



**MASTER OF SCIENCE IN MARITIME SCIENCE
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**The legal framework in order to fight
against drug trafficking at sea: A critical
analysis**

Student: Gauthier Moureau

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Supervisor: Frank Maes

Assessor: Klaas Willaert

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INTRODUCTION

General

Our modern society is more and more faced with a growing problem of drug abuse. According to the latest information, in 2013 around 187,100 people lost their lives prematurely due to drug-related abuse. An estimated total of 246 million people, or 5% of the world population between the ages of 15 and 64 years has used an illicit drug in 2013, an increase with 3 million people compared to the year 2012. Due to the fact that millions of people are also injecting drugs in their body, also other health problems arise, like a higher chance of getting HIV and hepatitis C.¹

The concrete numbers of people addicted to drugs and the crimes and health issues related to drug abuse clearly shows that it is necessary for states all over the world to take action against this illicit drug trade. Also on the international level, instruments need to be provided to allow the states to take necessary action against drug abuse and drug trade. One of the transnational crimes related to drug abuse is the illicit trade in drugs by sea.

Drug abuse doesn't only cause health problems and affect the lives of millions of people, it also affects social and economic communication and relationships between states. Drugs are often transferred by vessels or other means of transportation from one country to another, states need to cooperate in order to stop this transnational crime.

If we look at concrete numbers, it is clear that drug transportation by the areas of the sea is a serious problem and states are struggling to fight back against this illicit drug trade. In this master dissertation, we will look at the international legal framework in order to prevent and fight against illicit drug traffic by sea. Of course, we will start with a study on the states transnational rights and obligations in order to fight against this illicit drug trade. On the basis of this comprehensive study, we will make a critical analysis about this international legal framework in order to understand why it is so difficult for states to fight the illicit traffic of drugs at sea.

¹ World Drug Report by the United Nations Office on Drugs and Crime, 2015, p. IX and https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf (consulted on 2017-04-11).

Structure

The title of this master dissertation is: “The legal framework in order to fight drug trafficking at sea: A critical analysis”. First of all, in the first part of this master dissertation, I will discuss in depth the legal framework in order to fight against illegal drug trafficking by sea: I will shortly introduce the different legal sources, I will define the crime of illegal drug trafficking and after this I will discuss the rights and obligations of flag states, coastal states and third states. To end the first part, I will also discuss the international cooperation between states.

In the second part of this master dissertation, I will discuss this international legal framework in a critical way in order to identify the strengths and the weaknesses of this international legal framework. This second part has five different sections: One discussing the issues linked to the flag of vessels, one handling about the gaps in international legislation and a section about the problems which occur due to a certain attitude or standstill of states. In the fourth section, I will discuss the practical issues which occur in the fight against illegal drug trafficking. We will also give certain solutions for the weaknesses in the current international legal framework.

1. THE INTERNATIONAL LEGAL FRAMEWORK IN ORDER TO FIGHT AGAINST ILLEGAL DRUG TRAFFICKING BY SEA

1.1. LEGAL SOURCES

There are various sources of legislation dealing with illegal drug trafficking by sea. On the one hand there are international documents and customary international law dealing with this issue. On the other hand, states also bind themselves in regional, bilateral and also non-legally binding instruments and legislation.

1.1.1. The 1982 United Nations Convention on the Law of the Sea

On a global international level, we can make a distinction between two major legislative documents. First of all, there is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), also referred to as a sort of constitution for the law of the sea. The UNCLOS gives a general legal framework on the fight against drug trafficking by sea. There is one article in the UNCLOS dealing specifically with illicit traffic in narcotic drugs and psychotropic substances:²

“Article 108 - Illicit traffic in narcotic drugs or psychotropic substances:

- 1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.*
- 2. Any State which has 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 to suppress such traffic. “*

First of all, all the signatory countries are obliged to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances. Secondly, if a signatory country has a reasonable ground for believing that a ship flying its flag is engaged in such an illegal drug traffic, the state may request for the cooperation of other states.

It is clear that the UNCLOS only gives general guidelines about the cooperation between signatory countries in cases where drugs are transported by sea. The UNCLOS however doesn't give a

² Art. 108 of the 1982 United Nations Convention on the Law of the Sea.

detailed description about how countries have to deal in specific situations with vessels engaged in illegal drug trafficking.

1.1.2. The 1988 United Nations Convention against Illicit Drug Trafficking in Narcotic Drugs and Psychotropic Substances

The second important transnational legal document dealing with illegal drug trafficking by sea is the 1988 United Nations Convention against Illicit Drug Trafficking in Narcotic Drugs and Psychotropic Substances (the 1988 Convention). This international convention is far more detailed and contains a definition of illegal drug trafficking and its main characteristics. Firstly, I will give a short historic overview of the 1988 Convention. After this, I will give a brief overview of the general content of the 1988 Convention. The specific content (the rights and obligations of states etc.) will be discussed later on in this master dissertation.

1.1.2.1. History of the 1988 Convention

In the 1980s there was an increasing international awareness about the misuse of illegal drugs and psychotropic substances. Although, the growing internationalization of the crime of drug trafficking and drugs misuse was already longer internationally recognized.³ There was a also growing awareness about the fact that the two international conventions dealing with illegal drug trafficking at the time weren't sufficient anymore.^{4 5} The shortcomings of the existing legal framework were clearly expressed and explained in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, adopted by the 1987 United Nations Conference on Drug Abuse and Illicit Trafficking.⁶

“... it is necessary to ensure vigorous enforcement of the law in order to reduce the illicit availability of drugs, deter drug related crime, and contribute to drug abuse prevention by creating an environment favourable to efforts for reducing illicit supply and demand. ... Coordination of activities and cooperation among national agencies within each country and between countries are vital for the achievement of the objective.”⁷

³ M.C. BASSIOUNI, “The International Narcotics Control Scheme” in M.C. BASSIOUNI, *International Criminal Law*, Vol. 1, New York, Transnational Publishers, 1986, 507.

⁴ The two international conventions dealing with the issue of drug trafficking were the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol and the 1971 Convention on Psychotropic Substances.

⁵ S.K. SHATTERJEE, *Legal Aspects of International Drug Control*, The Hague, Martinus Nijhoff, 1981.

⁶ W.C. GILMORE, “Drug trafficking by sea: The 1988 United Nations contention against illicit traffic in narcotic drugs and psychotropic substances”, *Marine Policy* 1991, (Vol. 15, Issue 3) 183.

⁷ Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control adopted by the 1987 United Nations Conference on Drug Abuse and Illicit Trafficking.

After several initiatives taken by individual countries and a draft convention, a meeting of the United Nations Conference for the Adaption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was held in Vienna from 25 November 1988 until 20 December 1988. The United Nations Conference resulted in a consensus about a detailed treaty text with a total of 34 articles and one annex. The 1988 Convention entered into force in late 1990 after the twentieth ratification.⁸

1.1.2.2. General content of the 1988 Convention

The main objective of the 1988 Convention is the encouragement of international cooperation to deal with the issue of illegal drug trafficking (by sea). Art. 17, 1 of the 1988 Convention clearly puts forward this objective by stating: “*The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea*”.⁹ Art. 17 of the 1988 Convention is specifically dedicated to illegal drug trafficking by sea and also contains other instruments countries can use to prevent and suppress illegal drug trafficking by sea. Art. 17 of the 1988 Convention provides states with instruments like notifying other states, the possibility of a request for assistance, the possibility for a flag state to authorize a third state to board and search a vessel, etc. Furthermore art. 17, 9 of the 1988 Convention encourages states to enter into bilateral and regional agreements to carry out and enhance the effectiveness of the 1988 Convention.

Like I explained before, art. 17 of the 1988 Convention is wholly dedicated to the illegal drug trafficking by sea. Besides art. 17 of the 1988 Convention also other articles are very relevant. For example, art. 3 of the 1988 Convention renders drug trafficking illegal and obliges the states to establish it as a criminal offence under domestic law.¹⁰ Furthermore, also articles are dedicated to the exercise of jurisdiction over certain criminal offences (art. 4),¹¹ the possibility of confiscation (art. 5),¹² extradition (art. 6),¹³ mutual legal assistance (art. 7),¹⁴ etc.

⁸ W.C. GILMORE, “Drug trafficking by sea: The 1988 United Nations contention against illicit traffic in narcotic drugs and psychotropic substances”, *Marine Policy* 1991, (Vol. 15, Issue 3) 184.

⁹ Art. 17, 1 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹⁰ Art. 3 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹¹ Art. 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹² Art. 5 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹³ Art. 6 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

Besides the fact that the 1988 Convention heavily promotes international cooperation between states and contains some very relevant provision to combat illegal drug trafficking, only a few substantive obligations were imposed upon states. Nevertheless, the 1988 Convention provides a good basis for more effective law enforcement in the field of illegal drug trafficking.¹⁵

The two international conventions mentioned before (the 1982 United Nations Convention of the Law of the Sea and the 1988 Convention) should be applied together to get a broad view on the legal framework in order to fight against drug trafficking by sea. Often, the 1988 UN Convention against Illicit Drug Trafficking in Narcotic Drugs and Psychotropic Substance will be far more detailed than this one dedicated article in the UNCLOS, but in the area of cooperation between states the UNCLOS also has a very broad scope.

