on national territory or overseas by a Djiboutian national related to maritime terrorism or if the offense was committed on board of a vessel flying the Djiboutian flag.

As for the measures to implement the laws and prevent or fight terrorism, Djibouti has issued a Decree No 2001-0193/PRE that established a National Committee for the Fight against Terrorism.<sup>172</sup> This Committee is responsible for implementing the measures necessary for the fight against terrorism on the Territory of the Republic of Djibouti against international terrorism and they conduct their work in accordance with resolution 1373 of 28 September 2001 of the UNSC. They have the authority to decide and take appropriate measures and actions to prevent and suppress any terrorist acts, while ensuring compliance with international commitments and adherence to international conventions and protocols relating to terrorism. This committee regularly reports to the President of the Republic and the Prime Minister on the progress of the work, the actions taken and the results achieved. Given Djibouti’s strategic location in the Gulf of Aden, it should ensure that its domestic legislation and related policies and procedures permit the responsible authorities to effectively investigate and prosecute the

<sup>170</sup> Christopher C Joyner, ‘The 1988 IMO Convention on the Safety of Maritime Navigation: Towards a Legal Remedy for Terrorism at Sea’ (1988) 31 German Yearbook of International Law 230.

<sup>171</sup> *ibid.*

<sup>172</sup> *Djibouti Decree No. 2001-0193/PRE* (no date), available through *UNODC Sharing electronic resources and laws on crime (SHERLOC)* at <[https://sherloc.unodc.org/cld//legislation/dji/decret\\_no.\\_2001-0193pre\\_portant\\_creation\\_dun\\_comite\\_national\\_de\\_lutte\\_contre\\_le\\_terrorisme\\_/article\\_2-6/article\\_2-6.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld//legislation/dji/decret_no._2001-0193pre_portant_creation_dun_comite_national_de_lutte_contre_le_terrorisme_/article_2-6/article_2-6.html?lng=en&tmpl=sherloc)> accessed 17 November 2022.

wider range of acts covered under the concept of maritime terrorism.<sup>173</sup> Djibouti has strategic importance because of its geographical position in East Africa, as such, it hosts a contingent of African Union (AMISOM) troops.<sup>174</sup> Djibouti's importance to terrorists derives from its transit capabilities, rather than its potential as a base for international terrorism, given its function as the major port of entry for upper East Africa<sup>175</sup>

In 2019, Al-Shabaab increased its attacks on AMISOM bases, and future attacks on Djibouti are still possible.<sup>176</sup> Possible terrorist threats include attacks on foreign personnel and their facilities, disruption of the Djibouti port, and possible attacks to headquarters of the Intergovernmental Authority on Development (IGAD).<sup>177</sup> As explained above, the most likely threats related to maritime terrorism in Djibouti are those that derive from it being a transit country, as Djibouti is recognized by IGAD as being low threat for home-grown violent extremism.<sup>178</sup>

Djibouti is not seen to be 'a bastion of terror but a bastion against terrorism,'<sup>179</sup> and the most recent US Department of State report claims that there was no terrorist incident reported in Djibouti in 2020.<sup>180</sup>

#### 4.5.5 Illicit traffic in narcotic drugs and psychotropic substances

On the domestic level, Djibouti's first national law that regulated narcotics and psychotic drugs was adopted in 1981, some years after acceding to the relevant international conventions. The national law 171/AN/81 provided a solid base for the regulation of narcotic drugs and psychotropic substances, by incorporating the international criteria and best practices relating to the prohibition and prevention of trade, production, and manufacture of narcotics into domestic law. Trafficking and use of drugs are also criminalized in section V of the Djibouti Criminal Code, where it is also foreseen that persons who disclose criminality to the competent authorities are exempt from punishment.

