



Transnational Organized Crime at Sea: Smuggling and Trafficking of Migrants and Drugs.

Presentation by Prof. Dr. Kennedy Gastorn, the Secretary-General of AALCO at the “3rd International Symposium on the Law of the Sea”, Organized by the Ministry of Foreign Affairs of Japan, 3 February 2017.

Respected dignitaries

At the outset I take this opportunity to profusely thank the Ministry of the Foreign Affairs of Japan for inviting me in my capacity as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to share some of my thoughts at this Symposium on the Law of the Sea.

It is a great pleasure and honour to be a part of this Symposium and I look forward to hearing the perspectives of the eminent speakers on contemporary issues in this area.

The topic for my presentation is “*Transnational Organized Crime at Sea: Smuggling and Trafficking of Migrants and Drug*”.

My presentation seeks to review the legal framework that is available to combat organised crime at sea in relation to (a) smuggling/trafficking of migrants at sea and (b) drug trafficking. I will attempt to recommend a cohesive legal framework that may enable States to undertake policy measures by keeping in line with established legal norms. In doing so, I will attempt to combine the regimes available under Migration Law, Refugee Law and the Law Preventing Trafficking of Drugs and Psychotropic Substances_and synergising it with the UNCLOS to recommend a comprehensive legal regime that may be readily accessed by States in order to frame effective policy.

Background Information

The sea has been one of the many avenues for the rapid rise of global trade and services but conversely has also been a ready passage for the action of transnational organised crime groups. Curbing these transnational groups has been a crucial priority for both coastal and landlocked States across the globe as they pose a threat not only to national security but also to the preservation of fundamental human rights of victims across the globe.

When the United Nations Convention on the Law of the Sea¹ (UNCLOS) was conceptualized three decades earlier, [something which I am pleased to inform you, the Member States of AALCO played a major role in], the issue of criminality at sea was not at the forefront of negotiations.

Issues of equitable resolution of jurisdictional competences took precedence and as a model, seemed sufficient to address the problem of transnational crime as well. Serious crimes within territorial waters or the Exclusive Economic Zone (EEZ) were to be addressed by coastal States, whereas crimes on the high seas were to be addressed by flag States.

Only a limited number of crimes namely piracy, slave trafficking or illegal broadcasting were to be within the domain of international policing.

With the turn of the 20th century, however, the ground realities have changed. There are an array of transnational groups operating out of multiple countries that endanger security and safety, not only within the high seas or territorial waters but also have vital ramifications on the social and economic safety of nations on land. Such activities include piracy and armed robbery; maritime terrorism; migrant trafficking; release of environmental pollutants and drug trafficking.

Each of these crimes occur across a variety of zones which makes it difficult practically for any one State to adequately suppress such crimes. As a result, States have entered into

¹ United Nations Convention on the Law of the Sea, 1982- UNTS 397; entered into force 16 November 1994 [hereinafter: UNCLOS]

various multilateral and bilateral partnerships in order to ensure the existence of sufficient security arrangements. Examples of these partnerships include the US led Proliferation Security Initiative (PSI) that has been brought into force in order to ensure the interdiction of vessels suspected of engaging in criminal activity.² The PSI has 105 member states from all regions.

Recent wars and economic strife has also caused an unforeseen exodus of individuals attempting to flee from their countries of origin by any means possible including overcrowded and damaged vessels. These perilous journeys have led to the loss of many lives as they are at continuous risk of sinking. Since the Arab Spring in 2011 over 1,500 persons have lost their lives while attempting to cross the Mediterranean Sea.³ The migrants stuck in this vortex can be classified under many legal categories and may be entitled to refugee status under international refugee law⁴. However, it is often the case that these migrants are victims of trafficking and smuggling by transnational organized crime groups.⁵

Similarly, the use of commercial vehicles for the trafficking of drugs such as cocaine, opium and its derivatives has been along contentious issue. Consumer States have adopted various initiatives including but not limited to intercepting vessels both in their territorial waters but also in the territorial waters of transit States. There have also been multiple bilateral and multilateral agreements entered into in order to combat the same. The most relevant United Nations Conventions are the 1961 Convention on Narcotics Drugs⁶, the 1971 Convention on Psychotropic Substances⁷ and the 1988 United Nations

² See “Proliferation Security Initiative “<<https://www.state.gov/t/isn/c10390.htm>>? Accessed Jan 3 2016
“The Proliferation Security Initiative was launched in 2003 as a global effort that aims to stop trafficking of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. That strategy recognizes the need for more robust tools to stop proliferation of WMD around the world, and specifically identifies interdiction as an area where greater focus will be placed.