1.1.3. Other legal sources

Besides the mere international conventions, we also have to take in account the existence of dozens of regional and bilateral agreements. Often these agreements are expanding the rights and obligations of signatory countries. Examples of important regional and bilateral agreements are the Council of Europe 1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2003 Agreement between the government of the United States of America and the government of the Republic of Guatemala concerning the cooperation to suppress illicit traffic in narcotic drugs and psychotropic substances by the sea and air. Of course, there are plenty of other examples of important regional and bilateral agreements dealing with the illegal traffic of drugs by sea and other means of transportation.

Finally, there are also non-legally binding instruments used in the international community. For instance, there is an IMO Resolution on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic. Notwithstanding the fact that some international legal instruments are non-legally binding, it can nevertheless give an idea of good practise in case of illegal traffic of drugs and the suppression of this crime.

¹⁴ Art. 7 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹⁵ W.C. GILMORE, "Drug trafficking by sea: The 1988 United Nations contention against illicit traffic in narcotic drugs and psychotropic substances", *Marine Policy* 1991, (Vol. 15, Issue 3) 192.

1.2. ILLEGAL DRUG TRAFFICKING (BY SEA) AS A CRIME

1.2.1. Types of crimes in international law

If we look at different crimes in an international perspective, we can distinct two types of crimes: International crimes and crimes that have an international character.¹⁶

First of all, there are the international crimes or also referred to as “core crimes”.¹⁷ These crimes are crimes that encroach on the interests and rights of the society as a whole. These “core crimes” are genocide, war crime and crimes against humanity. These crimes have been all defined over time in a range of international conventions and agreements.¹⁸

Besides the international crimes, there are also the crimes that have an international character, also often referred to as transnational crimes.¹⁹ These types of crimes are also written down in international conventions and agreements. The object to prevent and punish those crimes is to ensure peace, safety, lives and health of people and to establish normal relationships between states.²⁰ The crimes with an international character or transnational crimes do not damage or bring out of balance the whole international community, but only affect the position of more than one state. Those transnational crimes include piracy, illegal drug trafficking, slavery, terrorism, ... Often transnational crimes are very hard to investigate because the actors of the crimes (often criminals), witnesses and the *locus delicti* are often placed in more than one state.²¹

Like mentioned before, one of the crimes which as an international character is the act of illegal drug trafficking. One of the ways of trafficking or transporting drugs from one place to another is to make use of the different areas of the sea.²²

¹⁶ K. KAYAN, *International Law: lecturies*, Moskow, Eksmo, 2009, 290.

¹⁷ R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure: Third Edition*, Cambridge, Cambridge University Press, 2014, 329.

¹⁸ OPEN SOCIETY FOUNDATIONS, *Fact sheet: International Crimes, 1*, https://www.opensocietyfoundations.org/sites/default/files/mx-factsheet-icl-20160603_0.pdf (consulted on 2017-04-13).

¹⁹ R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure: Third Edition*, Cambridge, Cambridge University Press, 2014, 329.

²⁰ K. KAYAN, *International Law: lecturies*, Moskow, Eksmo, 2009, 290.

²¹ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 6.

²² K. KAYAN, *International Law: lecturies*, Moskow, Eksmo, 2009, 290.

1.2.2. The principles of a crime with an international character or transnational crime

In order to speak about crimes with an international character or transnational crimes, we need to take in account a few principles which are governing these kind of crimes and thus also govern the act of illegal drug trafficking (by sea).

First of all, always one or more persons are liable and responsible for this type of crime: a government cannot be held liable for committing this sort of crime. The actors are always natural or legal persons, never a public body on its own.

Secondly, the objects in preventing and punishing those crimes are international. By preventing and punishing those crimes, the international community wants to establish normal relationships between states, promote international cooperation, defend human rights, etc.

Finally, all of this crimes (including illegal drug trafficking) are also defined and punished in national legislation, but this national legislation is often based on international rules.²³

1.2.3. The elements of the crime of illegal drug trafficking by sea

1.2.3.1. General elements of drug crimes in the 1988 Convention

The 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances stipulates that all states should take measures to prevent and punish the criminal offence of drug trafficking by establishing this crime as a criminal offence under its domestic law.

Each party to the 1998 Convention is obliged to take criminal measures for the following actions:

- The production, manufacturing, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic

²³ V.P. PANOV, *Communication between States against international criminal acts*, Moscow, Urist, 1993, 160.

substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;²⁴

- The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;²⁵
- The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any activities enumerated in the list mentioned in the first lid;²⁶
- The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the 1988 Convention, knowing that they are used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;²⁷
- The organization, management or financing of any of the offences enumerated above.²⁸

The elements and principles mentioned above are very general. In order to apply these elements to the crime of illegal drug trafficking, it is necessary that we identify the *corpus delicti* of the crime of illegal drug trafficking by sea.²⁹ We will take a closer look at the elements of the crime of illegal drug trafficking by sea under the following title.

1.2.3.2. *Constitutional elements of trafficking drugs by sea*

The identification of the crime of illegal drug trafficking by sea is very important in order to identify the punishment and guiltiness of the people involved in this crime. The details and elements are often more comprehensively written down in national legislation. In this master dissertation we will only discuss the general constitutional elements in the following paragraphs, which is sufficient to understand this sort of crime.

²⁴ Art. 3, 1, a), i) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

²⁵ Art. 3, 1, a), ii) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

²⁶ Art. 3, 1, a), iii) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

²⁷ Art. 3, 1, a), iv) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

²⁸ Art. 3, 1, a), v) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

²⁹ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 7.

Firstly, I will talk about the object of the crime, the object of a crime are the legal interests and rights violated by the committed crime. For the crime of illegal drug trafficking by sea the object will be the lives and health of people, safety of navigation, normal social and economic connections between states and the safety of navigation at sea.³⁰

Secondly, we have to also identify the objective aspect of the crime. This means the different types and techniques used in order to commit a crime. For the illegal act of drug trafficking by sea, the following techniques are used: the transfer of narcotic drug or psychotropic substances from the coast on a boat by the crew, passengers or cargo, the transfer of drugs from boats to the territorial sea or internal waters or the transfer of narcotic drugs or psychotropic substances on the high seas from one vessel to another (and possibly also the use of aircraft to achieve this).³¹

Thirdly, we also have to take a look at the subject or mental element of the crime. This mean the interrelationship between the subject of the crime and the criminal action committed by the subject. When we talk about drug trafficking, possible subjects can be the passengers, the crew, employees of transportation companies and the recipient or sender of goods. If we look at the interrelationship between those subjects and the crime committed, we can distinct a direct intention to commit a crime and an indirect intention to commit a crime.

There is a direct intention to commit a crime when the person(s) involved know(s) that the actions taken by them are illegal and can be punished. An example of such a direct intention are employees of a transportation company breaking a seal of a container and hiding drugs amongst the cargo in this container. It's clear that the employees know that what they are doing is illegal and can be punished. We talk about an indirect intention when this same employees of a transportation company know that illegal drugs are hidden in the container, but they decide to take no action and decide not to warn the public authority about it. In some cases, it can also happen that the subjects of the crime are totally unaware of the crime committed, for example when the crew doesn't know anything about the (illegal) cargo or when some transportation documents were falsified.³²

³⁰ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Artic University of Norway, 2014, 7.

³¹ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Artic University of Norway, 2014, 8.

³² CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Artic University of Norway, 2014, 8.

1.3. FLAG STATE RIGHTS AND OBLIGATIONS

First of all, we are going to talk about the rights and obligations of flag states in order to fight against illicit drug trafficking by sea. The rights and obligations of flag states are very important because flag states have exclusive jurisdiction over the vessels flying their flag, the exclusive jurisdiction of flag states is even a principle of international customary law and thus generally accepted in the international community.³³

We will both talk about the possible preventive measures a flag state can take and the possible repressive measures a flag state can take once a crime in relation to drug trafficking is committed. But first we will look at a key provision in the 1988 Convention; namely art. 4.

1.3.1. Art. 4 of the 1988 Convention – nationality of a vessel

Art. 4 of the 1988 Convention provides a legal framework for contracting states to establish its jurisdiction over crimes related on board of vessels flying its flag.³⁴ The measures a contracting party can take are closely related to the nationality of a vessel.³⁵ A flag state has exclusive jurisdiction over a vessel flying its flag, which gives the right to take action when crimes are committed on board of those vessels according to art. 4 of the 1988 Convention.

There is a problems possible when there is no genuine link between the vessel and the flag state or when a ship is flying more than one flag, this will be discussed under the title dealing with the critical analysis of the international legal framework.

According to art. 4, 1, ii) of the 1988 Convention,³⁶ each party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with this convention³⁷ when the offence is committed on board of a vessel flying its flag which is registered under its laws at the time the offence is committed.

³³ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 155.

³⁴ Art. 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

³⁵ Art. 91 UNCLOS - Nationality of ships: 1. Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every state shall issue to ships to which it has granted the right to fly its flag documents of that effect.