The criminalization of drug trafficking and usage in the Djibouti Criminal Code asserts that illicit import, production, manufacture, or export of narcotic drugs is sentenced with imprisonment and/or financial fines. If the crime of illicit drug trafficking is committed in an organized manner, a group or a cartel then the punishment extends to life imprisonment. Although there are no specific statements referencing illicit trafficking in drugs and psychotropic substances at sea in the national legislation, it is understood that the crime itself is punished whenever it takes place as long as Djibouti has jurisdiction.

It is significant to mention that khat, a plant-based stimulant drug is legal in Djibouti, so its production and manufacture within the country is not prohibited. It is sometimes believed that the differing legislative responses to khat in the region are driving an illegal smuggling

<sup>173</sup> See UNODC *Maritime Crime* (n 2) 140–2, citing 1988 SUA Convention (n **Error! Bookmark not defined.**) art 3(1)(b), art 3(1)(c), art 3(1)(e), art 3(2)(c); 2005 Protocol (n 16) art 4.

<sup>174</sup> Shaul Shay, 'Djibouti the next target of Al-Shabaab' (*International Institute for Counter-Terrorism (ICT)*, January 2021) <<https://ict.org.il/images/Djibouti%20the%20next%20target%20of%20Al-Shabaab.pdf>> accessed 17 November 2022.

<sup>175</sup> United States Institute of Peace, 'Terrorism in the Horn of Africa' (January 2004) Special Report 113 <<https://www.usip.org/sites/default/files/sr113.pdf>> accessed 17 November 2022.

<sup>176</sup> Shay (n 17474).

<sup>177</sup> United States Institute of Peace (n 175).

<sup>178</sup> US Department of State, 'Country Reports on Terrorism 2016: Djibouti' (*UNHCR Refworld*, 19 July 2017) <<https://www.refworld.org/docid/5981e443a.html>> accessed 17 November 2022.

<sup>179</sup> Lange Schemerhorn, 'Djibouti: A Special Role in the War on Terrorism' in Robert I Rotberg and others (eds), *Battling Terrorism in the Horn of Africa* (Brookings 2005) 49, 58 [emphasis in the original].

<sup>180</sup> US Department of State, *Country Reports on Terrorism 2020: Djibouti* (2021) <<https://www.state.gov/reports/country-reports-on-terrorism-2020/djibouti/>> accessed 17 November 2022.

market across East Africa and the Horn.<sup>181</sup> Considering these issues, the African Union's Plan on Drug Control and Crime Prevention has called for laws on new psychoactive substances to be reviewed in light of contemporary challenges. These include the link between illicit substances and drug trafficking, organized crime, and violence driven by illicit arms dealers, corrupt officials, and money launderers.<sup>182</sup>

As discussed above, article 108 of the UNCLOS provides that all states shall cooperate in respect of illicit traffic in narcotic drugs or psychotropic substances on the high seas, and that any state having reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other states in suppressing such traffic. However, Djiboutian law makes no reference to illicit trafficking at sea.

The main criterion used by Djibouti's legislation is territorial jurisdiction for drug-related crimes, either committed on its territory, within one of its aircraft and vessels, or under bilateral or multilateral agreements determining the applicability of Djibouti's jurisdiction to try and convict such offences. It is important to note that the national legislation also respects the universally applicable principle of *aut dedere aut judicare*.

There are few cases of drug trafficking where suspects were arrested in possession of drugs, however, it was not possible to get hold of evidence showing actual trafficking because no mutual legal assistance was established with Ethiopia where the trafficking took place. The consequence was that traffickers were sentenced to merely a couple of years for possession and not the actual trafficking.<sup>183</sup>

#### 4.5.6 Trafficking in persons, especially women and children

Djibouti has been a party to the Human Trafficking Protocol since 2005.<sup>184</sup> Two years after acceding, Djibouti passed a law to prevent, suppress, and punish trafficking in persons which was transposed into Law No 133 on the Fight Against Trafficking in Persons and Illicit Smuggling of Migrants in 2016.<sup>185</sup> Although no particular mention is made of trafficking in persons, especially women and children by sea, it is understood that the law criminalizes this act as long as it takes place within Djiboutian jurisdiction and also provides means of suppression and punishment for the human traffickers.