³ Patrick Kingsley, “Arab Spring spurs biggest migration wave since Second World War”, Jan 3 2015, The Guardian, <<https://www.theguardian.com/world/commentisfree/2015/jan/03/arab-spring-migrant-wave-instability-war>> accessed Jan 3 2017

⁴The Status and Treatment of Refugees and the Legal Protection of Migrant Workers are topics that have been deliberated upon at AALCO Annual Sessions.

⁵ Hein De Haas and Nando Sigona, “Migration and Revolution’ Forced Migration Review, <http://www.fmreview.org/north-africa/dehaas-sigona.html>

⁶1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the 1961 Single Convention on Narcotic Drug 18 UST 1407 / 520 UNTS 204 / 14 ILM 302 (1975)

⁷Convention on Psychotropic Substances (New York, 21 February 1971), 1019 UNTS, 176.

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Convention)⁸

Most of the illicit activities at sea are usually inter-linked as most of the transnational armed groups are often involved in more than one illegal activity.⁹ For instance, an operation commenced for the purpose of combatting drug trafficking may come across a fishing trawler that is instead involved in the trafficking of migrants.

The issue is that these require the operationalization of different Rules of engagement and thus may hamper effective implementation of the operation. As a result, various multi-purpose maritime security operations have been launched. These include for instance the 2008 CARICOM Maritime Security Arrangement¹⁰ that facilitates inter-agency co-operation and has had a fair amount of success in the Caribbean waters.

Broad Overview of the Legal Framework for Transnational Organized Crime at Sea

Distinguished delegates

The overarching contours of the legal framework are framed largely by the United Nations Convention on the Law of the Sea (UNCLOS)¹¹ and the United Nations Convention on Transnational Organised Crime (UNTOC)¹² and its Additional Protocols which include to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking in Persons Protocol)¹³ and against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol).¹⁴

⁸ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988), 21 ILM (1988), 1261

⁹Efthymios.D. Papastavridis, " Crimes at Sea: A Law of the Sea Perspective", Reporter of the Director of Studies,<https://www.peacepalacelibrary.nl/ebooks/files/380717654.pdf>, accessed Jan 3 2016

¹⁰ CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008 ;

¹¹ United Nations Convention on the Law of the Sea, 1833 UNTS 397; entered into force 16 November 1994

¹²United Nations Convention on Transnational Organised Crime 40 ILM 335 (2001) / UN Doc. A/55/383 at 25 (2000)/ [2004] ATS 1

¹³40 ILM 335 (2001) / UN Doc. A/55/383 (Annex II, p. 53) / [2005] ATS 27

¹⁴Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by GA Res. 55/25 of 15 November 2000 and entered into force on 28 January 2004.

The above instruments do not provide a definition of transnational organized crime. However, Article 2(a) of UNTOC defines organized criminal group, serious crimes and transnational as follows:

Organized criminal group:

“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.”¹⁵

Serious crime:

“conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

As per Article 3(2), Transnational Crime:

- (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.*

Specifically on drug trafficking, the current regime is largely governed by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

The 1988 Convention Against Illicit Trafficking in Narcotic Drugs was created to specifically deal with the increasing problem of international trafficking as the other two related Conventions did not adequately deal with this issue.

Article 17 (3) of the Convention reads thus:

“A Party which has reasonable grounds to suspect that a vessel exercising the freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another party is engaged in illicit traffic may so notify the flag State, request

¹⁵ Article 2 (a)UNTOC

confirmation of registry and if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.”

The focus of Article 17 is on the enforcement jurisdiction in relation to suspected vessels. The success of the Article 17 is contingent on the expedient possession of prescriptive jurisdiction by the intercepting State.

In this case, Article 17 (3) requires explicit authorization of the flag State, something that has been indicated by the Drafters in the preparatory papers (*travaux préparatoires*).¹⁶

However, this position was a result of a difficult compromise as the provision did not indicate that the requirement of authorization was limited only to the high seas. As a result, it was subsequently decided that "the suspected ship must be located beyond the outer limit of the territorial sea for an authorization to be requested from the flag State to board the vessel."¹⁷

The 1988 Drug Convention was soon followed by regional agreements. The Council of Europe took the lead with the “Agreement on Illicit Traffic by Sea” that strengthens the treaty framework in the European Context. Article 17 of the 1988 Convention acts as a constant frame of reference.

Another relevant regional agreement is that of the “Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area of 2008”. This agreement has underscored a concerted network of bilateral agreements among those regional players in Caribbean.

This Agreement deals with all threats to maritime security. However, this Agreement is only applicable to CARICOM Member nations and not to third-party States.

¹⁶ P. Van der Kruit, *Maritime Drug Interdiction in International Law* (2007)

¹⁷ United Nations Economic and Social Council, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1998)

There are also other multiple bilateral agreements in this regard.¹⁸ They have also tried to dilute the consent requirement in Article 17(3) by seeking the ad hoc consent of the flag State in order to interdict the suspected vessel.