³⁶ Art. 4, 1, ii) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

³⁷ Art. 3, 1 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

Further, art. 4, 2, i) of the 1988 Convention stipulates that a contracting state can also take measures that may be necessary to establish its jurisdiction over the offences established in accordance with this convention³⁸ when the alleged offender is present in its territory and it does not extradite to another contracting state on the ground that the offence has been committed in its territory or on board of a vessel flying its flag which was registered under its law at the time the offence has been committed.³⁹

Finally, art. 4, 3 of the 1988 Convention stipulates that this Convention does not exclude that a contracting state can exercise criminal jurisdiction in accordance with its domestic law.⁴⁰

1.3.2. Possible preventive measures taken by flag states

From the perspective of the 1988 Convention, it is very clear that a flag state as jurisdiction over a vessel flying its flag involved illegal drug trafficking. Preventive measures taken by contracting flag states can have a very big role in fighting against the illegal trafficking of drugs. It is very important to know what a contracting flag state can do in a preventive manner to avoid that ships flying its flag get involved in illegal drug trafficking.

1.3.2.1. Discouraging effect due to a clear domestic law

It is clear that when a contracting state has a good domestic law which punishes the act of illegal drug trafficking (by sea), this has a discouraging effect on possible criminals. According to art. 3 of the 1988 Convention, as mentioned before, the contracting states are required to include the prohibition of illegal drug trafficking (by sea) in its national legislation. This is really a major first step in order to fight against drug trafficking. When this first step in order to provide a legal framework is missing, other possible repressive steps will even not work in practice.

It is clear that a clear and understandable domestic law in each contracting state is mandatory in order to prevent drug trafficking and also to repress it once a crime is committed later on.

³⁸ Art. 3, 1 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

³⁹ Art. 4, 2, i) of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

⁴⁰ Art. 4, 3 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

1.3.2.2. Guidelines in legally non-binding instruments – IMO Res. MSC.228(82)

The IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic is an international legally non-binding instrument. This IMO Resolution provides a set of measures and action states can take in order to prevent international drug trafficking by sea.

In the preamble of this resolution, the purpose of this IMO Resolution is written down: *“The purpose of these Guidelines is thus to establish basic procedures, not only for detecting drugs on board, but also for making prevention the principal means of ensuring that the scourge of drug trafficking does not damage the world’s economy and wellbeing through attacks on international maritime trade”*⁴¹

The first chapter of the IMO Resolution MSC.228(82) underlines that prevention is one of the most important aspects in order to combat against illegal drug trafficking. An important part of the prevention involves enhancing safety and security arrangements for boarding points, ports, port facilities and ships, and supporting coordinated action among the competent authorities in ports, particularly those operating at the ship-port interface.⁴² Also the importance between the different actors in maritime operations is mentioned: There needs to be a good cooperation between the crew, the authorities, transit companies and other actors in order to make prevention and prosecution partially easier.⁴³

On the other side, Annex 2 of the IMO Resolution MSC.228(82) stresses why it is very important that besides taking preventive measures, also it is required to strike a fair balance with the facilitation of international transport and maritime security.⁴⁴ A too strict control on drug traffic

⁴¹ Paragraph 4 IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic.

⁴² Chapter 1 IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic.

⁴³ Chapter 1, 1, 1.1-1.8 IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic.

⁴⁴ Annex 2, Paragraph 3 IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic.

could hamper a fluent international trade between states, and thus can have a bad influence on world trade.

1.3.3. Possible repressive measures taken by flag states

1.3.3.1. Territorial aspect of repressive measures by a flag state

A flag state can proceed in taking repressive measures in its own maritime zones, the high seas, the Exclusive Economic Zone and the continental shelf of another state. When a crime is committed in the territorial sea or the contiguous zone of another state, art. 2 and 33 UNCLOS stipulates that there is also jurisdiction of the coastal state over the vessel.⁴⁵

Art. 17, 3 of the 1988 Convention also refers to the case were a foreign vessel is engaged in illegal drug trafficking in the territorial sea or contiguous zone of another coastal state. The article states that when a state has reasonable grounds to believe a vessel exercising freedom of navigation and flying the flag of another state, is engaged in drug trafficking the state may so notify the flag state of the vessel. The particular state can also request confirmation of registry and if the registry is confirmed can request authorization from the flag state to take appropriate measures.⁴⁶

1.3.3.2. Range of possible repressive measures by a flag state and authorization towards a coastal state

If the preventive measures taken by flag states are not sufficient and a crime related to drug traffic was committed, a state should deal with it in a repressive way. It is the second part of the actions that can be taken by flag states besides the preventive measures.

As a consequence of the fact that a flag state exercises jurisdiction over a vessel with its nationality, a flag state should deal with the crime committed on board of that particular vessel in a serious and effective way. There is a whole range of possible actions which can be taken by flag states, including boarding of the vessel, actions to stop the illegal activity right away and measures taken to save the evidence and return the vessel to the port.

When a coastal state is granted authorization to take measures regarding a vessel of a certain flag state under art. 17, 3 of the 1988 Convention, the coastal state can take different measures including

⁴⁵ Art. 2 and 33 of the 1982 United Nations Convention on the Law of the Sea.

⁴⁶ Art. 17, 3 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

the boarding the vessel, searching the vessel and if evidence is found also take appropriate action with respect to the vessel, the persons and the cargo on board.⁴⁷

It must be underlined that all the actions taken by flag states and coastal states must be in accordance with both national and international legislation. Like I mentioned before, the flag states as an exclusive jurisdiction over the vessels flying its flag, the particular measures taken by the flag states are thus basically based on a national legal system. It clear that problems can arise when flag states (and states with the reputation of a flag of convenience states) don't sign or ratify international regulations on drug trafficking or don't care about a decent national legal system to prevent and repress illegal drug trafficking. According to the United Nations Drug Report Committee and the World Drug Report of the United Nations Office on Drugs and Crime such states are for example Vanuatu and Bolivia.

1.4. COASTAL STATE RIGHTS AND OBLIGATIONS

Often, the crime of illegal drug trafficking is committed in a cross-border situation by using the maritime zones of a coastal state other than the flag state. In this chapter I will discuss the measures coastal states can take when a foreign vessel is engaged in the crime of illegal drug trafficking in their maritime zones.

The 1982 United Nations Convention of the Law of the Sea makes a distinction between different maritime zones. First of all, you have zones where the coastal state has a territorial sovereignty. This maritime zones are the internal waters, the territorial sea and the contiguous zone.⁴⁸ Having a territorial sovereignty means that a coastal state has full jurisdiction. Secondly, there are also maritime zones where a coastal state has sovereign rights: The exclusive economic zone (EEZ) and the continental shelf. Having sovereign rights means that the coastal state has no full jurisdiction but only some rights like for instance rights on the use of natural resources.⁴⁹

In this chapter I will discuss each maritime zone separately to have a good overview of the coastal state rights in every maritime zone.

⁴⁷ Art. 17, 3 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

⁴⁸ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 76.

⁴⁹ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 120.

1.4.1. The territorial sea and the right of innocent passage

1.4.1.1. *The principle of the right of innocent passage*

The first maritime zone I will discuss is the territorial sea over which a coastal state has sovereignty. The territorial sea of a coastal state may not exceed 12 nautical miles measured from the baseline.⁵⁰

Notwithstanding a coastal state has sovereignty over the territorial sea, foreign vessels have to right of innocent passage through the territorial sea of a coastal state.⁵¹ The innocent passage regime is mainly based on the freedom of navigation and the freedom of trade.⁵² To speak about a vessel using his right of innocent passage, of course some conditions need to be fulfilled. The right of innocent passage is limited because the territorial sea is a maritime area which falls under the exclusive jurisdiction of the coastal state. A right of innocent passage without any condition would hamper the exercise of full legal jurisdiction of coastal states.

1.4.1.2. *The conditions of the right of innocent passage*

The key question is whether a vessel which is involved in illegal drug trafficking can invoke his right of innocent passage through the territorial sea of another state. It is important to check whether the conditions of the right of innocent passage are fulfilled in this particular case.

The article dealing with the condition of the right of innocent passage is art. 18 UNCLOS.⁵³

“Article 18 – Meaning of passage:

1. Passage means navigation through the territorial sea for the purpose of:

(a) Traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) Proceeding to or from internal waters or a call at such roadstead

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered

⁵⁰ Art. 2 and 3 of the 1982 United Nations Convention of the Law of the Sea.

⁵¹ Art. 17 of the 1982 United Nations Convention on the Law of the Sea.

⁵² Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 85.

⁵³ Art. 18 of the 1982 United Nations Convention on the Law of the Sea.

necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”

If we read this article, it is clear that the passage should be continuous and expeditious, interruptions of the passage are only allowed if it is necessary for the ordinary navigation of the vessel, in force majeure situations or in situations of distress. According to article 19, 1 UNCLOS the passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. The passage should also take place in conformity with the Convention and with other rules of international law. Art. 19, 2 UNCLOS contains a list of activities which are considered to be prejudicial to the peace, good order or security of the coastal state.⁵⁴

We have to make a distinction between three different situations. First of all, it is possible that a vessel is loading or unloading drugs or psychotropic substances from or to the land or from one ship to another one. This situation falls clearly under art. 19, 2, (g) UNCLOS which stipulates that it is prejudicial to the peace, good order or security of a state to load and unload any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state. In the most national legislations, it will be considered illegal according to customs laws and sanitary laws to load and unload drugs and psychotropic substances. If so, we cannot speak about an innocent passage anymore, so a coastal state can stop these activities by taking appropriate measures by having full jurisdiction over the vessel. For actions other than just loading and unloading we could also invoke art. 19, 2, (l) UNCLOS which stipulates that a passage is not innocent when the vessel is doing any other activity not having direct bearing on passage.⁵⁵

Secondly, it can also happen that a vessel which has drugs or psychotropic substances on board is just passing through the territorial sea without doing any other activity. In this case it will be more difficult for a coastal state to take actions against this vessel. When a ship is just passing through the territorial sea, it could apply for the use of the right of innocent passage. Meanwhile, art. 4 of the 1988 Convention stipulates that a state should take necessary measures to establish its jurisdiction over offences related to and of illegal drug trafficking when the offences are committed in its territory (and off course also when committed in its territorial sea).⁵⁶ Also art. 27 UNCLOS states that a coastal state can exercise criminal jurisdiction when it is necessary for the suppression of

⁵⁴ Art. 19 of the 1982 United Nations Convention on the Law of the Sea.

⁵⁵ Art. 19 of the 1982 United Nations Convention on the Law of the Sea.

⁵⁶ Art. 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

illicit traffic in narcotic drugs or psychotropic substances.⁵⁷ Thus, it is very clear that a coastal state can also take measures against a vessel just passing through its territorial sea when the vessel is involved in illegal drug trafficking.

Thirdly, it could also be possible that a coastal state has information that a vessel which is involved in illegal drug trafficking will soon enter its territorial sea. Art. 25, 1 UNCLOS allows a coastal state to take necessary steps in its territorial sea to prevent passage which is not innocent.⁵⁸

1.4.1.3. Possible measures taken by coastal states

It is clear that a vessel involved in illegal drug trafficking has no right of innocent passage through the territorial sea of a coastal state. The consequence is that a coastal state has full jurisdiction over the vessel sailing through its territorial sea when it is involved in illegal drug trafficking. The measures a coastal state can take are not only based on national legislation, but also on international legislation.

Because the 1982 United Nations Convention on the Law of the Sea and the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances are not specific and clear about the measures which can be taken, we have to look at other international legal sources. The main legally non-binding source we can look at is The IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic.

According to the guidelines in the IMO Resolution, the competent authorities can board, search, arrest and seize a vessel involved in illegal drug trafficking.⁵⁹ The competent authorities may also mark goods, break up any place or container when the key are withheld or unavailable, sanction or arrest (a part of) the crew on board of the vessel, etc.⁶⁰

⁵⁷ Art. 27, 1, (d) of the 1982 United Nations Convention of the Law of the Sea.

⁵⁸ Art. 25, 1 of the 1982 United Nations Convention of the Law of the Sea.

⁵⁹ Chapter 1 IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic

⁶⁰ The IMO Resolution MSC.228(82) on the Revised Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic

1.4.2. The contiguous zone and enforcement jurisdiction

The maritime zone beyond the territorial sea of a coastal state is the contiguous zone. The legal regime applicable to the contiguous zone is written down in art. 33 UNCLOS.⁶¹

“Art. 33 – Contiguous zone:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringements of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

First of all, it is clear that the contiguous zone cannot measure more than 24 nautical miles measure from the baselines. Secondly, the coastal state has only an enforcement jurisdiction over the infringements of its customs, fiscal, immigration and sanitary laws, not a legislative jurisdiction.⁶²

It is clear that drug trafficking in the contiguous zone can be considered as an infringement of customs, fiscal, immigration and sanitary laws.⁶³ A coastal state can take both preventive and punitive measures according to art. 33 UNCLOS.⁶⁴ If a coastal state knows that a vessel involved in illegal drug trafficking will enter its territorial sea or territory, the coastal state can take preventive measures. For example, a coastal state can ask a vessel to leave the contiguous zone or forbid a vessel to come into the territorial sea when it is already in the contiguous zone.⁶⁵ If a vessel is sailing through the contiguous zone, without the intention to enter the territorial sea of a coastal state, the coastal state can also take preventive measures when they suspect a vessel of being involved in illegal drug trafficking. For example, the authorities of a coastal state can approach a vessel and ask for information (about its identity, the port of the next call, etc.) and monitor the

⁶¹ Art. 33 of the 1982 United Nations Convention of the Law of the Sea.

⁶² Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 122.

⁶³ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 19.

⁶⁴ Art. 33, 1, (a) and (b) of the 1982 United Nations Convention of the Law of the Sea.

⁶⁵ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 19.

further activities of the vessel. A vessel can be asked to leave the contiguous zone when the level of suspicion is very high.⁶⁶

When there is a violation of the customs, fiscal, immigration or sanitary laws in the territorial sea or on the territory of the coastal state, a coastal state can also take punitive measures. For example, when a vessel is operating from the contiguous zone of a coastal state and thereby is violation certain laws of the coastal state, a coastal state can take repressive measures against the vessel. The coastal state can prosecute, arrest the vessel, save evidence, etc.⁶⁷

1.4.3. The areas beyond the territorial sea and contiguous zone

1.4.3.1. The right of hot pursuit

It is plausible that a vessel which is involved in illegal drug trafficking wants to avoid measures taken by coastal states in maritime areas under its jurisdiction by sailing away from the territorial sea or contiguous zone. For example, a vessel can sail from the territorial sea, passing the contiguous zone, into the Exclusive Economic Zone of a coastal state.

Art. 111 UNCLOS regulates the use of the right of hot pursuit.⁶⁸ The hot pursuit of a foreign vessel can be undertaken when the competent authorities of a coastal state have good reasons to believe that the ship has violated the laws and regulations of the coastal state.⁶⁹ The hot pursuit can be started when the vessel (or one of his boats) is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone. On top of that, the hot pursuit may not be interrupted, otherwise the hot pursuit comes to an end. When the vessel suspected of being involved in illegal drug trafficking is located within the contiguous zone of a coastal state, the hot pursuit can only be undertaken when there is a violation of its customs, fiscal, immigration or sanitary law and regulations.⁷⁰ But like I explained earlier, illegal drug trafficking is clearly a violation of those laws. The rights of hot pursuit also applies to violations of the laws and regulations of the coastal state in the Exclusive Economic Zone or on the Continental Shelf, which also includes the safety zones around installations on the Continental Shelf.⁷¹

⁶⁶ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 19.

⁶⁷ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 19.

⁶⁸ Art. 111 of the 1982 United Nations Convention of the Law of the Sea.

⁶⁹ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 169.

⁷⁰ Art. 111, 1 of the 1982 United Nations Convention of the Law of the Sea.

⁷¹ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 169.

A suspected vessel should first have been given a visual or auditory signal to stop before the hot pursuit can start, only when the vessel neglects this signal, the hot pursuit can start.⁷² The hot pursuit can only be carried out by warships, military aircrafts or other ships and aircraft marked and identifiable as an authorized governmental vessel or aircraft.⁷³ Also, the pursuit must be hot and continuous.⁷⁴

Art. 111, 3 UNCLOS stipulates that the hot pursuit comes to an end once the vessel pursued enters the territorial sea of its own flag state or a third state.⁷⁵ When a hot pursuit is continued in the territorial sea of another state this would be clearly a violation of the territorial sovereignty of the coastal state. Once an hot pursuit has started in the territorial sea or the contiguous zone, it can continue on the High Seas and in the Exclusive Economic Zone and Contiguous Zone of a third state.⁷⁶

To conclude we can say that if a crime related to illegal drug trafficking is committed in the territorial sea or the contiguous zone of a coastal state, this coastal state can make use of the hot pursuit to catch the vessel. Thereby, the coastal state engaged in the hot pursuit can also ask for help from the flag state of the pursued vessel. To establish this cooperation between states, often bilateral agreements are made between different states; they will be discussed later on.⁷⁷

1.4.3.2. *Coastal state's jurisdiction in the Exclusive Economic Zone*

A more difficult question is whether a coastal state has jurisdiction over vessels involved in illegal drug trafficking when the vessel is only sailing in the Exclusive Economic Zone. To answer this question, we need to look at art. 56 UNCLOS which regulates the jurisdiction over vessel which are sailing through the Exclusive Economic Zone.⁷⁸

According to art. 56 UNCLOS, a coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources (living or non-living) and with regard to

⁷² Art. 111, 1 of the 1982 United Nations Convention of the Law of the Sea; Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 169.

⁷³ Art. 111, 5 of the 1982 United Nations Convention of the Law of the Sea.

⁷⁴ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 170.

⁷⁵ Art. 111, 3 of the 1982 United Nations Convention of the Law of the Sea.

⁷⁶ Y. TANAKA, *The international law of the sea*, Cambridge, Cambridge University Press, 2012, 170.

⁷⁷ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 21.

⁷⁸ Art. 56 of the 1982 United Nations Convention of the Law of the Sea.

other activities for the economic exploitation and exploration of the Exclusive Economic Zone (such as production of energy from the water, currents and winds). Also a coastal state has jurisdiction as provided by the relevant provisions in the Convention with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment and other rights and duties provided for in the Convention.⁷⁹

Another relevant provision is art. 73 UNCLOS which regulates the enforcement of law and regulation in the Exclusive Economic Zone of a coastal state.⁸⁰ Art. 73, 1 UNCLOS stipulates that the coastal state can, in exercise of its sovereign rights on natural resources, take measures necessary to ensure compliance with the laws and regulations on natural resources in the Exclusive Economic Zone (in conformity with the Convention). Examples of such measures are boarding a vessel, the inspection or arrest of a vessel and judicial proceedings.

If we take together the two relevant provisions, we could say that a state can only take enforcement measures when there is a violation on the laws and regulation about the natural resources in the Exclusive Economic Zone. Also vessels of all states have the right of navigation in the Exclusive Economic Zone, like on the High Seas.⁸¹ So in fact, we could say that in the case of illegal drug trafficking, the regime of the High Seas is applicable in the Exclusive Economic Zone.⁸²

It is clear that in the Exclusive Economic Zone of a coastal state, the state has actually no real enforcement power when a vessel is involved in illegal drug trafficking because drug trafficking doesn't affect the natural resources in the Exclusive Economic Zone. Of course, like mentioned before a state can exercise the right of hot pursuit through the Exclusive Economic Zone when the crime of illegal drug trafficking is committed in the internal waters, territorial sea or contiguous zone. Of course international cooperation between states is very important to stop illegal drug trafficking in each other's Exclusive Economic Zone.⁸³ For example, when states have knowledge of a drug trafficking channel the states can work together by using the right of hot pursuit to chase a vessel when it departs in their maritime zones. When the vessel enters the maritime zones of

⁷⁹ Art. 56, 1 and 2 of the 1982 United Nations Convention of the Law of the Sea.

⁸⁰ Art. 73 of the 1982 United Nations Convention of the Law of the Sea.

⁸¹ Art. 58 of the 1982 United Nations Convention of the Law of the Sea.

⁸² CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 22.

⁸³ CANDIDATE NO.4, *States rights and obligations in case of illegal drug trafficking by the sea*, Master dissertation in Law of the Sea at The Arctic University of Norway, 2014, 22.

another coastal state, this coastal state could take over the pursuit and exercise their jurisdiction over the vessel involved. It is really important that coastal states share information and work together to repress illegal drug trafficking in the Exclusive Economic Zone (and High Seas). Here, also the role of the flag states is very important because the flag state has jurisdiction over the vessel flying its flag.⁸⁴

One special issue is the jurisdiction of coastal states over artificial islands, installations and structures in the Exclusive Economic Zone. According to art. 60, 2 UNCLOS, the coastal state have exclusive jurisdiction over those artificial islands, installations and structures including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.⁸⁵ It is clear and explained before that illegal drug trafficking is clearly a breach of those laws and regulations. When drug trafficking is going one by making use of artificial islands, installations and structures, the coastal state could exercise full jurisdiction over this crime.

To conclude this part about the rights and obligations of coastal states we could say that the rights and obligations of coastal states are depending on the maritime zone in which the crime of illegal drug trafficking is taking place. In the internal waters, territorial sea and contiguous zone, the coastal states have clearly more enforcement power compared to the Exclusive Economic Zone. The reason behind this is the fact that coastal states have only enforcement powers regarding the natural resources in this area. For other crimes committed in the Exclusive Economic Zone, the regime of the High Seas (which includes the freedom of navigation) must be used.

1.5. THIRD STATES' RIGHTS AND OBLIGATIONS

1.5.1. Rights and obligations under the UNCLOS and the 1988 Convention

Like I explained under the previous titles, both flag states and coastal states can take measures against vessels which are involved in illegal drug trafficking. Sometimes the actions of those states are not enough to prevent illegal drug trafficking and third states find out that a vessel is involved in illegal drug trafficking. Under this title I will determine the rights and obligations of those third states.

⁸⁴ Art. 4 of the 1982 United Nations Convention of the Law of the Sea.

⁸⁵ Art. 60 of the 1982 United Nations Convention of the Law of the Sea.

1.5.1.1. Third states' rights and obligation in case of known nationality of the vessel

If a third state has reasonable grounds to believe that a vessel of another state is involved in illegal drug trafficking, it could take action under art. 17, 3 of the 1988 Convention. According to art. 17, 3 of the 1988 Convention, a state party to the Convention can notify a flag state, request confirmation of registry and request authorization from the flag state to take appropriate measures with regard to the vessel involved. When the third state gets authorization it could board and search the vessel and if evidence of illegal drug trafficking is found, take measures with respect to the vessel and the persons and cargo on board.⁸⁶

When a third state has taken action vis-à-vis a vessel of another flag state, it should promptly inform the flag state about the results of the action(s) undertaken according to art. 17, 8 of the 1988 Convention. Also art. 17, 1 and 17, 9 are pointing out the need for international co-operation of states to suppress illegal drug trafficking by sea by closing international, bilateral and regional agreements.

Furthermore, art. 110, 1 a, b, c, d and e UNCLOS provides the grounds on which a warship has the right to visit a vessel.⁸⁷ Nevertheless, when a vessel has a nationality and the third state believes that it is involved in illegal drug trafficking, there is no right to visit the ship. There is only a right to visit the ship when there are reasonable grounds to believe the vessel is involved in piracy, slave trade, unauthorized broadcasting, in case the vessel is without nationality and the vessel refusing to show its flag is in fact of the same nationality of the warship.

1.5.1.2. Third states' rights and obligation if the nationality of a vessel is not known

A second possible scenario can occur when a third state informs a flag state about possible illegal drug trafficking on board of a vessel and the third state gets no confirmation of the registry of the involved vessel in the flag state.

In such case the authorized people on board of a warship can board the vessel if there are reasonable grounds to believe that the vessel does not have any nationality according to art. 110, 1, d UNLCOS. So when a stateless vessel is involved in illegal drug trafficking and there is no confirmation about the nationality of the particular vessel, the authorized crew of the warship can visit the vessel.

⁸⁶ Art. 17, 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

⁸⁷ Art. 110 of the 1982 United Nations Convention of the Law of the Sea.

Furthermore, the UNCLOS does not determine the measures a warship of a third state can take against a stateless vessel once it made use of the right to visit the vessel. According to some people, any state can exercise jurisdiction over those vessels because the vessel does not enjoy the protection of any state due to the absence of any nationality.⁸⁸ On the other hand some people believe that the mere fact of absence of nationality does not give other states the right to exercise jurisdiction over those vessels.⁸⁹ This discussion clearly show that there is need for a legal framework which defines the rights and obligation of third states when a stateless vessel is involved in illegal drug trafficking. This issue will be discussed under the next chapter.

1.5.2. Rights and obligations under the special agreements

Third states can also derive rights and obligation from special agreements established between states. This rights and obligations will be discussed under the next title which deals with the international co-operation between states to prevent and repress illegal drug trafficking by sea.

1.6. INTERNATIONAL COOPERATION BETWEEN STATES

According to art. 108, 1 UNCLOS and art. 17, 1 of the 1988 Convention states must co-operate in order to prevent and repress illegal drug trafficking by sea.⁹⁰ Also the 1988 Convention heavily promotes the establishment of bilateral and regional agreements with the goal to prevent and repress illegal drug trafficking.⁹¹ Since the existence of the 1988 Convention, many bilateral and regional agreements were closed. Firstly, I will discuss some successful bilateral and regional agreements. After this, I will discuss an important agreement on the European level: The 1995 Council of Europe Agreement on Illicit Traffic by Sea which implemented art. 17 of the 1998 Convention.

1.6.1. Bilateral and regional agreements

There are many examples of bilateral and regional agreements concluded between states to prevent and repress illegal drug trafficking by sea. Those bilateral and regional agreements contain a wide variety of rights and obligations of the contracting states.

⁸⁸ A. BENNETT, "That Sinking Feeling: Stateless Ships, Universal Jurisdiction and the Drug Trafficking Vessel Interdiction Act", *The Yale Journal of International Law* 2012, (Vol. 37) 440.

⁸⁹ A. BENNETT, "That Sinking Feeling: Stateless Ships, Universal Jurisdiction and the Drug Trafficking Vessel Interdiction Act", *The Yale Journal of International Law* 2012, (Vol. 37) 440.

⁹⁰ Art. 108 of the 1982 United Nations Convention of the Law of the Sea and Art. 17, 1 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

⁹¹ Art. 17, 9 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

For example, in the Agreement between the Hellenic Republic and the Republic of Turkey, the states concerned have agreed upon mechanism to share information about illegal drug trafficking and bilateral operations.⁹²

In some regional agreements, some states get very broad rights to take action with regard to a vessel flying the flag of another state. An example of this is the Agreement between the United States of America and Trinidad and Tobago. In this Agreement the involved states agree that USA Coast Guard vessels can take appropriate measures over vessels in the territorial sea of Trinidad and Tobago when those vessels are involved in illegal drug trafficking.⁹³

Other agreements were closed to establish combined maritime operational programs in order to repress and prevent illegal drug trafficking by sea. An example of such an agreement is the agreement between the United States of America and Guatemala.⁹⁴ That same agreements also contains a detailed procedure to request authorization to board a vessel of another contracting state. If the relevant state doesn't respond to a request of authorization within two hours then the requesting state can take actions without authorisation such as boarding and searching the involved vessel.⁹⁵ The same principles were written down in the agreements between the United States of America and Honduras,⁹⁶ Nicaragua,⁹⁷ Panama⁹⁸ and Venezuela.^{99 100}

Another example of a successful bilateral agreement is the 1990 Spanish-Italian Treaty which gives the involved parties the right to take measures over each other's vessels when there are reasonable grounds to believe that a ship flying the flag of one of states is involved in illegal drug

⁹² Art. 2 of the Agreement between the Hellenic Republic and the Republic of Turkey on Cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of Internal Affairs of the Republic of Turkey on Combating Crime, Espacially Terrorism, Organized Crime, Illicit Drug Trafficking and Illegal Immigration, 17 April 2008.

⁹³ Agreement between the government of the Republic of Trinidad and Tobago and the Government of the United States of America concerning maritime counter-drug operations, 4 March 1996.

⁹⁴ Art. 5, 1 of the Agreement between the Government of the United States of America and the Government of the Republic of Guatemala concerning cooperation to suppress illicit traffic in narcotic drugs and psychotropic substances by sea and air, 19 June 2003.

⁹⁵ Art. 7, 3, b of the Agreement between the Government of the United States of America and the Government of the Republic of Guatemala concerning cooperation to suppress illicit traffic in narcotic drugs and psychotropic substances by sea and air, 19 June 2003.

⁹⁶ Agreement between the United States of America and the Republic of Honduras concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances, 29 March 2000.

⁹⁷ Agreement between the Government of the United States of America and the Government of Nicaragua concerning cooperation to suppress illicit traffic by sea and air, 1 June 2001.

⁹⁸ Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the U.S. Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 18 March 1991.

⁹⁹ Agreement between the Government of the United States of America and the Government of Venezuela to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, 9 November 1991.

¹⁰⁰ D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 89.

trafficking.¹⁰¹ Other agreements like the Agreement between the United States of America and Costa Rica are going further and contain an automatic boarding procedure when there are reasonable grounds to believe that a vessel is involved in the crime of illegal drug trafficking.^{102 103}

1.6.2. Agreements on the European level

Also on the European level action was taken to establish an international co-operation between European countries so prevent and repress international drug trafficking by sea. This need for international co-operation was written down in the 1995 Council of Europe Agreement on Illicit Traffic by Sea which implemented art. 17 of the 1988 Convention.¹⁰⁴ Art. 3, 2 of the 1995 Council of Europe Agreement extends the jurisdiction of parties to the agreement:¹⁰⁵

“Article 3 – Jurisdiction:

2. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of any other Party to this Agreement. Such jurisdiction shall be exercised only in conformity with this Agreement.”

It is very clear that art. 3, 2 of the 1995 Council of Europe Agreement goes further than the 1988 Convention by also allowing European states to exercise its jurisdiction on board of vessels flying the flag of other parties to the Agreement.

Also the possibilities of exercising jurisdiction over stateless vessels are clearly determined by art. 3, 3 of the 1995 Council of Europe Agreement. The Parties to the Agreement can exercise jurisdiction over stateless vessels when the crime of illegal drug trafficking is committed on board of that vessel. This goes further than art. 110, 1, d UNCLOS that only contains a right to visit the stateless ship by a warship. Also, art. 5 of the 1995 Council of Europe Agreement is wholly

¹⁰¹ D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 79-96.

¹⁰² Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning cooperation to suppress illicit traffic, 1 December 1998.

¹⁰³ D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 90.

¹⁰⁴ Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹⁰⁵ Art 3, 2 of the Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

dedicated to vessels without a nationality.¹⁰⁶ When a Party to the Agreement has reasonable grounds to suspect that a vessel without nationality is engaged in illegal drug trafficking, it shall inform other Parties that appear like closely affected and may request assistance of any such Party in suppressing its use of that purpose.

Notwithstanding the broad possibilities of exercising jurisdiction over vessels flying the flag of other European countries and stateless vessels, the flag state of a vessel has a preferential right to exercise its jurisdiction over ships flying its flag when the crime of illegal drug trafficking is committed on board of that vessel.¹⁰⁷ Only when the flag state doesn't react within 14 days from the receipt of evidence provided by the requesting state, the flag state shall be deemed to have waived the exercise of its preferential jurisdiction.¹⁰⁸

Finally, art. 6 of the 1995 Council of Europe Agreement contains the rules on authorization:¹⁰⁹

“Art. 6 – Basic rules on authorisation:

Where the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorisation of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken by virtue of this Agreement, without the authorisation of the flag State.”

When a request for authorisation is done, the requested flag state must immediately acknowledge the receipt of the request and communicate a decision within four hours of the request.¹¹⁰ Furthermore art. 9 of the 1995 Council of Europe Agreement contains a whole list of authorized actions on board of vessels of other Parties these actions include: stop and board the vessel,¹¹¹

¹⁰⁶ Art 5 of the Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹⁰⁷ Art. 3, 4 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹⁰⁸ Art. 14 ,2 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹⁰⁹ Art. 6 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹⁰ Art. 7 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹¹ Art. 9, 1, i, a Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

establish effective control of the vessels and the person on board,¹¹² take the vessel to the territory of the intervening state,¹¹³ search the vessel,¹¹⁴ open or require to open containers,¹¹⁵ require persons on board to give relevant information¹¹⁶ and seize, secure and protect any evidence or material discovered on board of the vessel.¹¹⁷ It is clear that art. 9 contains more possible action than the relevant provisions in other international agreements like the 1988 Convention.

To conclude, we could say that the 1995 Council of Europe Agreements not only includes all the basic principles of the 1988 Convention, but also extends and determines more precisely the possible actions European states can take to prevent and repress illegal drug trafficking by sea.

¹¹² Art. 9, 1, i, b Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹³ Art. 9, 1, i, d Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹⁴ Art. 9, 1, ii, a Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹⁵ Art. 9, 1, ii, b Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹⁶ Art. 9, 1, ii, c Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

¹¹⁷ Art. 9, 1, ii, e Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31.I.1995.

2. CRITICAL ANALYSIS OF THE INTERNATIONAL LEGAL FRAMEWORK IN ORDER TO FIGHT AGAINST ILLEGAL DRUG TRAFFICKING BY SEA

2.1. PROBLEMS LINKED TO THE FLAG OF VESSELS

2.1.1. Lack of international legislation on stateless vessels and vessels flying more than one flag

2.1.1.1. *Legal background*

No provision of the United Nations Convention of the Law of the sea determines any possible action towards vessels without nationality or stateless vessels. Some authors suggest that a stateless vessel does not enjoy the protection any state and that every state can assert jurisdiction over it.¹¹⁸ Other authors say that absence of any nationality does not automatically lead to a situation where any country is authorized to simply assert its jurisdiction over those stateless vessels.¹¹⁹

At the same time the United Nations Convention on the Law of the Sea stipulates in art. 92, 2 the following:¹²⁰

“Art. 92 – Status of ships:

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

It is very clear that a ship flying more than one flag is a category of stateless ships and can be treated in that way. Off course, like I explained no provision of the United Nations on the Law of the Sea provides a legal framework with regard to those stateless vessels.

2.1.1.2. *Legal questions*

The legal question which arise with regard to stateless vessels and vessels flying more than one flag is very clear: What can a state do when they are confronted with such vessels involved in illegal drug trafficking on the high seas and in other maritime zones?

¹¹⁸ A. BENNETT, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction and the Drug Trafficking Vessel Interdiction Act”, *The Yale Journal of International Law* 2012, (Vol. 37) 440.

¹¹⁹ A. BENNETT, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction and the Drug Trafficking Vessel Interdiction Act”, *The Yale Journal of International Law* 2012, (Vol. 37) 440.

¹²⁰ Art. 92 of the 1988 United Nations Convention of the Law of the Sea.

2.1.1.3. Solutions

2.1.1.3.1. National legislation

The first possible solution is already in use. Sometimes states adopt national legislation in order to take actions against vessels without nationality involved in illegal drug trafficking. An example of such legislation is the 2008 Drug Trafficking Interdiction Act adopted by the United States of America. This Drug Trafficking Interdiction Act gives authorized vessel of the United States of America the right to take action with regard to stateless vessels involved in illegal drug trafficking on the high seas. This is a very good step towards the punishment of drug traffickers which are operating from the high seas. But at the same time this type of rights also give rise to certain legal questions: Some authors are discussing the legality of such measures, the basis of this criticism is the wide spread principle in the United Nations Convention on the Law of the Sea that there is exclusive jurisdiction of the flag state and freedom of navigation on the High Seas. This type of legislation could be seen as a denial of this freedom of navigation.¹²¹

2.1.1.3.2. International legislation

The problems and criticism with regard to the first possible solution: Namely the adoption of national legislation, lead to a second and better possible solution. In my opinion it is necessary for the international community to make clear rules about how to deal with stateless vessels and vessels flying more than one flag. Thereby we should make a distinction between the different maritime zones.

In the territorial sea and the contiguous zone, the coastal state should have exclusive jurisdiction over stateless vessels. When other states could also interact in these maritime zones, this would be a breach of the principle of territoriality and this would go too far. If third countries have good reasons to believe that a stateless vessel is involved in illegal drug trafficking in the territorial sea or contiguous zone of another coastal state, it should immediately notify the coastal state.

When a state is confronted with a vessel without nationality in the other maritime zones and has good reasons to believe that the vessel is involved in illegal drug trafficking, it should be allowed to board and search the vessel. Off course prior authorization is not necessary because of the fact that the involved vessel has no nationality and thus there are also no national authorities which can be requested to grant authorization. Off course such legislation would be a sort of denial of the right of

¹²¹ A.M. BRODARICK, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power over the Drug Trafficking Vessel Interdiction Act", *University of Miami Review* 2012, (Vol. 67) 255-275.

freedom of navigation on the High Seas, but at the same time we should also consider the common interest of the world community to fight against illegal drug trafficking.

2.1.2. Lack of a genuine link with flag state

2.1.2.1. Legal background

A very important principle in the law of the sea is the obligation for states to effectively exercise jurisdiction over vessels flying its flag.¹²² When a flag state has information about illegal drug trafficking on board of a vessel flying its flag, it could exercise its jurisdiction over it and take appropriate measures. The rights and obligations of flag state are much broader than the rights and obligations of coastal states and third state (like I explained in the previous chapter).

The flag state can exercise jurisdiction over vessels by granting its nationality to vessels. Art. 91 UNCLOS stipulates that every state must fix the condition for granting its nationality to vessels, for the registration of vessels in its territory and for the right to fly its flag. Also there must exist a genuine link between the state and the ship.¹²³

2.1.2.2. Legal questions

Questions can arise about what to do when there doesn't exist such a genuine link between the vessel and the flag state and what can be done to establish effective jurisdiction over those vessels when they are involved in illegal drug trafficking.

First of all, the United Nations Convention on the Law of the Sea does not provide a definition of the concept of "a genuine link". Due to this, a first issue arises: When do we speak about the lack of a genuine link? Secondly the United Nations Convention on the Law of the Sea does not give guidance on what to do if such a genuine link does not exist.

The legal basis for the introduction of the concept of "a genuine link" is the *Nottebohm* case.¹²⁴ In the decision over this case, the Court described nationality as "... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." It is however not clear what is exactly required to establish such a genuine link.¹²⁵

¹²² Art. 94 of the 1982 United Nations Convention of the Law of the Sea.

¹²³ Art. 91 of the 1982 United Nations Convention of the Law of the Sea.

¹²⁴ International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)*, ICJ Rep 4 1955.

¹²⁵ R. COLES and E. WATT, *Ship Registration: Law and Practise, Second Edition*, London, Informa, 2009.

2.1.2.3. Solutions

In my opinion if the lack of genuine link is somehow proved by a state and it is proved that there is no effective jurisdiction exercised over the particular vessel, the vessel should not be treated automatically like a stateless vessel. If a state can decide on its own to treat a vessel like a stateless vessel because of the lack of a genuine link, this would lead to abuse and possibly chaos on the high seas.¹²⁶

It is necessary for the international community to clearly describe the concept of “a genuine link” on a global level and to determine clearly what a state can do if it finds evidence that there is absence of such a genuine link. By doing this, countries could more easily exercise jurisdiction over vessels involved in illegal drug trafficking flying the flag of a country without having a genuine link with it. Off course, in first instance, this should not encroach the rights of flag states to exercise effective jurisdiction over its vessels. The exercise of jurisdiction by third states over vessels without a genuine link should be determined very precisely with an eye for the rights and obligation of flag states.

2.2. PROBLEMS LINKED TO GAPS IN INTERNATIONAL LEGISLATION

2.2.1. Lack on the existence of a right for third states when a flag state is not responding or doesn't confirm registry

A first issue can occur when a requesting state which wants to interdict a vessel (according to art. 17 of the 1988 Convention) doesn't get an answer back from the flag state or the flag state does not confirm registry of the vessel.

When the flag state is simply not responding this is clearly a breach of art. 17, 7 of the 1988 Convention which obliges the flag state to respond expeditiously to a request from another party to the 1988 Convention.¹²⁷ Nevertheless, the 1988 Convention doesn't contain a sanction when this article is breached or doesn't provide alternative measures which could be taken by the requesting state. A situation where a flag state is not responding could occur when for example the flag state is involved in a war or the flag state doesn't have a recognized government anymore (like in Libya).

¹²⁶ D. ATTARD, M. FITZMAURICE, N.A. MARTINEZ GUTIERREZ, *The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea*, Oxford, Oxford University Press, 2014.

¹²⁷ Art. 17, 7 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

The second possible scenario can occur when a flag state doesn't confirm registry according to art. 17, 3 and 4 of the 1988 Convention.¹²⁸ Art. 17, 3 and 4 clearly create a possible extra obstacle by requiring that the requested state confirms registry before it authorizes an interdiction. This obligation can create significant delays in the case when the authorities don't get immediate access to the register of shipping or when the shipping registry is maintained by a different agency.¹²⁹ Even in the case where the requested authority has access to the shipping registry, such a search could take days to complete. Criminals which are involved in illegal drug trafficking can take advantage of such situations by searching for registration in states known to have inefficient registries and by this frustrate possible interdictions at sea.¹³⁰ Also national legal system often don't require for smaller vessel to register, smaller vessel may be entitled to fly the flag of a state of their owner without any registration. This can also cause possible identification issues and problems with requesting authorization for an interdiction when those smaller vessels are used to illegally traffic drugs.¹³¹

A possible and useful solution for these issues can be found in several bilateral and regional agreements. In some of those agreements, a requesting state can be authorized automatically to board a vessel when the authorities do not respond within a certain time frame.¹³² It would be beneficial for the international community to revise art. 17 of the 1988 Convention by inserting those automatic boarding procedures in the 1988 Convention. By doing this, the effective control by a requesting state over vessels involved in illegal drug trafficking would be far more enforceable and executable.

¹²⁸ Art. 17, 3 and 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹²⁹ J.A. ROACH, *Proliferation Security Initiative*, 2005, 389, (paper presented to the conference in Xiamen, China in March 2005).

¹³⁰ D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 95.

¹³¹ R. CHURCHILL and V. LOWE, "The International Tribunal of the Law of the Sea", *International J. Marine & Coastal L.* 2003, 474-475 and D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 95.

¹³² Such automatic boarding procedures are for example written down in the Agreement between the Government of the United States of America and the Government of the Republic of Guatemala concerning cooperation to suppress illicit traffic in narcotic drugs and psychotropic substances by sea and air, 19 June 2003, the Agreement between the United States of America and the Republic of Honduras concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances, 29 March 2000, the Agreement between the Government of the United States of America and the Government of Nicaragua concerning cooperation to suppress illicit traffic by sea and air, 1 June 2001, the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the U.S. Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 18 March 1991 and the Agreement between the Government of the United States of America and the Government of Venezuela to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, 9 November 1991.

2.2.2. No international legally-binding source for preventive measures

It is very clear that taking preventive measures can have a beneficial effect on the fight of national authorities against illegal drug trafficking. Nevertheless, there is no legally-binding source that says which preventive measures can be taken. Also states are not obliged to take preventive measures in order to fight against illegal drug trafficking by sea.

The IMO Resolution MSC.228(82) gives good guidelines about possible preventive measures, but is legally non-binding, so states can easily deviate from it. In my opinion in order to prevent illegal drug trafficking, states must share their knowhow. States must again cooperate and work together to avoid and prevent illegal drug trafficking by sea. Often prosperous countries will have a useful knowhow on how to combat illegal drug trafficking. Sharing this knowhow with poorer countries will have a beneficial effect on both countries (prosperous and less prosperous). On the one hand, there will be less pressure on the authorities of prosperous countries because other poorer countries will be able to take also effective preventive measures. Also poor countries (where often drug are produced) will be given the opportunity to build a good preventive system against illegal drug trafficking, in the long term cooperation between countries will have a significant beneficial effect.

2.2.3. Lack of obligation to notify flag states

According to art. 17, 3 of the 1988 Convention,¹³³ a Party which has reasonable grounds to believe that a vessel is engaged in illegal drug trafficking may notify the flag state and request authorization to take appropriate measures. The problem of course is that a Party to the 1988 Convention has no obligation to notify the flag state.

In my opinion it would be better to oblige Parties to the 1988 Convention to notify each other when there a reason to believe a vessel is involved in illegal drug trafficking. By doing this, flag states would be better informed when a vessel flying its flag is involved in illegal drug trafficking and later prosecution would be made more easily.

2.2.4. Lack of a list of specific actions which can be taken by third states

According to art. 17, 4 of the 1988 Convention,¹³⁴ a flag state may authorize a requesting state to board a vessel, search a vessel and if necessary take appropriate action with respect to the vessel,

¹³³ Art. 17, 3 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹³⁴ Art. 17, 4 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

persons and cargo on board. This provision is not very clear about the specific actions which can be taken with regard to the vessel once evidence of illegal drug trafficking is found on board.

Sometimes, bilateral agreements and regional agreements provide specific measures which can be taken by the boarding states.¹³⁵ Of course, this only goes for boarding states which established those bilateral and regional agreements. In my opinion it would be necessary to include more possible actions in art. 17 of the 1988 Convention. By doing this, a common legal framework about possible actions by boarding states would be established and boarding states would be less dependent on bilateral and regional agreements when they want to take appropriate measures on board of a ship.

Furthermore, art. 110 UNCLOS should also include a right of visit with regard to foreign ships.¹³⁶ Boarding a vessel, in my opinion, should also be allowed when there are reasonable grounds to believe that a ship having a certain nationality is involved in illegal drug trafficking. At the moment the situation is somehow weird: When a vessel without a nationality is suspected of being involved in illegal drug trafficking, there is a right of visit according to art. 110 UNCLOS. When a vessel has a nationality and is suspected of being involved in illegal drug trafficking, there is no right of visit. It would be beneficial to allow the right of visit in both possible scenario's mentioned by adapting art. 110 UNCLOS.

2.3. PROBLEMS LINKED TO THE ATTITUDE / STANDSTILL OF STATES

2.3.1. Lack of international cooperation between states

Illegal drug trafficking is a wide spread phenomenon on an international level, so the prevention and repression of this crime must take place on an international level. The 1988 Convention recognizes and underlines that no country, by itself, can deal with illegal drug trafficking on its own. Bilateral, multilateral and regional cooperation must be pursued in order to combat illegal drug trafficking in an efficient way.¹³⁷

¹³⁵ For example art. 9 of the Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, contains a whole list of possible actions which can be taken by boarding states.

¹³⁶ Art. 110 of the 1982 United Nations Convention of the Law of the Sea.

¹³⁷ J. GURULE, "The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?", *Fordham International Law Journal* 1998, (Vol. 22, Issue 1, Article 2), 120.

Art. 2, 1 of the 1988 Convention clearly articulates the necessity of international cooperation:¹³⁸

“Article 2 – Scope of the Convention:

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. ...”

Unfortunately, when we look at the party compliance, many states are reluctant are unwilling to comply with this international obligation. Several major drug-producing and drug-transit countries have not yet adopted decent legislation in order to prevent and repress illegal drug trafficking.¹³⁹ The international community must keep pointing out the duties of those countries in order to establish a decent cooperation in the fight against drug trafficking on an international level.

2.3.2. Lack of national anti-money laundering and asset forfeiture legislation

The crime of money laundering is strongly connected with the crime of illegal drug trafficking because illegal drug trafficking creates a black economy and criminals want to make use of money laundering to launder the profit they make. Also asset forfeiture legislation is necessary to punish illegal drug traffickers.¹⁴⁰ On an international level there is no real legislative document which handles exclusively about money laundering and asset forfeiture. At the same time, some provisions in international conventions criminalize for example money laundering (art. 3 of the 1988 Convention criminalizes the offence of money laundering).

The international community must be more aware about the cash flows illegal activities such as illegal drug trafficking are generating. Every country should have a decent national legislation about anti-money laundering in order to stop money-laundering and prosecute the persons and organizations involved in such activities.¹⁴¹ The same goes for asset forfeiture. When money-laundering is made difficult and asset forfeiture is made possible, less people and organizations would be attracted towards the crime of illegal drug trafficking. Because at the end of the ride,

¹³⁸ Art. 2, 1 of the 1988 United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.

¹³⁹ J. GURULE, “The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?”, *Fordham International Law Journal* 1998, (Vol. 22, Issue 1, Article 2), 120.

¹⁴⁰ J. GURULE, “The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?”, *Fordham International Law Journal* 1998, (Vol. 22, Issue 1, Article 2), 97-112.

¹⁴¹ J. GURULE, “The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?”, *Fordham International Law Journal* 1998, (Vol. 22, Issue 1, Article 2), 120.

criminal organizations want to make huge profit. When the possibility of making profit is (partially) taken away, automatically less illegal drug trafficking would occur. States should also take into account new forms of money transactions for example via online currencies like bitcoin.

Even better would be the adoption by the international community of a certain international convention about anti-money laundering and asset forfeiture. By doing this, uniform standards would be introduced for countries with regard to their anti-money laundering and asset forfeiture legislation.

2.4. PRACTICAL ISSUES

2.4.1. Questions on the use of force

When an interception is taking place at sea, sometimes the use of force may be deemed necessary by the intercepting authorities. Two cases where lethal force has been used to take control over a smuggling vessel are relevant: Namely the *Rigopoulos*¹⁴² and the *Medvedyev* case.¹⁴³ In general, it is accepted that the boarding state may use force against the smuggling vessel. At the same time the force must be used in extreme moderation and in strict accordance with the requirements of necessity and proportionality.¹⁴⁴

In the both cases mentioned before the European Court of Human Rights (ECtHR), it was not clear by the circumstances of the case whether the use of force was in exercise of the right of self-defense or the use of force was excessive and not necessary.¹⁴⁵ The possibility of the use of force is always a decision made by the boarding state and is always a decision made in a short time frame. The boarding state has no general guidelines and that makes it difficult for the boarding state to make decisions without the fear of being prosecuted afterwards.

In my opinion it is necessary that the international community determines clear guidelines about the possible use of force once a vessel is intercepted. Of course the authorities of the boarding state must be able to make certain decision according to the progress of the circumstances in each case.

¹⁴² ECtHR, *Rigopoulos v. Spain*, 37388/97.

¹⁴³ ECtHR, *Medvedyev and others v. France*, 3394/03.

¹⁴⁴ E. PASTAVRIDIS, "Interception on the High Seas to Counter Drug Trafficking" in E. PASTAVRIDIS, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, London, Hart Publishing, 2013, 242.

¹⁴⁵ E. PASTAVRIDIS, "Interception on the High Seas to Counter Drug Trafficking" in E. PASTAVRIDIS, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, London, Hart Publishing, 2013, 242.

Of course, it is a difficult consideration between making strict rules and letting the authorities of a boarding state make certain decisions at the moment when the action is going on.

2.4.2. The interdiction at sea as a specialized activity

The second practical issue has to do with cost and complexity of interdictions at sea. At-sea interdictions are logistically very complex operations. Besides the complexity, they are also potentially dangerous and in the most case very expensive. On a global level only a few prosperous countries have the trained personnel and resources and to conduct them on a high specialized level.¹⁴⁶

In my opinion it is necessary for prosperous countries (like the United States of America and most European countries) to work together with less prosperous countries in order to train officials, provide resources for state-of-the-art equipment and share their knowhow. By doing this, poor countries (where often drugs are produced) can act better when they are confronted with illegal drug trafficking and at the same time, the authorities of prosperous countries will experience less pressure on their own coast guards.

¹⁴⁶ D. GUILFOYLE, *Shipping Interdiction and the law of the sea*, Cambridge, Cambridge University Press, 2009, 95. The author of this book has talked to Captain J. Ashley Roach (Retired, US Department of State), Lt. Commander Brad Kieserman (US Coast Guard), Wayne Raabe (US Department of Justice) and Annabelle Bolt (HM Revenue and Customs).

CONCLUSION

The effect of illegal drug trafficking on the world community cannot be underestimated. Illegal drug abuse affects the lives of millions of people and therefore a decent international regulatory framework must be provided. The 1982 United Nations Convention on the Law of the Sea and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances are the basis of this international legal framework. Notwithstanding the existence of this international conventions, the crime of illegal drug trafficking is widespread and illegal drug trafficking keeps being an international problem. The criticism on the existing international regulatory framework can be divided in different aspects.

First of all, there are some issue linked to the flag of vessels. There is a lack of legislation on stateless vessels and vessels flying more than one flag. It is very important that in the case a vessel has no nationality, a state can somehow exercise jurisdiction over it in order to repress and prevent illegal drug trafficking. When a vessel is sailing in the territorial sea or the contiguous zone of a coastal state, this coastal state should have exclusive jurisdiction over it. When a vessel is sailing on the High Seas and a third state has reasonable grounds to believe the stateless vessel is involved in illegal drug trafficking, this third state should have the right to board and search the vessel. A second question linked to the flag of vessels, is the possible situation where the vessel involved in illegal drug trafficking has no genuine link with the flag state: It is necessary that the international community first gives a clear definition of the concept of “a genuine link”. Nevertheless, an automatic exercise of jurisdiction by a third state over vessels without a genuine link with the flag state would go too far, other solutions are possible when the concept of “a genuine link” would be clearly defined.

Secondly, there are also issues linked to gaps in the existing international regulatory framework regulating the suppression of illegal drug trafficking by sea. For example, there is no right for an intercepting state to take action when a flag state is not responding to a request for authorization or the flag state doesn't confirm registry. An automatic authorization to board a vessel involved in illegal drug trafficking would be a good solution and can yet be found in several bilateral and regional agreements. Other gaps in international legislation are the lack of binding international legislation dealing with preventive measures, a lack of obligation to notify flag states and the absence of a list of specific actions which can be taken by third states when they interdict a vessel.

Thirdly, there are also issues linked to the attitude or standstill of states. First of all, some states are denying their obligations under the 1988 Convention. The 1988 Convention obliges the Parties to cooperate on an international level to fight against illegal drug trafficking. Nevertheless, some major drug-producing and drug-transit countries refuse to get into those bilateral and regional agreements. On top of that there is a lack of (inter-)national anti-money laundering legislation and legislation about asset forfeiture. Those sort of legislation is very important in order to take away the economic incentive to get involved in illegal drug trafficking.

Fourthly, there are also some practical issues which arise in the fight against illegal drug trafficking. First of all, there are some questions about the possibility of the use of force against a vessel or the persons on board of a vessel when the vessel is involved in illegal drug trafficking. The international community must determine some clear guidelines about the possibility of the use of force without taking away the possibility for the authorities of the intercepting state to make decisions according to the circumstances of each individual case. We must also keep in mind that the interception of vessels at sea is a very costly and complex sort of activity. Therefore, it is necessary for prosperous countries to work together with less prosperous countries by sharing their equipment and knowhow.

To conclude, we could say that the existing international framework in order to fight against illegal drug trafficking has a good basis, but this basis is nowadays not enough to effectively suppress illegal drug trafficking by sea. States must cooperate together thoroughly, new international legislation about money laundering and asset forfeiture must be adopted and some gaps in the existing international regulatory framework must be closed.

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