Law No 133 of Djibouti defines trafficking in persons similarly to the first protocol of the UNTOC:

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

When concerned with trafficking of persons at sea, it is important to note that Djibouti ratified the UNCLOS on 8 October 1991. The UNCLOS does not exclusively address the crime

<sup>181</sup> Mohamed Daghar 'Regulating Khat Could Disrupt East Africa's Illegal Drug Economy' (*ISS Today*, 29 April 2021) <<https://issafrica.org/iss-today/regulating-khat-could-disrupt-east-africas-illegal-drug-economy>> accessed 13 September 2021.

<sup>182</sup> *ibid.*

<sup>183</sup> Informal discussion with the first authors of the present work and participants during the UNODC GMCP First Regional Prosecutors' Network Workshop, 22–4 November 2022, Djibouti Regional Maritime Training Centre.

<sup>184</sup> See above (n 15).

<sup>185</sup> Available from the ILO <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101766/122772/>> accessed 10 September 2021.

of trafficking in persons but provides crucial aspects and a basic legal framework for the investigation, prosecution, and other enforcement actions that may be taken on suspected vessels.

There is an important distinction between the crime of trafficking in persons and the crime of smuggling of migrants. Smuggled migrants, although they are still considered victims, consciously choose to be part of the process of smuggling. On the other hand, persons who are trafficked do not choose to be trafficked, or at least they do not provide the necessary conscious consent.

This difference affects not only the nature of the crimes themselves, but also the place where they are committed. The other difference is the criminal gain, which for migrant smugglers is the up-front payment that is provided by migrants, after which there is minimal interest in their welfare. When humans are trafficked, the criminal gain is usually received when the delivery of the persons trafficked is made. These distinctions make the crime of human trafficking less likely to be committed at sea, because of the dangers that such transport entails,<sup>186</sup> although migrants smuggled at sea are prone to human rights abuses which sometimes can turn into the crime of trafficking in persons when the individuals cannot provide the agreed price for their transport. It is reported that human trafficking networks functioning in the capital of Djibouti are using Djibouti both as a destination country for unpaid labour through debt bondage, and as a transit country for trafficking persons abroad.<sup>187</sup> The most recent available data from the *gendarmerie* in Djibouti indicated that the majority of those entering the country in 2016 were between 20 and 35 years old, and among the 35 who were female, a significant number were victims of sexual assault during their journey often at the hands of their smugglers.<sup>188</sup>

Other important international instruments concerning the crime of Trafficking in Persons are the ILO Forced Labour Convention (Convention No 29 of 1930) and its protocol which defines forced or compulsory labour, and the ILO Convention on Abolition of Forced Labour (Convention No 105 of 1957), both of which have been ratified by Djibouti.

Djibouti is not a state party to the Slavery Convention (1926) but acceded to the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) in 1979. In addition, the International Convention on Civil and Political Rights (ICCPR), which prohibits a number of practices directly related to trafficking, including slavery, the slave trade, servitude, and forced labour was acceded to by Djibouti on 5 November 2002. Furthermore, the UN Convention on the Rights of the Child (1989) was ratified by Djibouti on 6 Dec 1990 and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000), which prohibits trafficking in children for any purpose, including for exploitative and forced labour, was ratified by Djibouti on 27 April 2011. Finally, the ILO Worst Forms of Child Labour Convention (1999) which prohibits perpetrators from using children under 18 years of age for all forms of slavery or practices similar to slavery, trafficking, debt bondage, serfdom, forced or compulsory labour, and prostitution was ratified by Djibouti on 28 February 2005.

The United Nations High Commissioner for Refugees has noted that some people who have been trafficked or who are at risk of being trafficked may be entitled to international refugee protection under the Convention Relating to the Status of Refugees (1951) and its 1967

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<sup>186</sup> See Oliver Clark, 'From Piracy to Palermo: The Changing Challenges of Maritime Crime' in Jörg Schilknecht and others (eds), *Operational Law in International Straits and Current Maritime Security Challenges* (Springer 2018).

<sup>187</sup> 'Djibouti Country Statement, Addressing Migrant Smuggling and Human Trafficking in East Africa' (*Expertise France*, September 2017) <<https://www.expertisefrance.fr/documents/20182/234347/AMMi+-+Country+Report+-+Djibouti.pdf/5a8a7d16-1fb1-44a3-a680-e18ffb7bcc44>> accessed 10 September 2021.

<sup>188</sup> *ibid.*

protocol if they have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political option. Djibouti is a state party to this convention and its protocol.

Overall, the ratification of international conventions which regulate and combat trafficking in persons is relatively adequate in Djibouti, however the implementation is still lacking. The comprehensive approach to combating trafficking is not fully realized for many reasons. The official reason that Djiboutian authorities state for not properly prosecuting trafficking in person is the lack of technical capacity, especially specialized units within security structures, which would focus on combatting organized crime, human trafficking in persons, smuggling of migrants, trafficking of children and so on.<sup>189</sup>

#### 4.5.7 Smuggling of migrants

The UNTOC's Migrant Smuggling Protocol entered into force on 28 January 2004.<sup>190</sup> This protocol was the first time that a definition of smuggling of migrants was developed and agreed upon. According to article 2, '[t]he purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.' Djibouti acceded to the UNTOC and the Migrant Smuggling Protocol on 20 April 2005 without any objection or reservation. In 2016, Djibouti passed Law No 133, on the fight against trafficking in persons and illicit smuggling of migrants. However, regulating two highly similar crimes with one law may pose difficulties in terms of implementation.

The UNCLOS does not exclusively address the crime of smuggling of migrants, nonetheless it provides an essential legal background for the application of the primary relevant legal instrument, that is, the Migrant Smuggling Protocol.

Additional relevant international conventions that apply to migrant smuggling, or rescue operations that take place at sea is the international convention for the safety of life at sea of 1974, or the SOLAS Convention, which was signed by Djibouti on March 1984. Regulation 33 of chapter V of the SOLAS Convention reflects article 98 of the UNCLOS regarding the obligation of vessel masters to conduct operations when safety at sea is endangered, regardless of migrants possibly being undocumented.<sup>191</sup>

As mentioned above, the international framework for carrying out search and rescue operations of an accident at sea is provided by the SAR, which obliges states to provide basic assistance to those who are in distress at sea, which shall take priority over the investigation of crimes and procedures for evaluating refugee status. Djibouti is not a state party to this convention.

Article 3(a) of the Migrant Smuggling Protocol defines migrant smuggling as 'the procurement in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident.' In general terms, migrant smuggling is about making money by assisting a person to enter or stay in a country without having the legal permission to do so. Some of the migrants who are smuggled may be refugees, defined by article 1 of the 1951 Refugee Convention as a person 'unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

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<sup>189</sup> *ibid.*

<sup>190</sup> See above (n 15).

<sup>191</sup> Rob McLaughlin, Sofia Galani and Ian Ralby, *Maritime Crime: A Manual for Criminal Justice Practitioners* (2nd edn, UN 2019) available at <[https://www.unodc.org/documents/Maritime\\_crime/19-02087\\_Maritime\\_Crime\\_Manual\\_Second\\_Edition\\_ebook.pdf](https://www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf)> accessed 10 September 2021.



particular social group, or political opinion.’<sup>192</sup> It has been reported that Djibouti has served as a safe haven for refugees fleeing persecution and conflicts in the region, and has also been used both as a transit and destination country by thousands of impoverished migrants in search of better economic opportunities. These mixed-migration flows have often proved to be a heavy burden on the country due to its limited capacity.<sup>193</sup>

Djibouti is also not a state party of the International Labour Organization Convention on Migration for Employment, the ILO Convention on Migrant Workers and its supplementary provisions, or the International Convention of the Rights of all Migrant Workers and Members of their Families.

When considering the crime of smuggling of migrants it is important to note that Djibouti is a state party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Djibouti has also ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the main international human rights instruments.<sup>194,195</sup>

Although Djibouti’s national legislation generally demonstrates a high degree of compliance with international standards for the prevention and reduction of statelessness, there is a lack of safeguards against statelessness for children born in Djibouti. As such, Djibouti is not yet a state party to the 1954 Convention relating to the Status of Stateless Persons, or to the 1961 Convention on the Reduction of Statelessness. While smuggling immigrants by sea accounts for a small part of the overall migrant smuggling, the particular danger it entails make it a priority for response. In 2017, it was estimated that there were 3,597 fatalities due to drowning at sea. This represents 58 per cent of the overall reported migrant fatalities that year globally.<sup>196</sup> Conditions of travel across the Gulf of Aden from Djibouti and Somalia to Yemen are so severe that the journey is conservatively estimated to have a mortality rate of 5 per cent, with many people unaccounted for.<sup>197</sup> The lack of available data that may be accessed online regarding the smuggling of migrants in Djibouti is scarce and limited. The majority of the data available can be found in reports of international organizations however most of it is outdated.

## 4.6 International Co-Operation in Countering Piracy and other Maritime Crimes

### 4.6.1 Extradition

One way for a state to exercise its universal jurisdiction without undertaking prosecutions is to extradite the seized suspects to a country willing to prosecute. Article 11 of the DCoC envisions extradition alongside the use of handovers. Despite being the traditional and common modus operandi to acquire jurisdiction over a criminal suspect in a transnational setting, extradition has thus far rarely been used to bring piracy suspects seized by a patrolling naval state’s warship directly to the prosecuting state.<sup>198</sup> The main tools for this are currently transfers/handovers. For land-based facilitation of piracy and other maritime crimes, however, extradition remains an essential tool.

<sup>192</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>193</sup> UNHCR, ‘Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: DJIBOUTI’ <<https://www.refworld.org/pdfid/5072836f2.pdf>> accessed 10 September 2021.

<sup>194</sup> (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

<sup>195</sup> UNHCR (n 193).

<sup>196</sup> UNODC, ‘Global Smuggling of Migrants: 2018’ (UNODC, 2018) <[https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM\\_2018\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf)> accessed 10 September 2021.

<sup>197</sup> UNODC, ‘Issue Paper; Smuggling of Migrants by Sea’ (UNODC, 2011) <[https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf)> accessed 10 September 2021.

<sup>198</sup> Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014) 42.

The first laws on international cooperation were only adopted in Djibouti several years after its independence in 1977. There were three laws adopted in sequence in 1991:

- Act No 179/AN/91/2nd L ratifying the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic;
- Act No 180/AN/91/2nd L ratifying the Convention on Judicial Extradition in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic; and
- Act No 181/AN/91/2nd L ratifying the convention on the transfer of convicted prisoners between the Government of the Republic of Djibouti and the Government of the French Republic.

Extradition is partially governed by the provisions of the Code of Criminal Procedure (articles 533–58) and by the Money Laundering Act (Part V). Djibouti makes extradition conditional on the existence of a treaty. Djibouti has concluded extradition agreements with France, Ethiopia,<sup>199</sup> Yemen, and Somalia. In addition, the Code of Criminal Procedure and the Money Laundering Act provides for the possibility of an extradition procedure in the absence of a treaty. Furthermore, in accordance with article 37 of the Constitution, Djibouti considers any treaty that provides for international cooperation as a legal basis for such cooperation, be it in terms of extradition or mutual legal assistance. The law provides for a custodial sentence of at least two years (article 536 of the Code of Criminal Procedure) for an offence to be extraditable. When extradition is requested for several offences, the minimum penalty for each is two years' imprisonment (article 536 of the Code of Criminal Procedure).

Only the Money Laundering Act expressly includes specific offences which are extraditable (article 5-3-1). It also expressly states that certain offences may not be considered political offences (article 5-4-1).

Twenty years after the signing of these three conventions with the French Republic, the Law No 126/AN/11/6ème L was adopted upon the ratification of the IGAD Convention on Mutual Assistance in Criminal Matters,<sup>200</sup> signed by the representatives of the members of the IGAD, which are: the governments of the Republic of Djibouti, the State of Eritrea, the Federal Democratic Republic of Ethiopia, the Republic of Kenya, the Republic of Somalia, the Republic of Sudan, and the Republic of Uganda.

However, as this agreement is limited to IGAD member countries (which in itself is very important, as these are neighbouring countries with a high demand for international cooperation), the rules that are laid down beyond this are likely to be extended to all requests for international cooperation from Djibouti, whether it is an active or passive request. According to article 1, the states parties shall cooperate with each other to the fullest extent possible in criminal matters, in accordance with the Convention, which provides that the competent authorities of the requested state party shall comply with requests for mutual assistance in connection with criminal matters occurring in the requesting state party.

Djiboutian law, in adopting the IGAD Convention, recognizes the principles of reciprocity, double criminality, and the rule of speciality in the following manner:

<sup>199</sup> Ethiopia and Djibouti, Agreement on Extradition and Mutual Legal Assistance on Criminal Matters and a Memorandum of Understanding (MoU) on Cooperation in the Fields of Justice and Legal Training (18 March 2017).

<sup>200</sup> Inter-Governmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters, available at <<https://igadssp.org/index.php/documentation/2-igad-convention-on-mutual-legal-assistance-in-criminal-matters/file>> accessed 2 February 2023.

**Article 33: Double criminality**

1. Each State Party, in the absence of dual criminality, is encouraged to provide mutual assistance where it is consistent with the basic concepts of its legal system.
2. Each State Party shall, in the absence of dual criminality, consider adopting such measures as may be necessary to provide a broader framework of assistance.

**Article 34: Reciprocity**

1. Each State Party, in the absence of a mutual arrangement with the requesting State Party, is encouraged to provide assistance.
2. Each State Party shall, in the absence of reciprocity, consider adopting such measures as may be necessary to provide a broader framework of assistance.

**Article 35: Rule of speciality**

The requesting State Party shall not transmit to another State or use any information or evidence obtained in response to a request for assistance under this Convention in connection with any matter other than the criminal matter specified in the request without the prior agreement of the requested State Party.

These are basic rules of international cooperation, widely used and accepted by the international community, in addition to the IGAD countries.

Djibouti can refuse extradition when it is based on discriminatory reasons (article 537 of the Code of Criminal Procedure and article 5-3-3 of the Money Laundering Act) and Djiboutian nationals cannot be extradited (article 536). The Code of Criminal Procedure governs extradition procedures. Simplified measures are provided for urgent cases (articles 550 and 551), as well as by the various bilateral agreements to which Djibouti is a party. When an extradition request is issued for a foreign person, they may be taken into custody (article 550). Extradition requests are subject to proceedings before the indictments chamber where the requesting state can submit additional information in support of its request.

**4.6.2 Transfers/handovers**

Most commonly piracy suspects are brought within the jurisdiction of the prosecuting state by means of so-called ‘transfers’ or ‘handovers’ as they are referred to in the Djibouti Code of Conduct, article 11.<sup>201</sup> ‘Transfer’ is an umbrella term referring to the various techniques and procedures used to bring a piracy suspect within the jurisdiction of a third state for prosecution without having to resort to formal extradition proceedings.<sup>202</sup> Depending on the actors involved, the modalities, forms, and features of transfers vary considerably.<sup>203</sup> At times the interdicting ship transports the suspects directly to a port of the receiving state and in other instances, the suspects are brought to a port of a third state and then flown to the receiving state as was the case in one particular example where suspects were first transported to a port in Djibouti and then flown to Kenya for prosecution.<sup>204</sup>

**5. CONCLUSIONS AND RECOMMENDATIONS**

Transnational maritime crimes pose significant challenges to states, not only because they create the need for ongoing costly surveillance of large areas of water, but also because they

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<sup>201</sup> Petrig (n 198) 47.

<sup>202</sup> *ibid.*

<sup>203</sup> *ibid.*

<sup>204</sup> *ibid* 105 (Information from expert interview on file with Petrig).

mostly require transnational cooperation both in terms of tackling the crime at sea as well as in law enforcement and successful prosecution. Furthermore, often, comprehensive and effective domestic law on such crimes does not exist or law enforcement officials in some states lack expertise on how to combat these specific crimes. Domestic laws cannot however by themselves provide a satisfactory solution to challenges raised by transnational crime where cross-border cooperation is essential for enforcement.

Over the past decade, the UNODC GMCP has attempted to improve the cooperation and capacity of states to effectively prevent, prosecute, and combat transnational maritime crimes. For example, it established the Sahel Judicial Platform in 2010 to strengthen judicial cooperation in criminal matter between states in the Sahel.<sup>205</sup> The Judicial Regional Platforms of Sahel and Indian Ocean Commission Countries were established by the UNODC's Terrorism Prevention Branch and Organized Crime and Illicit Trafficking Branch to strengthen international cooperation in criminal matters in the regions of the Sahel and the Indian Ocean. These Platforms are international cooperation networks, which facilitate extradition and mutual legal assistance in criminal matters between participating states. It is recommended that a similar initiative be established for the Gulf of Aden.<sup>206</sup>

The Djibouti case study illustrates that significant work is still needed to deal effectively with transnational maritime crimes, and that despite significant efforts by the country, international cooperation is still developing. The case study also illustrates issues which are relevant for other Gulf of Aden's states. The first, general, point which is relevant to all states, is the importance of ratifying and effectively implementing international treaties such as the UNCLOS, the UNTOC, and the SUA. These instruments, along with other crime-specific instruments, while not perfect, if effectively implemented into domestic legislation, provide a good framework for dealing with transnational crimes at sea which can provide important guidance for states. The more uniform such implementations are and the closer they are to the international definitions the easier cooperation in criminal matters becomes.

Following on from this, another important issue which is highlighted by the case study is the need for legal clarity in respect of certain maritime crimes. The international legal instruments are, at times, vague and leave a lot of room for interpretation. States should enact clear definitions of all transnational crimes and seek to close any potential interpretative gaps which may lead to the inability to prosecute suspected criminals, bearing in mind uniformity with other domestic definitions in the region.

Uniformity in legislation is also essential in the area of extradition and mutual legal assistance laws. It is thus recommended that model treaties and model legislation be developed following the latest developments in international criminal cooperation which states could closely follow in the drafting of their domestic legislations as well as bilateral and multilateral treaties.

Lastly, legislation can only be truly effective when supported by strong enforcement bodies, ranging from the police force to judicial bodies. Capacity-building in this area is needed to ensure that states can effectively enforce their legal frameworks on transnational laws. It has been recognized that transnational crimes cannot be dealt with by states in isolation, and cooperation between states is necessary in order to effectively address transnational maritime crimes. The case study has illustrated that regional agreements, such as the DCoC, are useful in this regard, however they are not sufficient particularly when it comes to legal cooperation.

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<sup>205</sup> See 'PCJS' (*PCJS-Sahel*) <<https://pcjs-sahel.org/en/>> accessed 31 January 2022.

<sup>206</sup> It is anticipated that the first author of the present work will continue working on such an initiative together with the UNODC GMCP in 2023–5.

The UN Sustainable Development Goals recognise the essential importance of effectively tackling maritime crime, however as Fijnaut states ‘transnational crime is still an elusive phenomenon for many people and many governments.’<sup>207</sup> In order to adequately address this phenomenon, additional research on state practice with respect to transnational crimes, such as the research presented in this article is needed to uncover the necessary steps countries and the international community must take in order to enhance enforcement.

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<sup>207</sup> Fijnaut (n 2) 124.