Without falling afoul of the consent requirements in Article 17 (3), these arrangements are a victory for global diplomacy as they demonstrate that States can co-operate to adequately deal with threatening non-state actors.

Notable Legal Challenges to the Existing Legal Regime on Drug Trafficking

There are multiple problems faced by the existing regime that combats drug trafficking.

The first problem is that question- of jurisdiction may often turn out to be a hurdle. While jurisdiction safeguards state sovereignty, they do bring the drug trafficking legal framework into murky waters.

For example, if Japan authorities interdict a vessel belonging to a third country in Tanzanian waters pursuant to a bilateral treaty between the two; can Japan try the ship without any other form of jurisdictional nexus? The conventional answer is in the negative. However, the Treaty in question may provide an answer.

As drug-trafficking has not yet been indisputably recognised in the list of crimes for which universal jurisdiction may be claimed, the Japan cannot assert its jurisdiction. As per the existing laws, therefore, in such a scenario, the coastal State, in whose territorial waters the interception took place retains jurisdiction.

A problematic situation therefore arises where a State may have the right to interdict a vessel but no right to seize the cargo or impose their writ on the individuals concerned

¹⁸ According to the latest International Narcotics Control Strategy Report (March 2012), “there are 44 maritime counterdrug bilateral agreements or operational procedures in place between the United States and partner nations”.¹¹⁵ The United States has entered into agreements with the following countries in the region: Antigua, Barbuda, the Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Venezuela (Bolivarian Republic of). There is also an agreement with the United Kingdom and eight MoUs and Operational Procedures with other States having overseas territories in the region, such as the Netherlands or Belgium

which prevents the swift and expedient dispensation of justice. There may not be a treaty of extradition or even provision of mutual legal assistance between the two States.

The organized crime groups manipulate this loophole utilise the geography of the states to transit through their jurisdictional zones, thus hampering their effective apprehension or indictment.

Moreover, neither Article 17 nor Article 4 of the 1988 Convention clearly addresses the question of which State's jurisdiction applies once the vessel of another State has been boarded.¹⁹

The language of Article 17 points to flag State supremacy but in absence of a cohesive regime clashes in jurisdiction are bound to arise, neither of which are addressed clearly by the existing regime.

A necessary solution to the problem may be making drug trafficking a universal crime.

There has been a trend towards according of such a status in the recent "*Medvedyev case*" of the European Court of Human Rights.²⁰ The Grand Chamber argued that due to the gravity and severity of the problem, universal jurisdiction over the crime as an exception to the law of the flag State would be a huge step in the fight. They recommended that the international law on drug trafficking must be brought in line with what has existed many years with regard to piracy.

The UNODC has also identified these flaws and have urged States to make uniform their regimes and move towards a more cohesive and consistent regime that enables adequate enforcement. In an issue paper published in 2013, they have stated:

¹⁹ United Nations Office on Drugs and Crime, "Combating Transnational Organized Crime Committed at Sea" (United Nations, March 2013)

²⁰ *Medvedyev et al v France*, Judgment of 29 March 2010 (Grand Chamber, Application No 3394/03). Author Douglas Guilfoyle in his analysis of the judgement says that "While something of a mixed blessing, the decision can be seen as generally supportive of maritime law enforcement operations – so long as there is an underlying treaty that clearly contemplates criminal sanctions. Nonetheless, States would be wise to contemplate what practical measures could be taken to ensure judicial supervision of detention at sea and to allow suspects' families to be informed and even for legal advice to be provided. There are clearly many ECtHR judges who would apply the Strasbourg case law on point strictly, irrespective of the practical challenges that could present in many maritime law-enforcement operations". Blog of European Journal of International Law, April 19, 2010.

“In addition to issues surrounding the establishment of jurisdiction and prompt communication between the States’ competent authorities, there may be further hurdles in the fight against drug trafficking at sea. There is the need for international cooperation in relation to the collection of evidence, extradition of offenders, and the transfer of witnesses. Such issues are usually addressed by treaties of mutual legal assistance and extradition. The majority of the relevant agreements fall short of including detailed mutual legal assistance provisions and therefore there is need for the adoption of additional legislative measures, or the amendment of current legislative provisions, in order to fill this gap”²¹

Notable Legal Challenges to the Existing Legal Regime on Human Trafficking

The operationalization of the legal regime on human trafficking comes up against three major challenges.

The **first** issue is the legal classification of the individual. They may be irregular migrants or victims of trafficking or refugees or those voluntarily seeking assistance from smugglers. It is crucial that the authorities are able to decipher the status of these individuals. Further, it is crucial that adequate procedures take place in the port where the vessel is diverted to.²²

Second, even if the rescue operation has been carried out successfully, there is a problem about determining the point of disembarkation. While the State parties to the Safety of Life at Sea,1974 SOLAS and International Convention on Maritime Search and Rescue,1979 (SAR Convention) is to guarantee a "place of safety" as soon as reasonably possible, there are no requirements that such safe place must be in its own territory. There have been attempted remedies through, for instance the International Maritime Organisation (IMO) Facilitation Committee (FAL) Principles which stipulated that the government responsible for the area should also be responsible for the disembarkation.²³

²¹ United Nations Office on Drugs and Crime, "Combating Transnational Organized Crime Committed at Sea" (United Nations,March 2013)

²²HirsiJamaa and Others v. Italy, (Appl. No. 27765/09), Grand Chamber Judgment of 23 February 2012

²³ IMO, FAL.3/Circ.194, 22 January 2009, Principle No. 3

There is also talk presently of the adoption of a Memorandum of Understanding among European nations for the signing of a Memorandum of Understanding that could co-ordinate search and rescue services and delineate responsibilities.²⁴

The **third** crucial problem, much like in the case of drug trafficking is the question of jurisdiction. In the absence of any treaty espousing a concrete jurisdictional principle, there remain questions about the arrest, detention or responsibilities in such cases. While obligations towards refugees have been strictly codified in the Refugees Convention, loopholes still exist in the legal framework governing the admission of migrants and such loopholes extend to migrants at sea as well.

REFLECTIONS

Distinguished delegates, Ladies and Gentlemen

As I have identified previously, multiple issues exist with the implementation of each of the legal regimes, some of which are common to both.

Firstly, there is the possibility of clashes of jurisdiction which enable transnational State actors to evade the writ of a country.

Second, the law in both cases is fragmented into many legal treaties and Conventions, sometimes requiring law enforcement authorities to go into excessive and unnecessary interpretation.

Finally, both international legal regimes are sometimes at odds with the municipal regimes in each country. The gap between the municipal regimes and the international regimes are not, strictly speaking a violation of international law on part of the countries due to the ambiguous nature of obligations in this legal regime that do not cast concrete obligations.

²⁴ United Nations Office on Drugs and Crime, "Combating Transnational Organized Crime Committed at Sea" (United Nations, March 2013)

With regard to solutions to the problems caused by implementation of various legal regimes, the 2016 Report of the Expert Group Meeting on Transnational Organized Crime at Sea (EGM) found thus:

With regard to implementation, enforcement and prosecution, the expert group recommends that: *that incorporating capacity building into existing structures may be more appropriate than creating entirely new structures or arrangements.*

When providing capacity building options there must be a high level of awareness as to how each State structures its law enforcement jurisdiction at sea before presenting them with an omnibus of legislative experience. For a coast guard network to work effectively, States should have some clarity about their jurisdiction, mandate and powers. Greater focus on discussing jurisdictional issues in order to have more effective coastal and flag State cooperation is required.

Moreover, law enforcement at sea is expensive, and States might consider how they can implement intelligence based policing, thus creating models that are more cost effective. Although intelligence and detection /monitoring can be amongst the most difficult elements of capacity to build, they are essential to sustainable improvement. Additionally, even if jurisdiction is established with respect to the coastal State's law enforcement officials, there may be no prosecution framework in place.

Legislative frameworks and prosecution training are thus equally essential. A further option discussed at the EGM was for well-resourced States to help fill the gaps for partners who are unable to create the same structures. States should further consider the use of satellite tracking and open sources on the internet.²⁵

²⁵ 25th Session of the Commission on Crime Prevention and Criminal Justice, 23-27 May 2016: E/CN.15/2016/CRP.3

We at the Asian-African Legal Consultative Organization (AALCO) whole-heartedly agree with these recommendations.

We further believe that it is imperative that drug trafficking and migrant trafficking, along with all other ‘serious crimes’ under the UNTOC, be recognised as universal crimes, which would give all States jurisdiction to enforce their writ on a suspicious vessel they may interdict.

This should be done by means of a universal treaty that brings together the multiple regional agreements and carve out more concrete obligations. This treaty regime would ideally cast obligations and bestow rights on States against transnational groups that utilise the sea for their actions rather than creating separate regimes through multiple treaties for each crime. In such a scenario, there would be no problem, if a boat that was originally interdicted for being suspected of human trafficking was also caught with drugs. As both crimes would be accorded the status of universal jurisdiction via this treaty, there would be no obstacles caused to effective enforcement in such cases. The treaty should also facilitate co-operation between various regional groups seeking to combat transnational organized crime.

We also urge the international body to come up with a Model law to curb transnational organized crime as a whole. The UNODC has already taken the lead on this by proposing a model law on the smuggling of migrants²⁶ but we feel that these efforts can be extended to transnational organised crime as a whole. The syncing of municipal legislation in accordance with international standards is a must for developing a regime that seeks to tackle transnational legal violations.

²⁶UNODC, “Model law against the smuggling of migrants”<https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf>